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

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

Through

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Date Issued: September 26, 2010

Hearing Officer: Kimm Massey, Esq.

Case No:

Hearing Date: September 16, 2010

Room: 4b

HEARING OFFICER DETERMINATION

BACKGROUND

Student is a _____ year-old male, who recently was released from a residential placement and has now been assigned to attend a private special education school at DCPS's expense. Student's current IEP, which is dated May 17, 2010, lists a disability classification of emotional disturbance ("ED") and requires Student to receive 30 hours per week of specialized instruction, 3 hours per week of psychological services, and 1 hour per week of speech/language services, for a total of 34 hours per week of special educational and related services.

On July 14, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to provide wraparound services for Student and failed to attend Student's last IEP meeting. Petitioner further asserted that Student required 5 hours per day of services, "to include transportation services, mentoring services, recreation services, socialization skills training, [and] education support to include GED training." Complaint at G.1.

On July 26, 2010, DCPS filed its Response to the Complaint, asserting that "wrap-around services" is not a term defined under the IDEA, and that Student "is currently in a residential

facility where his IEP is being fully implemented and is receiving all needed services.” Response at 1.¹

On August 19, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. At the request of counsel for DCPS, Petitioners’ counsel clarified that DCPS was being charged with failing to attend Student’s May 17, 2010 IEP meeting. The hearing officer discussed the requested relief with counsel, noting that the 34 hours per week of services required under Student’s IEP, which includes 3 hours per week of psychological services, in addition to the 25 hours per week of wraparound services requested in the instant action, would amount to a total of 59 hours per week of services. The hearing officer noted that such an award of services is so large as to be highly unlikely. The hearing officer issued the Prehearing Order on August 24, 2010.

By cover letter dated September 9, 2010, DCPS disclosed five documents (DCPS-1 through DCPS-5). By disclosure letter dated September 9, 2010, Petitioner attempted to disclose 8 documents. However, Petitioner failed to file an official copy of its disclosures with the Student Hearing Office (“SHO”) and subsequently failed to include document #5 in the hearing officer’s copy of the disclosures. Therefore, Petitioner actually disclosed documents numbered 1 through 4 and 6 through 8 (Petitioner’s Exhibits 1 – 4 and 6 – 8).

The hearing officer convened the due process hearing on September 16, 2010.² DCPS’s disclosed documents were admitted into the record without objection. Petitioner’s documents numbered 1 through 4 and 8 were admitted into the record without objection. Petitioner’s documents numbered 6 and 7 were admitted into the record as background documents, over DCPS’s objection.³ As a preliminary matter, Petitioner withdrew from consideration its claim concerning DCPS’s alleged failure to attend Student’s May 17, 2010 IEP meeting, leaving only the claim for wraparound services to be addressed during the hearing. During the course of the hearing, the hearing officer and Petitioner’s counsel learned that the individual DCPS designated as its party representative is actually an employee of a non-DCPS entity that DCPS proposed to provide after-school services for Student, although the individual at issue is housed in a DCPS facility pursuant to a contract between DCPS and her employer.⁴ As the individual had attended most of the hearing and heard the bulk of Petitioner’s testimony, Petitioner objected to the receipt of any testimony from the individual due to potential prejudice. The hearing officer overruled the objection and allowed the witness to testify on the ground of necessity, because she was DCPS’s primary witness in this matter. However, the hearing officer decided to adjust the weight to be assigned to the witness’s testimony in light of the potential prejudice to Petitioner.

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.

¹ DCPS initially contended that it had not received service of the Complaint for this matter.

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

³ The hearing officer’s further examination of Petitioner’s disclosures subsequent to the due process hearing revealed that Petitioner’s Exhibits 7 and 8 are actually two copies of the same document, a July 18, 2010 Adaptive Evaluation. As a result, Petitioner has for all practical purposes disclosed only six of the intended eight documents.

⁴ The witness at issue is designated as a DCPS case manager in the attached Appendix.

§§ 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.”).

