DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
STUDENT HEARING OFFICE
2012 MAR -5 PM 4:30

PETITIONER,
on behalf of STUDENT,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: March 5, 2012

Hearing Officer: Peter B. Vaden

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PETITIONER (the "Petitioner" or "Mother"), 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, Petitioner alleges that DCPS denied Student a free appropriate public education ("FAPE") by (i) failure to implement the Behavioral Support Services and transition plan in

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

Student's August 1, 2011 IEP; and (ii) by not developing a Behavior Intervention Plan ("BIP") to address Student's school attendance issues.

Student, an AGE young man, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on December 22, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on December 23, 2011. The parties met for a resolution session on January 24, 2012, but did not come to an agreement. The 45-day timeline for issuance of this HOD began on January 22, 2012. On January 9, 2012, 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 February 2, 2012 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. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called, as witness, EDUCATIONAL ADVOCATE. DCPS called, as witness, COMPLIANCE CASE MANAGER ("CC Manager"). Petitioner's Exhibits, P-1 through P-32, were admitted into evidence without objection. DCPS' Exhibits R-1 through R-6, were admitted into evidence without objection. The day before the hearing, counsel for DCPS gave notice that DCPS intended to offer into evidence CC Manager's notes from a January 30, 2012 Multidisciplinary Team ("MDT") meeting. Petitioner objected to the exhibit because it had not been included in DCPS' January 26, 2012 disclosure of witnesses and exhibits. Over Petitioner's continuing objection, the Hearing Officer admitted the MDT meeting notes (Exhibit R-7) and allowed CC Manager to testify about the meeting. It is the

determination of the Hearing Officer that the meeting notes and testimony of CC Manager do not constitute surprise evidence. *See* Student Hearing Office, Standard Operating Procedures, § 800.1.7. While preserving her objection, Petitioner requested leave to offer, in rebuttal, Educational Advocate's January 30, 2012 meeting notes and a follow-up email, which were admitted, without objection, as Exhibits P-31 and P-32.

Counsel for both parties made oral closing arguments. No request was made for leave to file post-hearing briefs.

PRIOR DUE PROCESS ADJUDICATIONS

In calendar year 2011, Petitioner filed two prior due process complaints against DCPS, which were resolved by Hearing Officer Determinations ("HODs"). In her April 22, 2011, complaint, Case No. 2011-0599, Petitioner sought an order for DCPS to continue to fund Student's placement at NON-PUBLIC SCHOOL. On August 23, 2011, after a due process hearing on August 3 and August 10, 2011, Hearing Officer Frances Raskin issued an HOD (the "August 23, 2011 HOD"), in which she held, *inter alia*, that Petitioner had not proven that DCPS denied Student a FAPE by placing him at CITY HIGH SCHOOL ("CHS"). Although Hearing Officer Raskin found no denial of FAPE, she found that Student required additional assistance outside of school to access the curriculum, make social emotional progress and prepare for life after high school. The hearing officer ordered DCPS to engage a community service provider to assist student to get sufficient sleep and proper nourishment, get to school on time, complete his homework, have social and recreational opportunities and follow a regular routine. *See* August 23, 2011 HOD.

On September 15, 2011, Petitioner filed a second due process complaint, Case No. 2011-0937. In this request for due process, Petitioner alleged that DCPS had denied Student a FAPE

by failing to implement the August 23, 2011 HOD and by failing to timely allow Student to enroll in CHS and provide school transportation. On December 9, 2011, following a due process hearing on November 10, 2011, Hearing Officer Erin H. Leff issued an HOD (the "December 9, 2011 HOD"). In the December 9, 2011 HOD, Hearing Officer Leff granted DCPS' motion to dismiss Petitioner's failure to implement claims, but found that Student was denied a FAPE by the failure of DCPS to timely enroll Student at CHS and to provide school transportation. Hearing Officer Leff awarded Student compensatory education in the form of 15.5 hours of academic tutoring and one hour of compensatory behavioral support. At the prehearing conference in this case, the parties stipulated that this Hearing Officer shall adopt findings of fact made in the August 23, 2011 HOD (Exhibit R-2) and the December 9, 2011 HOD (ExhibitR-1), to the extent found relevant by the Hearing Officer.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

- WHETHER DCPS HAS FAILED TO IMPLEMENT STUDENT'S AUGUST 1, 2011 IEP BY NOT PROVIDING THE FULL EXTENT OF COUNSELING/ BEHAVIORAL SUPPORT SERVICES SPECIFIED AND BY NOT IMPLEMENTING THE TRANSITION PLAN IN THE IEP; and
- WHETHER DCPS DENIED STUDENT FAPE BY NOT DEVELOPING AN UPDATED BEHAVIOR INTERVENTION PLAN, WITH ATTENDANCE GOALS, AT NOVEMBER 3, 2011 MDT MEETING.

