

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

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION¹

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a _____ year-old male, who currently attends a DCPS middle school. Student's most recent IEP identifies his primary disability as specific learning disability ("SLD") and requires him to receive 15 hours per week of specialized instruction outside of general education and 1 hour per week of behavioral support services in general education.

On March 4, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to develop an appropriate IEP and placement, failed to complete a functional behavioral assessment ("FBA") and convene a follow-up meeting with parent to develop a behavioral intervention plan, and failed to provide Petitioner with a complete copy of the IEP.

On March 14, 2011, DCPS filed its Response to the Complaint. In its Response, DCPS asserted that Student has poor attendance and missed more than half of the days of instruction during the current school year, that Student's IEP is appropriate and the current DCPS school can implement it as written, and that the current school is willing to prepare an FBA and BIP. Overall, DCPS denied that there has been a denial of FAPE.

¹ This Hearing Officer Decision has been revised to reflect in Paragraph 3 of the accompanying Order that Petitioner's Complaint was filed on March 4, 2011 and not on March 14, 2011.

DCPS
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On April 14, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Petitioner withdrew its claim for failure to provide a complete copy of the IEP. The hearing officer issued the Prehearing Order on April 20, 2011.

By their respective disclosure letters dated April 21, 2011, Petitioner disclosed eighteen documents (Petitioner's Exhibits 1 – 18), and DCPS disclosed DCPS-1 through DCPS-8.

The hearing officer convened the due process hearing on April 28, 2011.² All disclosed documents were admitted without objection. Thereafter, the hearing officer received opening statements, testimonial evidence, and closing statements before concluding the hearing.

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

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS fail to develop an appropriate IEP and placement for Student?
2. Did DCPS fail to complete an FBA and convene a meeting with Parent to develop a BIP?

FINDINGS OF FACT

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

1. Student is years old and he attends grade at a DCPS high school.³
2. Student was retained twice – in 2nd grade and approximately 5th grade, but he was not receiving special education services at the time. Student began receiving special education services for the first time during SY 2010/11.⁴
3. On September 22, 2010 when Student was in the grade, Student received a comprehensive psychological evaluation, which included the Woodcock Johnson III

² Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

³ Testimony of Parent; testimony of Student.

⁴ Testimony of Parent.

Tests of Cognitive Abilities (“WJ-III Cognitive Tests”), the Woodcock-Johnson III Tests of Achievement (“WJ-III Achievement Tests”), the Behavior Assessment Scale for children, Second Edition (“BASC-2”), and the Attention-Deficit/Hyperactivity Disorder Test (“ADHD Test”). Student’s performance on the WJ-III Cognitive Tests revealed that his general intellectual ability, verbal ability, and cognitive efficiency are in the Low Average range, while his thinking ability is in the Average range. Student’s performance on the WJ-III Achievement Tests revealed that he was performing at the following grade equivalencies (“GEs”): Broad Reading – 6.6 GE; Broad Math – 5.3 GE; Broad Written Language – 6.5 GE. With respect to social-emotional functioning, the results of the BASC-2 and ADHD Test, together with information provided about Student’s educational and psychological history, suggested to the evaluator that Student has a wide variety of emotional and behavioral problems, including inattention, distractibility, hyperactivity, a depressed mood, and a history of cannabis abuse. The evaluator rendered the following diagnoses for Student on Axis I: Learning Disorder Not Otherwise Specified; Attention-Deficit/Hyperactivity Disorder, Combined Type; Cannabis abuse. The evaluator opined that Student meets the criteria for the LD, ED and OHI disability classifications and that Student should be placed in a full-time special education therapeutic school.⁵

4. Student’s history of marijuana use extends back for approximately two years, according to Parent. Student’s teachers have also reported to Parent that Student comes to school under the influence of marijuana. Although Parent has threatened Student, he continues to use marijuana.⁶
5. The evaluator who conducted Student’s comprehensive psychological evaluation notes that Student feels very poorly about himself, his place and his ability to do better. Student’s symptoms of depression began when he was approximately 10 years old and his negative experiences in school contributed to the ongoing symptoms. The depression stems from the lack of ability to progress in school, where Student is ridiculed for having been retained twice and is not affirmed. Although Student has many depressive tendencies within, he has charm and charisma and is the type to put on the persona that everything is well with him. Given Student’s depressive tendencies, as well as his below-grade academic abilities, Student is a young man who will struggle in school without emotional and academic support. Student also needs a BIP to help improve his school attendance. A large school with classes set apart in a separate area of the school is unlikely to work for Student because of the stigma that will attach when he stands out for going to that separate area. A self-contained class in a therapeutic setting where everyone is receiving some level of services and there is a community around Student that wants him to succeed would be a much better option for Student.⁷
6. At Student’s November 10, 2010 eligibility meeting, the team determined that Student was eligible for special education services as a student with the disabilities of OHI for ADHD and LD. DCPS determined to provide Student with 15 hours per week of

⁵ Petitioner’s Exhibit 4; DCPS-5.