ISSUES

The issue to be determined is as follows:

1. Did DCPS deny Student a FAPE by failing to provide Student with wraparound services?

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 has a troubled history, which has included *in utero* exposure to drugs and alcohol, CFSA cases involving claimed parental neglect and lack of supervision, the loss of a younger brother as a result of a reported smothering death, removal from his home and an eventual placement with his current guardian, the death of his biological mother, a history of marijuana use, previous psychiatric hospitalizations, a history of behavior and emotional problems, and involvement with the criminal justice system.⁵
2. In 2008, Student was sent to a residential placement.⁶
3. On March 23, 2010, Student’s psychiatrist at the residential placement sent a letter to DCPS’s Placement Specialist in the Office of Special Education. The letter stated Student was preparing for the transition process to reunite with his family and school in his community, and he would need intensive wraparound services to be successful. Although the psychiatrist recommended a minimum of five hours per day, five hours per week of wraparound services, she stated that the degree, duration, and frequency of the services should be determined by Student’s MDT. The letter listed the following as Student’s current DSM IV diagnoses: Mood Disorder NOS, Learning Disorder NOS, Cannabis Abuse – In Remission, Neglect of Child – Victim, Borderline Intellectual Functioning, Obesity, Problems with primary support group, Problems related to the social environment, Problems related to interaction with the legal system/crime, and Education problems. The letter indicated that Student is currently taking the following medications: Risperdone, Propanolol, Seroquel XR, Cogentin, and Motrin.⁷
4. Student’s current IEP is dated May 17, 2010. It identifies Student as ED and requires him to receive 30 hours per week of specialized instruction, 3 hours per week of

⁵ Petitioner’s Exhibit 6; testimony of guardian; testimony of Student.

⁶ Testimony of Guardian.

⁷ Petitioner’s Exhibit 1.

psychological services, and 1 hour per week of speech/language services, for a total of 34 hours per week of special education and related services.⁸

5. At Student's May 17, 2010 IEP meeting, it was determined that Student would transition to an assisted living residence. DCPS did not participate in the meeting. However, the remaining team members recommended five hours per day of wraparound services seven days per week, to include the following therapeutic support: reunification with community, reinforcement of ability to successfully access specialized instruction in a therapeutic day program, personal support and education, parental support and education, therapeutic recreation/assessment of leisure function, transitional support to/from school and to/from additional Intensive Out patient services, increased awareness and execution of executive function (organization, decision making, planning and goal setting). One team member opined that the services could be provided through either CFSA or IDEA.⁹
6. On July 14, 2010, Petitioner filed a Complaint against DCPS, seeking 5 hours per day of services for Student, "to include transportation services, mentoring services, recreation services, socialization skills training, [and] education support to include GED training."¹⁰
7. At Student's July 15, 2010 MDT meeting, the Clinical Director of the residential placement indicated that CFSA was still attempting to secure residency for Student in the community. When the team stated that wraparound services still had not been initiated, the DCPS placement specialist stated that the terminology has now changed to transitional and educational services. The DCPS placement specialist agreed to refer Student to a specific service provider for transitional services.¹¹
8. On August 10, 2010, the DCPS placement specialist completed a Transitional Case Management Services Referral Form for Student. The DCPS Program Manager received the referral within a matter of days and assigned the transitional case manager for Student. The transitional case manager received the referral on August 16, 2010 and left a message for Guardian that same day. The transitional case manager also called and left a message for Guardian on August 23, 2010. On August 24th or 25th, Guardian called the transitional case manager and indicated that Student would be discharged to an assisted living facility. At the case manager's request, Petitioner's counsel subsequently called the transitional case manager and arranged a meeting at the residential facility for September 13, 2010.

The role of the transitional case manager is to assist in the transition from one location of services to another. The case manager works with the new school to make sure the IEP is implemented correctly and the transition is smooth. Upon receiving the referral for a case, the case manager begins acting in this role.¹²

⁸ Petitioner's Exhibit 2; DCPS-1.

⁹ Petitioner's Exhibit 3.

¹⁰ Complaint.

¹¹ Petitioner's Exhibit 4.

¹² DCPS-3; testimony of DCPS program manager; testimony of transitional case manager.

