DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

Parent, on behalf of	)	
Student,	)	**Case Number: 2012-0447**
Petitioner,	)	**Hearing Officer: James McKeever**
v.	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	**Hearing Date: August 21, 2012**
Respondent.	)	

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HEARING OFFICER DETERMINATION

I. Introduction and Procedural Background

This is a due process proceeding brought in accordance with the Individuals with Disability Education Act 2004 ("IDEA"), and its implementing regulations codified at 20 U.S.C. Section 1400 et seq., against Respondent, District of Columbia Public Schools (DCPS).

Petitioner is the parent of the Student, a year-old boy classified as a Student with a disability who resides in the District of Columbia and currently attends a DCPS High School (High School) located within the District of Columbia. The Student is eligible for special education and related services as a student with a disability under the IDEA.

On June 21, 2012, Petitioner filed a Due Process Complaint ("DPC") against DCPS alleging that DCPS failed to offer the Student a free and appropriate public education (FAPE) during the 2011-2012 school year because the Individualized Education Plan (IEP) developed by DCPS on November 8, 2011, failed to provide full-time special education services throughout the school day and because DCPS failed to provide the Student with a placement in a structured and specialized program during the 2011-2012 school year.

On July 20, 2012, DCPS filed its Response denying the allegations contained in the DPC and asserting that the Student was offered a FAPE for the subject school year because the IEP was reasonably calculated to provide the Student with an educational benefit, *inter alia*.

A resolution session was held on July 2, 2012. The parties were unable to resolve the complaint, but continued the resolution period to July 21, 2012. The 45-day timeline began July 21, 2012.

The Prehearing Conference (PHC) was held on July 20, 2012. During the PHC, the parties discussed and clarified the issues and the requested relief. It was agreed that the Due Process Hearing (DPH) would be held on August 21, 2012 and that the five-day disclosures would be filed by August 14, 2012.

The Five-day disclosures were filed as directed on August 14, 2012 and the DPH was held on August 21, 2012. Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-45[1] were admitted into evidence. Respondent's Exhibits 1-3 were also admitted into evidence.

The following witnesses testified on behalf of the Petitioner: Parent, Clinical Psychologist, Principal of Non-Public school, Program Specialist at the Private school.

The following witnesses testified on behalf of the Respondent: Special Education Coordinator at DCPS High School (SEC).

II JURISDICTION

[1] A list of all Exhibits entered into evidence is annexed hereto at Appendix "B"

The Due Process Hearing was held in accordance with the rights established under the Individuals with Disability Education Act 2004 ("IDEIA"), and its implementing regulations at 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25. This decision constitutes the Hearing Officer's Determination (HOD) pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513. The HOD is due by September 4, 2012.

III. ISSUES PRESENTED

The following issues were certified for adjudication at the due process hearing:

a. Whether DCPS denied the Student a FAPE by failing to develop an IEP on November 8, 2011 that was reasonably calculated to provide the Student with an educational benefit for the 2011-2012 school year because the IEP failed to provide full-time special education services.

b. Whether DCPS denied the Student a FAPE by failing to provide the Student with a placement in a structured and specialized program during the 2011-2012 school year.

Petitioner requests an Order directing DCPS to place the Student in a non-public, full-time, self contained school that can implement a full time IEP with transportation and compensatory education services

IV. FINDINGS OF FACT

The Student is a year-old boy who resides in the District of Columbia. The Student is eligible for special education and related services under the IDEA as a child with an Intellectual Disability (also known as Mental Retardation) (Exhibit P-40-IEP dated 11/8/2011).

The Student attended a non-public school, at DCPS expense, from 3rd grade to 8th grade (Testimony of Director of Non-Public School). During this time the Student had an IEP that provided for full-time, specialized instruction to address his severe cognitive and academic delays with related services of counseling, speech and occupational therapy (Testimony Principal of Non-Public School, Exhibit P-33). At the end of the 8th grade, the Student was not making progress with respect to the goals on his IEP (Testimony of Principal of the Non-Public School).

On October 1, 2010, when the Student entered the grade, for the first time (2010-2011 school year), the Student attended a "Transition Academy" within DCPS. The Student's IEP for this school year provided for 30.5 hours per week of specialized instruction, 1 hour per week of behavior supports, 30 minutes per week of speech and

language therapy and 30 minutes per week of occupational therapy (Exhibit P-36, page 11).

On February 4, 2011, DCPS issued Prior Written Notice for the Student to attend the DCPS High School where the Student is currently placed (Exhibit P-38).

