

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

Student Hearing Office
810 First Street, S.E.
Washington, DC 20002

STUDENT,¹ by and
through the Petitioner,

Petitioner

v.

District of Columbia Public Schools,
Respondent.

Date Issued: February 12, 2012

Hearing Officer: Michael Lazarek

OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner's Notice of Due Process Complaint ("Complaint") dated November 29, 2011. (P-1) This IHO was appointed to hear this matter shortly thereafter, on November 30, 2011. Respondent filed a Response to the Complaint on December 8, 2011. A resolution meeting was held on December 12, 2011. The parties, however, were not able to reach an agreement. A Prehearing Conference was scheduled for January 3, 2012, but Petitioner did not appear. A second Prehearing Conference was scheduled and held on January 9, 2012 and was continued on January 12, 2012. A Prehearing Conference Summary and Order was issued on January 13, 2012. (Exh. IHO 1)

A hearing was held on February 1, 2012 and continued on February 2, 2012. It was a closed hearing, and the Petitioner was represented by Maria Mendoza, Esq. Respondent was

¹ Personal identification information is provided in Appendix A.

represented by Tanya Chor, Esq. Petitioners entered into evidence exhibits 1 to 32; Respondent entered into evidence exhibits 1 to 14. Petitioner presented as witnesses: Petitioner; Natasha Nelson, clinical psychologist; _____ mentor; Valerie Darden, Advocate. Respondent presented at witnesses: _____ special education teacher. After the hearing, Petitioner submitted a closing argument on February 2, 2012. (Exh. IHO 2) Respondent submitted a closing argument on February 3, 2012. (Exh. IHO 3)

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

BACKGROUND

The Student is male, _____ years old, and eligible for services as a student with a specific learning disability. He is in the _____ grade. He currently receives 10 hours per week of specialized instruction in the general education setting with “small group centers.” The Complaint alleges that the Respondent failed to evaluate the Student in all areas of disability and denied the Student a FAPE for 2011-2012 by failing to develop an appropriate IEP on October 4, 2011. The Complaint seeks compensatory education for the Student, requests that the Student be provided with behavioral support services once a week, requests that the Student be provided with 25 hours of specialized instruction outside the general education setting, requests a functional behavioral assessment, a behavior intervention plan, all necessary evaluations.

At the prehearing conference, Petitioner withdrew claims relating to the failure of DCPS to evaluate the Student in all areas of disability. Petitioner also withdrew claims requesting to revise the IEP to include a functional behavioral assessment and a behavior intervention plan.

ISSUES

The issues to be determined are as follows:

1. Whether Respondent denied the Student a FAPE by offering the October 4, 2011 IEP which provides the Student with 10 hours per week of specialized instruction in the general education setting.

2. Whether Respondent denied the Student a FAPE by offering the October 4, 2011 IEP which did not offer the Student behavioral support services.

Petitioners seek placement in a full time special education “therapeutic” placement with behavioral support services for one hour a week. (Exh. IHO 3) Petitioners also seek compensatory education in the form of 200 hours of tutoring and 150 hours of mentoring. (Exh. P-31)

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. The Student is eligible for services as a child with a specific learning disability. (IHO Exh. 1)

2. The Student attended _____ Center in 2008-2009 until he started at _____ School beginning on January 30, 2009. At _____ the Student did not show interest in learning, would not participate in class discussions, would threaten the other Students, would fight in class, would walk out of the classroom on a daily basis. (Exh. P-16-6)

3. The Student has shown a long history of aggression, including assaulting staff and refusing to work in class. (Testimony of Natasha Nelson; Exh. P-15-3)

4. On April 30, 2009, Ultressa Diamond conducted a Psychological Evaluation of the Student. She noted that there were reports about the Student's misbehavior, that he had issues with his temper, an inability to control himself, refused to do work, had unacceptable social skills, would threaten other students, destroy property, get into fights. (Exh. P-16-6-11)

5. On April 30, 2009, through testing by Joyce Phipps-Arthur, the Student achieved a standard score of 90 in the Broad Math portion of the Woodcock Johnson III Tests of Achievement, putting him in the 25th percentile with a grade equivalent of 3.6. (Exh. R-1-1-4; Exh. P-13-2; Exh. R-1-3)

6. On April 30, 2009, through testing by Joyce Phipps-Arthur, the Student achieved a standard score of 78 in the Broad Reading portion of the Woodcock Johnson III Tests of Achievement, putting him in the 7th percentile range with a grade equivalent of 2.7. (Exh. R-1-1-4; Exh. P-13-5; Exh. R-1-3)

7. On April 30, 2009, through testing by Joyce Phipps-Arthur, the Student achieved a standard score of 85 on the spelling subtest of the Woodcock Johnson III Tests of Achievement, putting him at the 16th percentile with a grade equivalent of 2.8. (Exh. R-1-1-4; Exh. P-13-8; Exh. R-1-8)