⁶ Testimony of Parent.

⁷ Testimony of Licensed Clinical Psychologist.

specialized instruction in math, written expression and reading and 1 hour of behavioral support per week at a DCPS high school. Parent and the advocate disagreed with the amount of specialized instruction and the location of services offered but agreed to allow Student to try them.⁸

7. Student's November 10, 2010 IEP lists Specific Learning Disability as his primary disability and includes a disability worksheet which indicates that Student's meet all of the criteria for OHI. The IEP requires Student to receive 15 hours per week of specialized instruction outside general education and 1 hour per week of behavioral support services in general education. The IEP includes annual goals in the academic areas of mathematics, reading and written expression, and in the area of emotional, social and behavioral development.⁹
8. Even with the new IEP, Student does not always understand what is being taught in his classes. In math, his teacher does not break down the lesson so that Student can understand it. As a result, Student has only learned in math class what he already knew prior to attending his new DCPS high school. Student currently has a tutor who works with him every Sunday on math and reading. Student is learning a lot in tutoring, and Student believes the tutor is teaching him things that he is not being taught at the DCPS high school. Student's schedule at the current DCPS high school includes 7.5 hours per week in a self-contained learning lab and 7.5 hours per week in a special education Algebra I class, as well as a general education Extended Literary class where Student receives assistance from a special education teacher.¹⁰
9. Student has not been attending school and/or his classes at his new DCPS high school. He has also been suspended 3 times because a security guard has reported him for being in the hallways. The DCPS high school has held several meetings concerning Student's behaviors, and after the Winter Break of SY 2011/12, the school started using a conduct card for Student. The conduct card is the only intervention DCPS has implemented to address Student's attendance, and it has not worked. Student does not deny that he skips classes. Student reports that sometimes his teachers, particularly his math and reading teachers, do not let him into class because they do not think he will be successful in class.¹¹
10. DCPS's Attendance summary for Student for SY 2010/11 indicates that between August 16, 2010 and April 21, 2011, Student was present for only 34 of the 90 days of instruction that had been provided.¹²
11. The special education coordinator ("SEC") at Student's new DCPS high school does not know Student personally and was not aware of his truancy issues until she received the Complaint in this matter. The SEC has since become familiar with Student's records and

⁸ DCPS-6; Petitioner's Exhibit 3.

⁹ DCPS-4; Petitioner's Exhibit 2.

¹⁰ Testimony of Student; *see* Petitioner's Exhibit 6; testimony of SEC.

¹¹ Testimony of Parent; testimony of Student.

¹² DCPS-2.

spoken with Student's case manager. There are more than 700 students in Student's DCPS high school, with 200 special education students, and the SEC is responsible for all 200 special education students. Student is not doing well at his current DCPS high school. He does not attend classes and his grades are horrible, as he is pretty much receiving all Fs even though he receives academic support in all of his classes besides ROTC and music. Attendance is the biggest problem. The Attendance Officer at the school had a meeting with Parent and implemented an attendance contract for Student, but it has been unsuccessful in improving his attendance. Truancy can affect a special education student's academic performance. Unfortunately, attendance is sometimes an issue the school cannot correct, especially for children who are living at home as opposed to children who are living in group homes and have probation officers.¹³

12. Student's algebra teacher is also his case manager. Student has been skipping class since he began attending the DCPS high school, and he only goes to his math class approximately once per week. When Student is in math class, the teacher feels he's an excellent student with a tremendous ability to do the work and very good manners, but he doesn't go to class very often. The algebra teacher/case manager has attempted to address Student's truancy by working with the Dean of Student, speaking to Student's counselor, speaking to the attendance counselor, who developed an attendance contract, and even speaking to Student. The algebra teacher/case manager suspects that Student uses drugs and hangs out with the wrong children doing the wrong things. Student is capable of learning algebra, even with skills at a solid 6th grade level, but the largest concerns with respect to his math class are absenteeism and drug abuse. The algebra teacher/case manager is concerned about Student's truancy and does not think it is acceptable for the DCPS high school to simply continue what it has been doing with respect to Student.¹⁴
13. On April 20, 2011, DCPS issued a letter authorizing Parent to obtain an independent FBA for Student.¹⁵
14. Student has been accepted to attend two private full-time special education schools, but Parent prefers one school over the other because the preferred school offers a vocational program. Student also likes Parent's preferred private school, which is located outside of the District. Student believes that he could learn at the private school, but he is concerned that the school is too far and doesn't necessarily want to ride the school bus. Nevertheless, Student would go to the school on the bus, and Parent would also do all she could to make sure Student rode the bus each day.¹⁶
15. The private special education school that Parent and Student prefer is a full-time therapeutic day school that provides academic and support services for children from 5 to 21 years of age. The school is certified by OSSE (DC) to serve Students with a variety of disabilities, including LD, ED, ID, SLI and multiple disabilities. There are no non-