For relief, Petitioner seeks an order for DCPS to amend Student's IEP to include behavior goals and a BIP to address attendance, and an order for DCPS to implement the counseling and transition services provisions in the August 1, 2011 IEP. Petitioner also seeks 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:

1. Student is an AGE resident of the District of Columbia, where he lives with his mother. Testimony of Mother.

2. Student attends CHS, a DCPS public school, where he is in the GRADE. Prior to the 2011-2012 school year, Student attended Nonpublic School. December 9, 2011 HOD.

3. In a May 17, 2010 Comprehensive Psychological Evaluation Report, the examiner reported Student's diagnoses as Dysthymic Disorder, Early Onset, Attention Deficit Hyperactivity Disorder ("ADHD"), combined type, Learning Disorder Not Otherwise Specified, Adjustment Disorder with Mixed Anxiety and Depressed Mood (by history), and Disruptive Behavior Disorder (by history). Exhibit P-13.

4. Student's last IEP, dated August 1, 2011, was developed at Non-Public School. In this IEP, Student's primary disability is identified as Emotional Disturbance ("ED"). The IEP provided for full-time special education instruction outside of general education, including 29 hours per week of Specialized Instruction, to address deficits in reading, math and written expression, and 1 hour per week of behavioral support services for psychological counseling to address self-awareness, regulating emotions, following rules and regulations, and exhibiting positive interaction with peers and adults. Exhibit P-2.

5. The August 1, 2011 IEP included a Post-Secondary Transition Plan for Student. The Transition Plan provided that Student would receive 240 minutes per month[2] of "Guidance

[2] The IEP states Student will receive "240 hr per mon" of such services. Counsel for Petitioner stipulated that this was a typographical error and that the IEP team's intent was 240 minutes per month.

Counselor" transition Activity/Service. Exhibit P-2.

6. In the December 9, 2011 IEP, Hearing Officer Leff found that DCPS had denied Student a FAPE by failing to enroll him in, and provide transportation, to CHS for 8 school days in September 2011. She awarded tutoring and 1 hour of behavior support services as a compensatory education remedy. Hearing Officer Leff found it was not a denial of FAPE for DCPS not to provide a community-based worker for Student, as ordered in the August 18, 2011 IEP, because the ordered relief in the August 18, 2011 HOD was not founded on a claim based on FAPE. December 9, 2011 IEP.

7. DCPS began to provide transportation services to Student on September 26, 2011. December 9, 2011 IEP. DCPS failed to provide Student's behavioral support services at CHS from that date until at least October 21, 2011. DCPS agrees to make up the missed sessions of behavioral support services. Stipulation (at hearing) of DCPS.

8. During the 2010-2011 school year at Non-Public School, Student was often absent from, or late to, school. Student's poor attendance was a manifestation of his depression. August 23, 2011 HOD. At the August 2011 due process hearing, a DCPS special education coordinator represented that if Student continued to have poor attendance at CHS, the school would develop a BIP with attendance goals. *Id.*

9. From September 29, 2011 through November 17, 2011, Student had a total of 42 unexcused class absences, including 13 absences from English 1 and 12 absences from Reading Workshop. Exhibit P-8. After the Winter Break, Student's attendance improved dramatically. However, Student still has an attendance issue. At the January 30, 2012 IEP meeting, SPECIAL EDUCATION TEACHER stated that Student's issue is attendance and, if Student were in class everyday, he would have an A. Exhibit R-7.

10. CHS has not put in place a BIP to address Student's class attendance issues because CHS SOCIAL WORKER and CHS CASE MANAGER do not believe that Student would respond well to an intervention plan. Exhibits P-31, R-7.

11. Since, around October 21, 2011, when DCPS began, belatedly, to provide behavioral support services to Student, Social Worker has provided counseling services to Student for 60 minutes per week. Counseling was provided in a both individual and group settings. Exhibits R-5, R-7.

12. At a January 30, 2012 Multidisciplinary Team ("MDT") meeting at CHS, CHS Social Worker offered to provide Student two additional 30 minute counseling sessions per week, for one month, to make up for the behavioral support services not provided to Student between September 27, 2011 and October 21, 2011. Educational Advocate agreed that these extra counseling sessions would be sufficient. Exhibit R-7.

13. At CHS, Student's transition services are provided by Special Education Teacher and by Case Manager. Transition goals are implemented every day in the Special Education Teacher's class. In that setting, the class constantly speaks about self-determination and goals. The teacher assesses careers through interest interviews and inventories. The Case Manager also assesses Student through the DCPS Bridges assessment. Students in Special Education Teacher's class also review samples of resumes and practice job applications. CHS also works with an independent company, RSA, which interviews Students to determine goals and areas of interest. Exhibit R-7.

CONCLUSIONS OF LAW

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

In this due process hearing, the third hearing convened for this Student over a six month period, the issues are limited. Petitioner seeks a compensatory remedy for DCPS' alleged failure to provide the full extent of Counseling/ Behavioral Support services and transition services specified in Student's August 1, 2011 IEP and an order for DCPS to develop a Behavior Intervention Plan to address Student's school attendance issues.