8. On April 30, 2009, through testing by Joyce Phipps-Arthur, the Student achieved a standard score of 82 on the writing fluency subtest of the Woodcock Johnson III Tests of Achievement, putting him at the 12th percentile with a grade equivalent of 2.8. (Exh. R-1-1-4; Exh. P-13-8; Exh. R-1-8)

9. On September 9, 2010, the Student achieved a standard score of 79 in the math computation portion of the Wide Range Achievement Test, 4th Edition, putting him in the 8th percentile with a grade equivalent of 3.8. (Exh. P-16-1-5; Exh. P-13-2)
10. On September 9, 2010, the Student achieved a standard score of 83 on the Sentence Comprehension portion of the Wide Range Achievement Test, 4th Edition, putting him in the 13th percentile with a grade equivalent of 3.7. (Exh. P-16-1-5; Exh. P-13-5)
11. On December 10, 2010, an IEP was created for the Student by an IEP team which recommended special instruction outside the general education setting for 25 hours per week at School B PCS. (Exh. IHO Exh. 1; Exh. P-14-6; Exh. R-2--6)
12. The December 10, 2010 IEP recommends that the Student receive a calculator, manipulatives, small group instruction, and peer tutoring in math. (Exh. P-14-2; Exh. R-2-2)
13. The School B PCS IEP recommends that the Student receive small group instruction and peer tutoring in connection to reading and writing. (Exh. P-14-3-5; Exh. R-2-5)
14. The School B PCS IEP indicates that the Student's small group instruction and peer tutoring in connection to reading and writing will help the Student to access the grade level curriculum and allow him more support to focus on the material. (Exh. P-14-3; Exh. R-2-3-5)
15. The Student was engaged in disciplinary incidents at School B PCS, including assault, constant classroom disruptions, walking off school grounds. (Exh. P-23-1; Exh. P-25-1; Exh. P-28-1)
16. The Student had excessive absences at School B PCS, where grades in academic subjects ranged from C to F. (Exh. P-30-1) The Student did little to no work at the school, was not taking his medications, did not follow directions, had atypical peer relationships. Exh. R-14)
17. He walked out of school many times at School B PCS. (Testimony of Petitioner)

18. There were 12-15 students in the classes at School B PCS. There were too many distractions in the classroom. The Student does better where there are few distractions and greater teacher attention. (Testimony of

19. He was at a juvenile detention facility for a period of time after May, 2011. (Testimony of Petitioner)

20. The Student has been on probation for breaking into a car. (Exh. P-15-2)

21. School B PCS did not allow the Student back to school for 2011-2102. (Testimony of Petitioner)

22. The Student was enrolled at School A in August, 2011. (Testimony of

23. When the Student started school at School A, he was very often misbehaving, and expected to be discharged from the school. (Testimony of

24. On September 20, 2011, the Student threatened to burn down the classroom with in it. (Exh. P-19-1)

25. The Student was suspended from September 21 through September 23, 2011 because he brought a lighter to school, pushed the principal, and used profanity. (P-24-1)

26. On September 30, 2011, the Student achieved a standard score of 613 on the STAR math diagnostic, putting him in the 4th-12th percentile with a grade equivalent of 3.8. (Exh. P-13-3; Exh. R-8-3)

27. For the October 4, 2011 IEP meeting, called School B PCS and reviewed everything he could obtain in connection to such meeting. (Testimony of

28. At the IEP meeting, it is “fair to say” the District molded the IEP to fit the school that would accept the Student, School A. Hours were reduced because School A did not have the 25 hours of special education services to be provided. (Testimony of

29. Respondent’s IEP dated October 4, 2011 recommends that the Student receive 10 hours per week of specialized instruction in the general education setting. (Exh. P-13-11; Exh. R-8-11)

30. The IEP also recommends reading of test questions in math, science and composition; repetition of directions; simplification of oral directions; translation of words and phrases in math, science and composition; use of a calculator; a location with minimal distractions; a small group setting for testing; testing administered over several days; breaks between subtests; extended time on subtests; breaks during subtests. (Exh. P-13-13; Exh. R-8-13)

31. The Petitioner agreed to send the Student to School A because she had no other choice and needed to get the child into school. (Testimony of Petitioner)

32. The October 4, 2011 IEP indicated that, in terms of math, the Student’s main focus should be his fluency with his basic skills, though he can also work on his calculation and his ability to solve real world problems. (Exh. P-13-3; Exh. R-8-3)

33. The October 4, 2011 IEP indicated that the Student’s disability prevents him from completing math assignments at the same pace and at the same accuracy as his non-disabled peers. (Exh. P-13-3; Exh. R-8-3)

34. The October 4, 2011 IEP indicated that the Student responds to a small group or a one-on-one setting, and these settings should be used as much as possible with him in terms of math. (Exh. P-13-3; Exh. R-8-3)

35. The October 4, 2011 IEP indicated that the Student's grade level math work should be "chunked" into smaller problem sets that are immediately assessed for his understanding. (Exh. P-13-3; Exh. R-8-3)