On March 21, 2011, DCPS generated an IEP that provided for provided for 19.5 hours per week of specialized instruction with part time instruction in a general education setting, 1 hour per week of behavior supports, 30 minutes per week of speech and language therapy and 30 minutes per week of occupational therapy (Exhibit P-39, page 10). The IEP team acknowledged that the Student had made "minimal" progress and that he is often absent from school (Exhibit 39, page 6). The IEP team also acknowledged that the Student is "compliant" and "positive" when instructed in a 1:1 setting (Exhibit 39, page 6).

The Student has a history of marijuana use and engages is "school avoidant" behavior, in part, because the Student struggles in school (Testimony of Clinical Psychologist). The Student was prescribed medication to control his behavior. However, sometime in 2011, the Student refused to take his medication (Exhibit 30)

On May 31, 2011, Petitioner and DCPS entered into a settlement agreement (SA) regarding a prior DPC wherein DCSP agreed to convene an IEP meeting to review an independent comprehensive psychological evaluation, an independent vocational assessment, an independent speech and language evaluation, an independent occupational therapy evaluation and then revise the Student's IEP, if necessary..." (Exhibit 6, page 2).

A comprehensive psychological evaluation conducted on August 11, 2011indicated that the Student had a full scale IQ of 46 and academic achievement skills that were at that the "early" elementary school level. The Student's learning issues "go beyond the scope of any type of special Learning Disability and are instead related to his global cognitive deficits" (Exhibit P30, page 12). It was recommended that the Student's IEP include classifications of "Other Health Impairment" as well as "Emotionally Disturbed" in order to insure that the Student receive appropriate services to "meet his varied needs" (Exhibit 30, page 13). The evaluator also opined that the Student should not continue at the DCPS High School given his substantial learning needs and his unwillingness to attend (Exhibit P-30, page 13).

DCPS did not implement a school attendance plan during the 2011-2012 school year to address the Student's excessive absences (Exhibit P-30, page 13).

The Student requires a "highly structured, specialized program that can provide him with functional academics and vocational skills" as well as life skills training. The Student also requires a small class in order to receive 1:1 support as well as a Behavior Intervention (BIP) in order to address his significant social/emotional and behavioral issues (Exhibit P-30, page 14), which include "frequent temper tantrums" and "physical aggression towards his peers" (Exhibit P-30, page 1).

On November 8, 2011. DCPS convened an IEP meeting to review the independent psychological evaluation conducted on August 11, 2011, among other things. On this date, DCPS generated an IEP that provided for 19.5 hours per week of specialized instruction with part time instruction in a general education setting, 1 hour per week of behavior supports, 30 minutes per week of speech and language therapy and 30 minutes per week of occupational therapy (Exhibit P-39, page 10). This was identical to hours of specialized instruction and related services that were offered to the Student on the March 21, 2011 IEP. Additionally, the "Present Levels of Performance" reported on the November 8, 2011 were identical to the Present Levels of Performance reported on the March 21, 2011 IEP (See, Exhibit P-39, pages 5, 6 and Exhibit P-40 pages 5, 6 respectively).

On March 12, 2012 the Student was administered a battery of cognitive and achievement testing pursuant to an Order of the Superior Court of the District of Columbia, Family Court Division (Exhibit, P-31). The testing results from this evaluation were similar to the results from the independent comprehensive psychological evaluation cognitive and achievement conducted in August 2011 (Exhibits P-30 and P-31), to wit, that the Student was "mildly MR" with an IQ of 47 and functioning at a "very low academic level for his age" (Exhibit P31, page 12). The March 2012 evaluator also recommended that the Student attend a school that is "specifically designed to help youths suffering from academic, emotional and behavioral issues" and that the Student should receive individualized instruction in basic skill areas as well as significant counseling services (Exhibit P-31, page 13).

On May 2, 2012, the Student underwent a "competency Evaluation" pursuant to Court Order (Exhibit P-32). The purpose of the evaluation was to assist the Court in its determination of the Student's competency to participate in a legal proceeding. The Court Appointed evaluator found the Student' "incompetent" to participate in the Court proceedings (Exhibits P-32, page 3).

During the 2010-2011 and the 2011-2012 school years, when the Student's hours of specialized instruction were reduced from 30.5 hours to 19.5 hours, the Student failed all of his classes (Exhibit 41). During the same time period, the Student engaged in "school avoidant" behavior that resulted in excessive absences from school (Testimony of Clinical Psychologist). As a result of the Student's lack of success at school during the 2010-2011and 2011-2012 school years, the Student will be entering the grade for the third time during 2012-2013 school year.