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 FAIL TO IMPLEMENT STUDENT'S AUGUST 1, 2011 IEP BY NOT PROVIDING THE FULL EXTENT OF COUNSELING/ BEHAVIORAL SUPPORT SERVICES SPECIFIED AND BY NOT IMPLEMENTING THE TRANSITION PLAN IN THE IEP?

Discussion

"'[T]o prevail on a [failure to implement] claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.' *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 348-49 (5th Cir.2000). Thus, a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were 'substantial or significant,' or, in other words, whether the

deviations from the IEP's stated requirements were 'material.' *Ibid.*; *see also Schoenbach*, 309 F.Supp.2d at 83 n. 10 ('[F]ailure to implement all services outlined in an IEP does not constitute a *per se* violation of the IDEA.')." *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007).

i. Failure to provide behavioral support services

Student's August 1, 2011 IEP provides that he is to receive 1 hour per week of Behavioral Support Services. Petitioner alleges that after Student was allowed to be enrolled at CHS in late September 2011, DCPS did not initiate counseling services until October 21, 2011. DCPS stipulates that it delayed providing counseling services from September 22, 2011 to October 21, 2011 and that it agrees to provide make up services in compensation. At the January 30, 2012 MDT meeting, Social Worker offered to provide two additional 30 minute counseling sessions per week to Student, for one month, to make up for the missed services. Petitioner's Educational Advocate agreed these compensatory services would be sufficient. DCPS' one month delay in providing counseling to Student was a substantial omission. I find, therefore, that an award of eight additional 30-minute individual counseling sessions is reasonably calculated to compensate for any loss of educational benefits resulting from DCPS' failure to timely implement the behavioral support services specified in Student's August 1, 2012 IEP. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005). Petitioner prevails on this issue.

ii. Failure to implement IEP Transition Plan

The August 1, 2011 IEP specified that Student would receive, *inter alia*, 240 minutes per month of transition services. The August 1, 2011 IEP was developed at Nonpublic School,

where the services would have been provided by the private school guidance counselor. At CHS, transition services are provided by Special Education Teacher and Case Manager. Special Education Teacher attended the January 30, 2012 MDT meeting for Student and reported that Student's transition goals were being implemented every day in his classroom, including discussions of self-determination and goals, career interest interviews and inventories, reviewing sample resumes and practice completing job applications. He also reported that Case Manager assesses Student through the DCPS Bridges assessment. DCPS maintains that, through these services provided by Special Education Teacher and Case Manager, it is implementing the IEP transition services requirements. Petitioner did not provide evidence to refute DCPS' contention that it was providing the transition services. Therefore, I find that Petitioner has not met her burden of proof to establish that DCPS has failed to implement the transition services part of the August 1, 2011 IEP. DCPS prevails on this issue.

2. DID DENY STUDENT FAPE BY NOT DEVELOPING AN UPDATED BEHAVIOR INTERVENTION PLAN, WITH ATTENDANCE GOALS?

In the August 23, 2011 HOD, Hearing Office Raskin made a finding of fact that, if Student continued to have poor attendance after he matriculated to CHS, the public school would include attendance goals in Student's BIP. The IDEA requires that, in the case of a child whose behavior impedes the child's learning, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 34 CFR § 300.324(a)(2)(i). In some circumstances, the IDEA requires the education agency to use such behavior interventions to address truancy issues. *See, e.g, Board of Educ. of Oak Park v. Ill. State Bd. of Educ.*, 21 F.Supp.2d 862, 877 (N.D. Ill. 1998) (School District's truancy interventions insufficient to meet the *Rowley* test of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary

to permit the child to benefit from the instruction.)

From September 29, 2011 through November 17, 2011, Student had a total of 42 unexcused class absences at CHS, including 13 absences from English 1 and 12 absences from Reading Workshop. After the Winter Break, Student's attendance improved dramatically. However, Student still has an attendance issue. According to Special Education Teacher, Student's issue still is attendance. I find that, based upon the finding in the August 23, 2011 IEP that CHS would include attendance goals in Student's BIP if needed, and because Student has continuing attendance issues which impede his learning, it is necessary to develop and implement BIP attendance goals and strategies to enable Student to benefit from instruction at the public school. According, I will order DCPS to convene Student's IEP team at CHS to develop behavior intervention goals and strategies to address Student's attendance issues. Petitioner prevails on this issue.

Summary

In summary, I have found that DCPS denied Student a FAPE by not timely providing the behavioral support services specified in Student's August 1, 2011 IEP. I find that Petitioner has not met her burden of proof to establish that DCPS has failed implement the transition services provisions of the IEP. Finally, I find that Student requires behavior intervention strategies and goals to address his continuing poor class attendance issues.

ORDER

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

1. DCPS shall promptly provide to Student, eight additional 30-minute individual counseling sessions, delivered two times per week, as compensatory relief for DCPS' delay in starting behavioral support services this school year;

2. Within 10 school days of the entry of this order, DCPS shall convene Student's IEP team to develop a Behavior Intervention Plan with goals and strategies to address Student's attendance issues at CHS; and

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

Date: March 5, 2012

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).