36. The October 4, 2011 IEP indicated that the Student responds to positive reinforcement in terms of math work. (Exh. P-13-3; Exh. R-8-3)

37. The October 4, 2011 IEP indicated that the Student has difficulty participating in english class, rarely participating in class discussion. In english, the Student is more inclined to respond when he is talking to a teacher on a 1:1 basis. (Exh. P-13-5; Exh. R-8-5)

38. The October 4, 2011 IEP indicated that the Student can benefit from instruction that includes repeated reading, passage previewing, assisted reading, practicing words in isolation. (Exh. P-13-6; Exh. R-8-6)

39. The October 4, 2011 IEP indicated that the Student's disability prevents him from completing reading assignments at the same pace and with the same accuracy as his non-disabled peers. (Exh. P-13-6; Exh. R-8-6)

40. The October 4, 2011 IEP indicated that the Student's grade level readings should be read to him aloud or a corresponding book on tape should be provided to him. (Exh. P-13-6; Exh. R-8-6)

41. The October 4, 2011 IEP indicated that the reading assignments should be chunked so that the Student can focus on a small part of the assignment for decoding and comprehension purposes. (Exh. P-13-6; Exh. R-8-6)

42. The October 4, 2011 IEP indicated that reading assignments should be reread to improve comprehension, to foster the ability to think critically about a passage, to improve oral rate, to improve fluency. (Exh. P-13-6; Exh. R-8-6)

43. The October 4, 2011 IEP indicated that reading assignments should be accompanied by visuals wherever possible so that the Student can make connections to the text. (Exh. P-13-6; Exh. R-8-6)

44. The October 4, 2011 IEP indicated that writing assignments should focus on fluency, spelling, and written expression, including work on multi-sensory techniques, phonics instruction. Technology should be used with the Student in terms of writing. (Exh. P-13-9; Exh. R-8-9)

45. The October 4, 2011 IEP indicated that the Student requires a literate, risk-free classroom environment, daily practice in writing. (Exh. P-13-9; Exh. R-8-9)

46. The October 4, 2011 IEP indicated that the Student's disability prevents him from completing written assignments at the same pace and with the same accuracy as his non-disabled peers. (Exh. P-13-9; Exh. R-8-9)

47. The October 4, 2011 IEP indicated that the Student rarely completes written assignments. (Exh. P-13-9; Exh. R-8-9)

48. The October 4, 2011 IEP indicated that the Student should get written assignments in "chunks" so that he has to write one paragraph at a time. He should not go on to a second paragraph until the first paragraph is checked by the teacher. (Exh. P-13-9; Exh. R-8-9)

49. The October 4, 2011 IEP indicated that the Student should be given graphic organizers for writing. (Exh. P-13-9; Exh. R-8-9)

50. Prior Written Notice was provided for the Student on October 4, 2011 in connection to School A. (Exh. R-7-1)

51. An HOD was issued on October 24, 2011 in connection to the Student's attendance at School B PCS. (Exh. R-12)

52. The HOD found that the School B PCS LEA denied the Student a FAPE by failing to evaluate the Student in all areas of disability. The HOD required that the LEA fund an independent clinical psychological evaluation of the Student. The HOD denied the parent's request for compensatory education in connection to the School B PCS IEP. (Exh. R-12-12)

53. There is an "emotional aspect" to the Student's personality that impacts on his performance in school. This is something that "you really can't argue with." The Student "has good days and bad days." On a "bad day" behavior can range from being unresponsive to teachers to walking around a lot within class to making comments to students. (Testimony of

54. The Student has fallen asleep in class, has pushed his desk aside, walks around in the classroom, puts his head down in class. (Testimony of

55. The Student is very quiet in class, he keeps to himself, though he will joke around with other students during lunch. (Testimony of

55. The Student's work habits are inconsistent. On certain days, he will not do work. On other days, he will be on point. (Testimony of

56. At School A, the Student has been involved in behavioral incidents, including fights, walking out of class, using inappropriate language, bringing in tools that could be used as weapons. (P-19-1; P-20-1; P-21-1; P-22-1;)

57. The Student's grades ranged from D to F in academic subjects for the marking period ending October 28, 2011. His first advisory period grades showed a D+ for math and an F for english. The Student also received an F for Science, and a D for Middle School Support. The Student was absent 22 days during the first advisory period. (Exh. P-15-3)

58. The Student rarely brings homework home from School A. (Testimony of Petitioner)

59. School A is no longer able to “run inclusion really well.” Special Education services at the school are “spread pretty thin.” There are 5 special educators covering the entire building. (Testimony of

60. An observation by Educational Advocate Valerie Darden revealed children were running around the hallway at School A. (Testimony of Valerie Darden)

61. On November 8, 2011, the Educational Advocate Valerie Darden sent an E-mail requesting that the Student receive a Functional Behavioral Assessment from the District. (Exh. P-9)

62. On November 8, 2011, the Petitioner signed a consent for evaluation of the Student. (Exh. R-10-1)

63. An IEP meeting was held on November 8, 2011 regarding the Student. (Exh. R-11-1) It was determined that an “educational re-evaluation” was necessary to gauge the Student’s current level of functioning.