¹³ Testimony of SEC.

¹⁴ Testimony of special education teacher.

¹⁵ DCPS-3.

¹⁶ Testimony of Parent.

disabled students at the school. The tuition is _____ per day, including group counseling, for 180 to 183 days of instruction per year. Individual counseling costs _____ per session. The school also offers ESY for 6 hours per day from July 5 through August 12. The school serves a total of 111 students in 1 building with 3 levels. High school classes, which cover grades 9 through 12, range in size from 2 to a maximum of 10 students. Approximately 98% of the students in the high school are from the District of Columbia, and the school follows the District of Columbia curriculum for Students from the District. As a general rule, the high school teachers are certified in their content areas and for special education. However, if a particular teacher is not certified in special education, he or she teaches under the supervision of a certified special education teacher. The school has a 90% graduation rate. The school has experience dealing with students who have attendance issues. Students at the school are unable to roam the halls because there are cameras in the halls and staff members patrol the halls as well. There is a psychologist on staff and behavioral support staff to handle crisis intervention needs. Although there is no substance abuse program at the school, the school refers to an outside substance abuse program when necessary and students can work on substance abuse issues in their counseling sessions.¹⁷

CONCLUSIONS OF LAW

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

1. Development of IEP and Placement/Location of Services

"The 'free appropriate public education' required by [IDEA] is tailored to the unique needs of the handicapped child by means of an 'individualized educational program.'" Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.* Hence, an LEA satisfies its obligation to provide a child with a disability with a FAPE by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction, and the personalized instruction provided should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.*

IDEA also requires a public agency to provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. Hence, IDEA defines a FAPE as special education and related services that, *inter alia*, are provided in conformity with an IEP and include an appropriate preschool, elementary or secondary school in the State involved. 34 C.F.R. § 300.17.

¹⁷ Testimony of Assistant Educational Director of private school.

With respect to educational placements, each public agency must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114.

On the other hand, where a public school system has defaulted on its obligations under IDEA, a private school placement is proper under the Act if the education by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). “Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment.” *N.G. v. District of Columbia*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley*, *supra*, 456 U.S. 176, 202)).

In the instant case, Petitioner argues that Student’s current IEP is inappropriate because Student needs a full-time IEP in light of his academic and cognitive delays, his history of retentions, and his ADHD and depression. Petitioner has also requested placement at a private full-time special education school, pointing out that Student has not performed well in the big-city DCPS high school he is currently assigned to attend, as well as compensatory education in the form of ESY services at the requested private school.

On the other hand, DCPS argues that the current location of services is the least restrictive environment for Student, but Student has failed to attend school by missing approximately 2/3 of the school days to date. DCPS acknowledges that it has tried to address Student’s truancy by implementing an attendance contract, providing behavioral support, and engaging in conversations/meetings, but none of these efforts has proven successful. Nevertheless, DCPS maintains that Student can succeed with his current 15-hour IEP at the current location of services and points in support of this position to witness testimony that Student can do the work if only he would come to school.

a. The IEP

A review of the evidence in this case demonstrates that Student has been entitled to receive 15 hours of specialized instruction outside general education for the last 6 months pursuant to his initial IEP, but he has not received the services that DCPS has made available to him because of his failure to attend school. Indeed, the evidence shows that Student began exhibiting a high rate of truancy from the very beginning at this current DCPS high school. Hence, although his grades are very poor, consisting primarily of Fs, his excessive absenteeism makes it impossible to determine with certainty whether he could, indeed, access FAPE with 15 hours of specialized

instruction per week. On the one hand, the evidence indicates that Student is LD and functioning several grades below grade level, but he can perform the work in his special education math class when he attends the class. On the other hand, there is evidence that Student is unable to understand the instruction provided in his special education math class because he is not receiving the level of detail he requires to understand. Taking all of the evidence of record into account, the hearing officer concludes that the evidence does not definitively prove that the personalized instruction DCPS has made available to Student is not reasonably calculated to enable Student to achieve passing marks and advance from grade to grade. Therefore, the hearing officer concludes that Petitioner has failed to meet its burden of demonstrating that DCPS denied Student a FAPE by failing to develop an appropriate IEP that provides full-time specialized instruction for Student.