The proposed Private School is a non-profit, non-public school located in Baltimore County, Maryland. The Private School services students with multiple disabilities by providing academic remediation and a variety of vocational skills training as well as counseling services (Testimony of Program Specialist). If the Student were attend this school he would be placed in a self-contained class of 3-4 students with one certified teacher and a teaching assistant. The curriculum would be modified and the instruction would be individualized to meet the Student's needs. The Private School has a

school-wide BIP and after consulting with the school's clinical director, an individualized BIP would be developed for the Student (Testimony of Program Specialist). The small class size at the Private School would permit 1:1 instruction throughout the day (Testimony of Program Specialist). The Private School is certified by the Office of the State Superintendant for the District of Columbia (OSSE), and the annual tuition with related services is $56,000. Bus transportation from the Student's home to the Private School is approximately 45 minutes to one hour, each way (Testimony of Program Specialist).

DCPS did not identify any other school that could meet the Student's cognitive, social/emotional and/or behavioral needs.

V. BURDEN OF PROOF

The burden of proof in a special education due process hearing lies with the party seeking relief. DCMR 5-3030.3; see, Schaffer v. Weast, 546 U.S. 49 (2005).

VI. SUMMARY

The Hearing Officer concludes that Petitioner has met her burden of proof with respect to issue A and B listed above.

VII CREDIBILITY DETERMINATIONS

This Hearing Officer finds that all of the witnesses at the due process hearing provided credible testimony. However, I do not credit the testimony of the SEC who testified that the Student's hours of specialized instruction were reduced in March and November 2011 at the parent and her former attorney's request (Testimony of SEC). The evidence shows that the SEC was not present at either the March or the November IEP meetings (Exhibits 39 and 40) and that at the time of the November 2011 IEP meeting, the Multidisciplinary Team (MDT) reviewed the independent psychological revaluation, which recommended a full-time IEP throughout the day with one to one educational support (Exhibit 30). As such, I will not credit the SEC's testimony with respect to these alleged facts as they are not corroborated by any other evidence.

VIII. ANALYSIS AND CONCLUSIONS OF LAW

a. Whether DCPS denied the Student a free and appropriate public education by failing to develop an IEP on November 8, 2011 that was reasonably calculated to provide the Student with an educational benefit for the 2011-2012 school year because the IEP failed to provide full-time special education services.

A free appropriate and public education "consists 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." Bd. Of Education v. Rowley, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982). Under Rowley, a child is deprived of a free and appropriate public education: (a) If the LEA violated the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free and appropriate public education, or (b) if the IEP is not reasonably calculated to enable a child to receive educational benefits.

Under the IDEA, the federal government provides funding to states and local educational agencies, including those of the District of Columbia, see 20 U.S.C. § 1401(31), for the education of disabled children. As a condition of receiving that funding, an educational agency must maintain policies and procedures ensuring that a "free appropriate public education is available to all children with disabilities residing in the [jurisdiction] between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "central component of a disabled student's special education under the IDEA" is the individualized education program ("IEP"), which is a written statement setting out the student's "individually tailored goals and the means of achieving them." *District of Columbia v. Doe,* 611 F.3d 888, 892 n.5 (D.C. Cir. 2010) (citing 20 U.S.C. § 1414(d)).

Pursuant to 34 C.F.R. Section 300.324(a)(1), in the development of the IEP, the IEP team must consider: (1) the strengths of the child; (ii) the concerns of the parent for enhancing the education of their child; (iii) the results of the initial or most recent evaluation of the child; and (iv) the academic, developmental and functional needs of the child. *Id* at 300.324(a)(1).

In this case, the evidence shows that the results of the most recent evaluation, which the MDT team had at the time of the IEP meeting on November 8, 2011, confirmed that the Student had a full scale IQ of 46 and that the Student's academic achievement skills that were at an "early" elementary school level, which was far below his chronological age (15 at the time). The evaluation also revealed that the Student required significant remedial academic services to ensure that his basic academic skills were addressed and that the Student required a "highly structured and specialized program that could provide him with "vocational skills" as well as life skills training. Additionally, based on the Student's global deficits, the Student should be placed in a small class and be provided 1:1 support as well as an individualized BIP in order to address his significant behavioral issues (Exhibit P-30, page 14).