64. The Student was suspended from November 9, 2011 through November 10, 2011 for fighting. (P-27-1)

65. On November 22, 2011, Angela Allen from the District indicated that the Student would be more alert in class if he went to bed on time, that the Student was not exhibiting depression, and that his behavior was manageable. (Exh. P-9)

66. The Student was suspended from School A for two days in mid-January, 2012. (Testimony of Petitioner)

67. The day before the first hearing date, the Student walked out of school and did not come home until late in the evening. The probation officer was notified, and this resulted in a court date. (Testimony of Petitioner)

68. In the second advisory period, they have seen some improvements. Still, the Student is not engaged in his work on most school days. (Testimony of

69. The Student was initially put into a small "Just Words" class at School A, but this class moved too quickly. Thereafter, he was placed in a Wilson reading class, where the students are provided with systematic teaching of different phonics rules, decoding, vocabulary work, sentence work. This program takes the Student 2-3 years to complete when done to fidelity, when done daily. The Student likes the Wilson class, which meets his needs educationally and emotionally. (Testimony of

70. The Wilson reading class includes a points rewards system that works for Jameson and provides him with "instant" rewards upon successful completion of a task. He kept pace with the group in the Wilson reading class. (Testimony of

71. The Student's math abilities are "basic." He requires a little more work to get him to perform on the grade level assignments. (Testimony of

72. There has been no introduction on math goal #1, relating to determining the values of variables in simple equations. There has been progress on math goal #2, relating to solving two-digit by two digit multiplication problems. There has been no introduction of math goal #3, relating to solving division problems where a multi-digit whole number is evenly divided by a one digit number. There has been progress on math goal #4, relating to demonstrating an understanding of fractions. There has been progress on math goal #5, relating

to solving simple arithmetic problems. (Testimony of Exh. R-8-3-4; Exh. P-13-3-4)

73. The Student will seek out his math teacher to get one-on-one help. (Testimony of

74. An increase in specialized instruction could help the Student, but it depends on what the increase in school hours will mean. (Testimony of

75. The Student benefits from being with peers. (Testimony of

76. The Student responds to pull-out instruction. (Testimony of

77. The Student needs counseling, which is a “very reasonable and appropriate” service for the Student. (Testimony of

78. There has been progress on reading goal #1, relating to relating to applying rules to correctly break two-to-four syllable words into their syllables. There was limited progress “verbally” on reading goal #2, relating to identifying the author’s purpose and summarizing the critical details in the text. There was limited or no progress on the remainder of the reading goals, which relate to identifying elements of a story, citing evidence from the text to describe the traits of the character, oral reading comprehension. (Testimony of Exh. R-8-6-7; Exh. P-13-6-7)

79. The Student would respond well to a math pull-out class. (Testimony of

80. School A has 400 plus Students ranging from those in Head Start to eighth grade. There are three groupings of students per grade. Each class is “tracked,” with one class the highest performing students, one class the middle performing students, one class the lowest performing students. The Student is in the lowest “track.” (Testimony of

81. There are about 17 students in the Student's classes. (Testimony of

82. In the 90 minute math class, pushes into the class on Monday and Wednesday and every other Friday. He plans the work in the class, he co-teaches the class with the general education teacher and an Americorp volunteer. There is whole group instruction and then they will break up into groups. (Testimony of

83. In math, the Student understands the material "at times" but does not get much benefit from whole group lectures. Many of the students in the class do not benefit from whole group lectures. (Testimony of

84. In the Student's 45 minute Wilson reading class, there are four children in the class. The Student responds well to the instruction, and the competition in the class keeps him motivated. (Testimony of

85. In the Student's 90 minute english class, pushes into the classroom on Tuesday and Thursday afternoons. He will plan for the class and co-teach the class with the general education teacher, pushing the Student into groups. He now pushes into this class every Friday as well. (Testimony of

86. The teacher of the english class is traditional, and the Student will sometimes not pay attention. There is a difficult time getting the Student to complete work in this class, and he does not pay much attention during whole group instruction. His work completion was pretty minimal in this class. (Testimony of

87. The Student does not participate in english class with and refuses to complete his work in the class. (Exh. P-15-4)

88. Dr. Natasa Nelson, a licensed clinical psychologist who reviewed the Student's educational records, indicated that the Student needs small group special education instruction for reading, math, written expression. (Testimony of Natasha Nelson)

89. Dr. Nelson indicated that the Student needs full time special education IEP in therapeutic school for children with emotional disturbance, i.e., a school with a small teacher to student ratio, with teachers closely monitoring the student for emotional issues, with a counselor available if there are any incidents. (Testimony of Natasha Nelson)