b. The Location of Services

A review of the evidence in this case reveals that Student has been unable to access the specialized instruction DCPS has made available to him at his current DCPS high school due to his extreme truancy problem. Although the current DCPS high school has implemented an attendance contract/conduct card and convened a number of meetings to discuss Student's excessive absenteeism, there is no dispute that these measures have been unsuccessful. Indeed, the SEC at Student's current DCPS high school admits that attendance is sometimes an issue the school cannot correct, especially for children such as Student who are living at home, even as Student's case manager acknowledges that Student requires something more than what is currently being done. Moreover, although the evidence reveals that Student requires a therapeutic environment where he can receive emotional support to address his depressive tendencies, negative feelings about himself, and ADHD symptoms, his current DCPS high school services more than 700 students and the SEC at the school is responsible for a total of 200 special education students and does not know Student personally. Indeed, despite Student's failing grades at his current school, the SEC was not even aware of his truancy issues until she received the Complaint in the instant matter. Based on this evidence, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS has denied Student a FAPE by failing to provide him with an appropriate location of services where his special education and related services needs can be met.

With respect to the relief to be awarded as a result of this denial of FAPE, the hearing officer concludes that it would be inappropriate to place Student in a private full-time special education school that has no nondisabled children, especially since Petitioner has failed to prove in this case that Student requires the full-time specialized instruction that the private school provides to each and every student in attendance. Hence, the hearing officer will deny Petitioner's request for funding and placement at a private full-time special education school and will instead order DCPS to convene an MDT meeting for Student and provide Parent with one or more locations of services that can implement Student's current IEP while also offering Student a therapeutic environment and sufficient emotional support to address his extreme truancy issues. DCPS shall also allow Student the option of attending said school for summer school so that he can attempt to earn some of the credits he failed to obtain during the current school year. Moreover, in light of Student's cannabis dependency/abuse issues, the hearing officer will order DCPS to have the

IEP team discuss and make every effort to recommend a substance abuse program that Student can attend outside of school hours.

Upon careful consideration of the facts of this case, the hearing officer has determined to decline Petitioner's request for an award of compensatory education. In reaching this conclusion, the hearing officer has considered the following factors: Student's very own conduct in failing to attend classes on a routine basis is the primary cause of any harm that he has suffered in this case; DCPS has routinely made the required specialized instruction and behavioral support services available to Student in the appropriate forms and amounts even though Student has chosen not to access the services; and Student is already receiving tutoring services that are proving quite beneficial to him even as he continues to choose to skip his classes on a regular basis. *See Reid v. District of Columbia*, 401 F.3d 516 (D.C. 2005) (compensatory is an equitable remedy to be awarded within a court or hearing officer's discretion).

2. Failure to provide an FBA and BIP

In evaluating a child with a disability, a public agency must ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6). Moreover, when developing a disabled child's IEP, in the case of a child whose behavior impedes the child's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i).

In the instant case, Petitioner has alleged that DCPS denied Student a FAPE by failing to complete an FBA and convene a meeting with Parent to develop a BIP. However, the evidence reveals that on April 20, 2011, DCPS issued a letter authorizing Parent to obtain an independent FBA for Student. As completion of the FBA is a prerequisite to the development of a BIP, DCPS has authorized Petitioner to obtain an independent FBA, and there is no evidence tending to suggest that DCPS will refuse to review the FBA and draft a BIP, the hearing officer finds that Petitioner has failed to meet its burden of proving a denial of FAPE in connection with this claim.

ORDER

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

1. Within 12 school days of the issuance of this Order, DCPS shall convene an IEP/MDT meeting for Student, and at said meeting DCPS shall (1) provide Parent with one or more locations of services that can implement Student's current IEP while also offering Student a therapeutic environment and sufficient emotional support to address his extreme truancy issues, and (2) have the IEP Team/MDT discuss and make every effort to recommend a substance abuse program that Student can attend outside of school hours.

2. DCPS shall allow Student the option of attending summer school at the school identified at the IEP/MDT meeting ordered in Paragraph 1 above, so that Student can attempt to earn some of the credits he failed to obtain during the current school year.
3. All other requests for relief in Petitioner's March 4, 2011 Complaint are **DENIED** and the claims upon which they are based are **DISMISSED**.

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: 5/18/2011

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