Here, the evidence shows that the IEP developed by DCPS on November 8, 2011 provided for only 19.5 hours per week of specialized instruction with part-time instruction in a general education setting (Exhibit P-39, page 10). This was the same

amount of hours of specialized instruction that DCPS offered on the Student's March 21, 2011 IEP, which was before DCPS possessed the evaluation referenced above (Exhibit P-30). Additionally, the evidence shows that at the time DCPS developed the November 2011 IEP, DCPS was aware that the Student, who previously had a full-time IEP that provided for over 30 hours per week of specialized instruction, had made "minimal" progress in the previous school year and was repeating the 9th grade because he failed all of his classes in the previous school year. Accordingly, based on the above, I find that the IEP developed by DCPS on November 8, 2011, failed to offer the Student a FAPE for the 2011-2012 school year because it failed to provide for full-time special education services outside of the general education setting throughout the entire school day as recommended on the Student's most recent evaluation, and because the IEP did not sufficiently address the Student's academic, developmental and functional needs *Id* at 300.324(a)(1).

Further, although the evidence demonstrated that the Student was often absent from school, the record reveals that the Student engaged in "school avoidant" behavior, in part, because the program recommended by DCPS failed to address his needs (Testimony of Clinical Psychologist). Additionally, no evidence was presented at the hearing to demonstrate the Student's failure to take medication to control his behavior and/or the Student's use of marijuana was the cause of his failure at school.

With respect to whether DCPS denied the Student a FAPE by failing to provide the Student with a "structured and specialized program during the 2011-2012 school year," the evidence shows that the Student requires a "highly structured, specialized program that can provide him with functional academics and as well as vocational skills and life skills training (Exhibit P-30, page 14). The evidence also shows that the Student requires a small class size and 1:1 support in order to make progress (Exhibit P-30). As indicated above, DCPS' recommended placement, which included only 19.5 hours per week of specialized instruction with part time instruction in a general education setting, is inappropriate for this Student because that level of support is insufficient to address the Student's significant academic and social/emotional and behavioral needs. As such, I find that that DCPS' recommended placement was inappropriate for the Student because it was not specifically designed to meet the unique needs of the Student and because the recommended hours of specialized instruction would not enable the Student to obtain an educational benefit Bd. Of Education v. Rowley, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982).

Private School Placement:

The evidence shows that the Student requires a highly structured, specialized program that can provide him with functional academics, vocational skills and life skills training. The Student also requires a full-time IEP with specialized instruction for all classes outside the general education setting in order to address the Student's academic and social/emotional needs (Exhibit P-30, page 1).

The Private School services students with multiple disability classifications and employs teachers who are certified in special education (Testimony of Program Specialist). The curriculum at the Private School is modified to meet the individual needs of each student and vocational and life skills training and counseling services are available to its students. Additionally, upon admission, the Private School will develop an individual BIP for the Student after consulting their clinical psychologist (Testimony of Program Specialist). Based on these facts, I find that the program and services offered at the Private School are appropriate to meet the Student's needs. Additionally, there was no showing that the Student's needs could be met at a DCPS school or any other school. Finally, the school is approved by OSSE and I find that the annual tuition of which includes the cost of related services, is not unreasonable.

Further, I find that the Private School is the Student's least restrictive environment (LRE), as the evidence shows that the Student should not be placed in the general education setting, but in a small class with a small student to teacher ratio (Exhibit P-30). Additionally, the evidence shows that the Student was placed by DCPS at a different non-public school from 3rd grade to 8th grade. Accordingly, Petitioner's request for funding for the Student's placement at the Private School for the 2012-2013 school year is granted Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005).

Equities:

The evidence shows that Petitioner cooperated with the IEP process and no evidence was presented to warrant a denial of prospective funding for the Private School. As such, I find that the equities support an award of prospective funding for the Student's placement at the Private School for the 2012-2013 school year.

Compensatory Education:

Petitioner contends that any compensatory educational services owed to the Student based on DCPS' denial of FAPE would be addressed by the Student's placement at the proposed Private School.

Where a school system fails to provide special education or related services to a disabled Student, the Student is entitled to compensatory education, which is the replacement of educational services that the child should have received in the first place. Reid v. District of Columbia, 401 F 3d. 516 (D.C. Cir. 2005). As indicated above, Petitioner is not requesting any specific compensatory educational services based on DCPS' denial of FAPE. I find that the Private School's program, which includes vocational and life

skills training as well as small group and one-to one-instruction, would address any compensatory educational services owed to the Student based on DCPS' denial of FAPE during the 2011-2012 school year. As such, Petitioner's request that any compensatory educational services owed to the Student based on DCPS' denial of FAPE be addressed by the Student's placement at the proposed Private School is granted.

Transportation:

DCPS shall provide the Student with appropriate transportation to and from the Private School during the 2012-2013 school year.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 2nd day of September 2012, it is hereby

ORDERED that DCPS shall fund the Student's placement at the Private School for the 2012-2013 school year and provide transportation to and from school.

Dated September 2, 2012

By: /s/ James McKeever
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer's Determination shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. Section 1415(i)(2).

Distributed to:

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