90. Ekwenzi Gray, Ph.D., a psychologist, tested the Student on December 5, 2011 and issued a report in connection to the Student on January 13, 2012. (Exh. P-15-1)

91. The Student reported to Dr. Gray that he has no interest in staying in school and is angry, and that people do not understand him. (Exh. P-15-3)

92. The Student indicated to Dr. Gray that he sleeps for fun, that he wants to quit school, make money and do whatever he wants. (Exh. P-15-17)

93. Dr. Gray's testing of the Student on the Wechsler Intelligence Tests for Children-Fourth Edition dated December 5, 2011 showed a Full Scale Intelligence Quotient of 60, but the Student completed some tasks nonchalantly and refused to complete other tasks. (Exh. P-15-7)

94. Dr. Gray's testing of the Student on the Verbal Comprehension Index on December 5, 2011 show a standard score of 59, putting this Student at a .3 percentile rank. The Student did not complete some of the tasks on this test. (Exh. P-15-7)

95. Dr. Gray's testing of the Student on the Perceptual Reasoning Index on December 5, 2011 showed a standard score of 73, putting the Student at the 4th percentile rank. The Student did not complete all the tasks on this test. (Exh. P-15-7)

96. Dr. Gray's testing of the Student on the Working Memory Index on December 5, 2011 showed a standard score of 65, putting the Student at the 1st percentile rank. The Student did not complete all the tasks on this test. (Exh. P-15-8)

97. Dr. Gray's testing of the Student on the Processing Speed Index on December 5, 2011 showed a standard score of 73. (Exh. P-15-8)

98. Dr. Gray's testing of the Student on the Wechsler Individual Achievement Test-III on December 5, 2011 showed a standard score of 66 on oral language, putting the Student at the 1st percentile rank. On basic reading, the Student had a 57 standard score, putting him at the .2 percentile rank. The Student did not complete all the subtests. On written expression, the Student had a 49 standard score, putting the Student at the .1 percentile rank. The Student did not complete all the tasks on this subtest. On math, the Student achieved a standard score of 65, putting the Student at the 1st percentile. The Student did not complete all these tasks and put forth poor effort on this task. On math fluency, the Student achieved a standard score of 73, putting his skills at the 3.7 grade equivalent and in the 3rd percentile. (Exh. P-15-8-11)

99. Dr. Gray's testing of the Student on the Behavior Assessment Scale for Children-Second Edition reflected ratings by _____ of Respondent and _____ of Respondent. _____ rating scales showed that the Student fell into the At-Risk category for the composites in Externalizing Problems (clinically significant for aggression), Internalizing Problems, School Problems (clinically significant for learning problems), Behavioral Symptoms, Adaptive Skills. _____ of Respondent also conducted a rating scale for the Student.

_____ testing showed that the Student fell into the At-Risk category in the composites for Externalizing Problems (clinically significant for aggression). The Student fell into the Clinically Significant range in the composites for School Problems, Behavioral Symptoms,

Adaptive Skills. Dr. Gray's own rating scales showed that the Student fell into the Clinically Significant category for the composites for School Problems, with subtests showing that the Student was clinically significant for Attitude to School, Attitude to Teachers, Locus of Control, Relations with Petitioners. (Exh. P-15-11-15)

100. Dr. Gray diagnosed the Student (Axis I) with Dysthymic Disorder, Disruptive Behavior Disorder Not Otherwise Specified, Learning Disorder Not Otherwise Specified (By History). (Exh. P-15-19)

101. Dr. Gray recommended that the Student be provided with small group instruction or individualized instruction for Math, English, Reading. He recommended that the Student be placed in a full-time special education environment in a therapeutic school. He recommended that the Student receive behavioral support services to help him understand and address his emotional and behavioral challenges. He recommends school counseling for at least once a week. He recommends a Functional Behavioral Assessment and a Behavior Intervention Plan. He recommends a mentor as an adjunct to therapy. (Exh. P-20-21)

102. Educational Advocate Valerie Darden recommended that the Student receive 200 hours of tutoring and 150 hours of mentoring for the Student to catch up academically and make progress emotionally. (Testimony of Valerie Darden; Exh. P-31-1-3)

103. All of the witnesses at the due process hearing provided reasonable, credible testimony. Petitioner, Dr. Nelson, and Ms. Darden all agreed that the Student needed a full-time special education placement. [redacted] disagreed, indicating an objection to full-time special education placements generally. (Testimony of Petitioner, Dr. Natasha Nelson, Valerie Darden,

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:

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conforming with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D); 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005).

1. FAPE Denial, 2011-2012

A FAPE is offered to a student with a disability when the local educational agency (LEA) complies with the IDEIA procedural requirements and the child's IEP is "reasonably calculated" to enable the student to receive educational benefits. Board of Ed. Of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 207 (1982).

LEAs must provide a placement for a disabled child that furnishes a "basic floor of opportunity" and that allows him to "benefit from special education." Long v. District of Columbia, 56 IDELR 122 (D.D.C. 2011)(citing Rowley, 458 U.S. at 187, 201). This consists of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."

The IDEA does not require that the public school provide the best education possible. However, Congress did not intend that a school system could discharge its duty under the Act by providing a program that produces some minimal academic advancement, no matter how trivial. Hall v. Vance County Board of Education, 774 F.2d 629, 636 (4th Cir. 1985). There is no bright line test for determining what constitutes sufficient special education or meaningful progress.

The IDEA requires an IEP to confer a "meaningful educational benefit" gauged in relation to the potential of the child at issue. Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 862 (6th Cir. 2004) (citing T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572, 578 (3d Cir. 2000); Ridgewood Bd. of Educ. v. NE., 172 F.3d 238, 247 (3d Cir. 1999)). The determination of "meaningful benefit" requires "a student-by-student analysis that carefully considers the student's individual abilities." Ridgewood, 172 F.3d at 248. A court must "analyze the type and amount of learning of which a student is capable in order to determine how much of an educational benefit must be provided." Kingwood, 205 F.3d at 577-78 (quoting Ridgewood, 172 F.3d at 248). "Only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement. In conducting this inquiry, courts should heed the congressional admonishment not to set unduly low expectations for disabled children." Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 863 (6th Cir. 2004).

A. Social and Emotional Needs.

The record reveals that the Student has had social and emotional difficulty in class in the current school year. The Student falls asleep in class, improperly walks around in class, puts his head down on the desk in class, walks out of the classroom, walks out of the school, gets into verbal altercations with school staff, refuses to do work, fights in school. The Student has been suspended a number of times during the school year, has threatened to "burn down the class" with his teacher in it. However, the October 4, 2011 IEP does not provide any behavioral supports for the Student. In particular, the IEP does not provide the Student with behavioral support services such as counseling.

Every witness in the proceeding indicated that the Student has significant social and emotional needs that impact on his school day. The lone District witness, _____ is the Student's special education teacher. _____ indicated that the Student is not engaged in academics on most days, though the Student has made some progress of late. He indicated that there is an emotional aspect to the Student's personality that "you can't really argue with."

_____ indicated that the Student would benefit from counseling.

Moreover, Dr. Natasha Nelson testified credibly that the Student requires the presence of an available "at-risk" counselor in the school to support the Student during the school day. Dr. Nelson explained that the Student is given to behavioral incidents, and that a school counselor should be made immediately available to the Student in case the Student engages in particularly inappropriate behavior. There is nothing in the record to contradict this opinion, and the District's closing statement is not to the contrary.

Finally, Dr. Nelson also offered that the Student requires small group instruction so that teacher could closely monitor the Student's emotional condition. Dr. Nelson indicated that, in a small group, special education teachers would be able to watch the Student more closely to address his social and emotional needs. Dr. Nelson noted that the Student has shown a long history of aggression, including assaulting staff and refusing to work in class. The report by Dr. Gray is consistent with these claims. Respondent did not call any expert witness to contest the findings of Dr. Nelson or Dr. Gray. Expert witness testimony may be credited by an IHO, particularly if there is no expert testimony to the contrary. G.B. and L.B. on behalf of N.B. v. Tuxedo Central School Dist., 751 F. Supp. 552 (S.D.N.Y. 2010).

The District indicates that the Student has significant social and emotional issues. (IHO Exh. 3) However, the District suggests that it complied with the IDEA in this connection by

simply transferring the Student's IEP from the previous LEA, noting that the School B PCS IEP did not contain counseling or reference behavioral issues.

The regulations indicate that an LEA must provide services consistent with the prior IEP when a student is transferred to such LEA. 34 CFR Sect. 300.323(e). However, the regulations go on to state that the prior IEP is no longer applicable after the new LEA "(d)evelops, adopts and implements a new IEP. . ." 34 CFR Sect. 300.323(e)(2). Here, the District developed and implemented its own IEP on October 4, 2011. Such IEP must necessarily meet the requirements for carefully evaluating the Student's needs, pursuant to 34 CFR Sect. 300.320 through 34 CFR Sect. 300.324.

The District suggests that it complied with the IDEIA because it did not have sufficient information about the child's social and emotional needs. (IHO Exh. 3) However, information relating to these issues was available to the IEP team when it conducted its October 4, 2011 review. The Student had been enrolled in the school at least a month previous to the review, and the record indicates that the Student was often misbehaving at the start of the school year. The Student was suspended from school from September 21, 2011 through September, 2011 because he brought a lighter into school, pushed a principal, and used profanity. The incident wherein the Student threatened to "burn down the classroom" with _____ in it occurred prior to the development of the October 4, 2011 IEP. Moreover, a Psychological Evaluation report dated April, 2009 indicated that the Student has serious behavioral concerns. This evaluation is referenced in the October 4, 2011 IEP. The evaluation indicated that the Student engaged in frequent misbehavior, that he had issues with his temper, an inability to control himself, refused to do work, had unacceptable social skills, would threaten other students, destroy property, get into fights. This IHO notes that, upon a student transfer to a new public agency, the new LEA

must “take reasonable steps” to promptly obtain the child’s records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child. 34 CFR Sect. 300.323(g)(1).

This IHO finds that the IEP dated October 4, 2011 denied the Student a FAPE by failing to provide the Student with appropriate support to address his social and emotional needs.

B. Academic Needs.

The record also reveals that the Student has special needs in connection to academic issues. Achievement testing available to the team at the October 4, 2011 IEP meeting indicated that the Student was then testing at a low level in all domains. The most recent STAR math testing from September 30, 2011 reveals that the Student was in the 4th through 12th percentile, with a 3.9 grade level equivalent. Testing on the DC-BAS from March, 2010 indicated that the Student was testing at a “Below Basic” level. September, 2010 testing on the Wide Range Achievement Test, 4th Edition indicated that the Student tested with a 3.8 grade equivalent in math computation, and a 3.7 grade level equivalent in sentence comprehension. Testing by Joyce Phipps-Arthur from April, 2009 indicated that the Student’s broad reading was in the 7th percentile according to the Woodcock-Johnson III, with broad math at the 25th percentile.

The School B PCS LEA’s IEP team had recommended that the Student be provided with 25 hours of specialized instruction outside the general education setting. Respondent’s IEP reduced the amount of specialized instruction to be provided to the Student to 10 hours, and placed the Student in a general education setting.

Testimony from _____ reveals that these services were provided in three ways. After initial placement in a “Just Words” class that was too fast paced for the Student, the Student received a small group Wilson reading class. _____ also “pushed into” the math and

english classrooms for two to three days a week. For the remainder of the time in math and english, the Student was in a general education class of 17 without any special education support. Additionally, the Student was in a general education class of 17 or so students without support in all other subjects.

There was no specific rationale behind Respondent's decision to reduce the Student's special education hours from 25 hours to 10 hours. Instead, the record indicates that Respondent found a school for the Student and then created an IEP that was molded to fit the specific school location. indicated that this was "fair to say." In fact, the IEP team's function is to first determine an educational placement for the Student. Cf. T.Y. v. New York City Dep't of Educ., 584 F.3d 412 (2d Cir. 2009)(upholding District practice of not placing specific school location on IEP). Though the Petitioner agreed with this educational placement, the record indicates that the Petitioner did not have any other school for her child and was trying to make sure the child did not stay home without school.

In regard to the Student's academic performance in Respondent's educational program, the record indicates that the Student has had difficulties. His first advisory period grades showed a D+ for math and an F for English. The Student also received an F for Science, and a D for Middle School Support. The Student was absent from school 22 days during the first advisory period. The Student did not make progress on many of his English goals, and has indicated that he wants to quit school. The record indicates that the Student is distractable in a class with 12 or more students. The record also indicates that the Student has difficulty understanding group lessons in a general education classroom, will walk out of the classroom, will not turn in his work, will not participate in lessons. By contrast, the record indicates that the Student did participate and has done well in his small group Wilson reading class, which has

4 students in the group and is taught at a slow pace. I find that Respondent's offer to provide 10 hours of special education in a general education setting did not offer the Student a FAPE for 2011-2012.

2. Relief.

A. Compensatory Education.

One of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award "educational services...to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award." Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524. Still, if Petitioners are provided with an opportunity to present a plan, and the Petitioner's plan is not consistent with the Reid standards, a hearing officer may rule that no compensatory

education is due. Gill v. District of Columbia, 770 F.Supp.2d 112 (D.D.C. 2011) (distinguishing between a case where a student did not receive an appropriate education for a four month period and a case like Reid, where there was a multi-year violation); see also Phillips v. District of Columbia, 736 F.Supp.2d 240 (D.D.C. 2010)(it is “entirely conceivable” that no compensatory education is required for a denial of a Free Appropriate Public Education because alleged deficiencies may have been mitigated or even totally alleviated by a school placement).

The Petitioner asserts that the Student is due 200 hours of compensatory education. Petitioner supports this assertion through a compensatory education plan submitted by the Educational Advocate, Valerie Darden. However, a review of the testimony of Ms. Darden indicates that Ms. Darden calculated the 200 hours without heed to the Reid standards. Ms. Darden did not show how the 200 hours of tutoring would place the Student in the status quo ante as of October 4, 2011. Ms. Darden’s plan seeks simply to address the Student’s low academic levels. I should point out that this claim for relief is not mentioned in Petitioner’s closing argument. I must deny the Petitioner’s request for compensatory education in the form of tutoring.

Petitioner also requests that the Student be awarded 150 hours of mentoring services. This recommendation is also made by Ms. Darden, who did not indicate any credentials in connection to psychology or counseling. While the recommendation is also referenced in the report by Dr. Gray, Dr. Gray did not testify as a witness here to explain why the mentoring is needed, how such mentoring can be helpful to the Student, and whether mentoring is necessary given that Mr. Simmons currently acts as a mentor to the Student. I should point out, again, that this claim for relief is not mentioned in Petitioner’s closing argument. I must deny the Petitioner’s request for 150 hours of mentoring services.

B. Placement in Therapeutic Special Education Program/Counseling.

Petitioner also requests that the Student be placed in a full-time therapeutic special education program out of general education as recommended by Dr. Gray and Dr. Nelson. Petitioner characterizes this claim as a compensatory education claim.

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, e.g., 20 U.S.C. Sect. 1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations." Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993).

In regard to social and emotional issues, there is no dispute that the Student requires one hour a week of counseling. The record also indicates that the Student requires a small group setting, particularly with a "therapeutic" approach. Dr. Natasha Nelson, a psychologist who testified for the Petitioner, is a well credentialed clinical psychologist who reviewed the Student's records. Dr. Nelson indicated that the Student would benefit from small group special education instruction because with a small group, teachers would be able to watch the Student more closely to address his social and emotional needs. Dr. Nelson noted that the Student has shown a long history of aggression, including assaulting staff and refusing to work in class. Dr. Nelson also indicated that a therapeutic school should have a counselor available to provide assistance to the Student were the Student to be engaged in a behavioral incident during the school day. Dr. Gray's report also indicated that the Student should be placed in a small group special education environment, with a therapeutic orientation. Respondent did not call any expert witness to contest the findings of Dr. Nelson or Dr. Gray. Expert witness testimony may be credited by an IHO, particularly if there is no expert testimony to the contrary. G.B. and L.B. on behalf of N.B. v. Tuxedo Central School Dist., 751 F. Supp. 552 (S.D.N.Y. 2010).

In regard to academics, the record indicates that the Student focuses when there is more teacher attention, a slower pace, and less distractions in the classroom. indicated that the Student did well in his small group Wilson reading class, which has a class size of four and a slower pace. also indicated that the Student would benefit from a pull-out math class. Moreover, indicated that the Student did not absorb the whole group instruction in the Math and English classes. Parenthetically, indicated that the Student is eager to learn in the right setting, noting that the Student will seek out his math teacher for additional help. This IHO agrees with Petitioner that Petitioner is appropriately served by small group special education instruction in regard to academics.

The District pointed out that School B PCS was a full-time special education school, and that the Student did poorly there. However, there was no testimony from either side about the particulars of the education at School B PCS. From the School B PCS IEP, it is apparent that the School B PCS school location is not akin to the placement being requested by the Petitioner. The School B placement did not provide counseling to the Student, as the parties agree is required. The School B placement did not have a counselor available to the Student were he to engage in a behavioral incident in the middle of a school day. Moreover, testimony from Mr. Simmons indicated that the School B placement had class sizes that went up to 15 children in a class. There is no evidence in the record to reasonably conclude that the Student can receive a basic floor of education opportunity in a general education class with a class size of 15.

The District also points out that the Student should be educated in the Least Restrictive Environment. However, the requirement for a Least Restrictive Environment must be balanced against the Student's right to a Free Appropriate Public Education. The IDEIA requires mainstreaming to the maximum extent appropriate, not the maximum extent possible. See

Heather S. ex rel. Mark S. v. Niles Tp. High School Dist. No. 219, 31 IDELR 137 (N.D. Ill. 1999), aff'd Heather S. v. State of Wis., 125 F.3d 1045 (7th Cir. 1997).

Given the Student's academic and social and emotional needs, I find that the Student cannot presently be educated in a general education setting. Accordingly, I agree with the Petitioner that the IEP should reconvene to rewrite the IEP and place the Student at a full time "therapeutic placement." Such a placement shall offer the Student small group instruction in every academic class. Such placement shall offer the Student counseling once weekly for one hour by a qualified, experienced, professional counselor. Such placement shall offer the Student at-risk counseling services, i.e., a counselor should be available to provide immediate counseling and therapy to the Student when the Student is engaged in inappropriate behaviors in school.

ORDER

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

1. Respondent shall reconvene an IEP team for the Student within 10 days and revise the Student's IEP to reflect an educational placement that is "therapeutic" and will provide the Student with small group special education instruction in all academic subjects for the entirety of each academic classroom period during the school day;
2. Such educational placement shall provide the Student with behavioral support services for one hour per week;
3. Such educational placement shall provide the Student with immediate behavioral support services if the Student threatens others or threatens himself during the school day;
4. Such educational placement shall have counselors that are qualified to provide counseling to school students;
5. Such placement may be in a public school operated by Respondent;
6. The Petitioner's other claims are hereby denied with prejudice.

Dated: February 12, 2012

Michael Lazan
Impartial 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 USC §1415(i).

Date: February 12, 2012

Michael Lazan
Impartial Hearing Officer