9. Student was discharged from his residential placement on September 13, 2010, at which time he moved into an assisted living facility. Student also began attending a full-time private special education school upon his discharge from the residential placement. Among other things, the school will provide Student with GED training. DCPS is paying for the private school. Student was discharged from the residential facility because he had met all the discharge criteria, he was more stable than he had been since arriving at the facility, and he was becoming frustrated to the point that his team was concerned that he might regress if not moved to a less restrictive environment so that would help him transition into adulthood and to function independently. However, Student's team at the residential facility was concerned that he would need a comprehensive support system offering the highest level of care to provide adequate support. One of the team's concerns is that Student gets frustrated when confronted with difficult situations or situations where he does not know the answer, and he reacts with physical or verbal aggression.¹³
10. On September 13, 2010, the very day Student was discharged from his residential placement, Guardian and Student participated in a meeting with several potential providers of wraparound services, including DCPS's program manager and transitional case manager, and DCPS's proposed service provider. Petitioner's counsel did not attend the meeting. DCPS's program manager and transitional case manager did not learn that Student was being discharged from the residential facility that day until the meeting. Ultimately, Guardian was not impressed with DCPS's proposed service provider because of her impression that the provider could only provide 5 to 7 hours per week of services and would not be able to provide services during the middle of the night. On the other hand, Guardian was of the impression that the other two independent service providers were able to provide more services, including services in the event of an emergency during the middle of the night. Student prefers one of the independent service providers as well, because he likes the activities that program offers and he knows another young man who participated in the program and is now doing very well in terms of going to a better school and having a job. Student wants to participate in activities all afternoon and evening so that he will have something to help keep him on track. Guardian and Student advised the DCPS program manager and transitional case manager that they had spoken with other agencies and would follow up with DCPS later. As of the date of the due process hearing, the follow-up still had not occurred.¹⁴
11. The clinical social worker who worked with Student at the residential placement is of the opinion that now that Student has been discharged from the residential facility, he needs individual, group and family therapy, in addition to a medication compliance program, substance abuse services to help keep Student free of drugs, therapy for grief and loss, and speech services by a speech/language therapist. Although the social worker recommended continued support for Student upon his discharge at Student's May 17,

¹³ Testimony of Independent Contractor; testimony of Student; testimony of transitional case manager.

¹⁴ Testimony of Guardian; testimony of Student; testimony of program manager, testimony of transitional case manager.

2010 MDT meeting, he did not specifically mention the individual, family, group and substance abuse therapies.¹⁵

12. Student's previous case manager at the residential placement is of the opinion that Student should do well so long as he continues with his medication regimen and receives therapy and supportive services. In the case manager's experience, when Student has a bad day and does not have someone with whom he can talk, he keeps to himself and broods over the situation. He becomes agitated, curses, and begins pacing; his boundaries become blurred and he tries to get in the face of someone to explain himself; he begins repeating things and talking to himself, withdraws and starts saying that he's okay and its good. In the past Student also resorted to physical aggression, but the case manager has not seen that behavior in the past year.¹⁶
13. The independent service provider preferred by Student and Guardian offers supportive services for at-risk children and families. The services offers three different phases of care: Phase I costs per month and includes a maximum of 2 direct contacts per week with weekly parent meetings and crisis intervention; Phase II costs monthly and offers 3 to 4 direct contacts per week; Phase III costs per month and includes services 6 to 7 days per week and 24 hours/7 days per week availability. The Owner/Director of the program initially recommends Phase III services for Student, which could last for years but will gradually taper off. Petitioner is seeking an Order requiring DCPS to pay for these services.¹⁷
14. Student's current assisted living facility offers some supportive services, and he also has a CFSA social worker. It is a supervised semi-independent program. The assisted living facility gives Student his medicine twice per day by actually knocking on his apartment door, pulling the tab off the medicine, handing it to Student and watching him place it in his mouth. The facility also takes Student and the other residents to participate in after-school activities, such as buffets, movies, exercise, and basketball and football games. The facility helps its residents obtain jobs and provides adult supervision, but it does not offer a program for academics so Student plans to ask for homework help at his new private school. On Fridays, the assisted living facility takes the residents to cash their checks and to do laundry or go to a movie.¹⁸
15. The DCPS proposed service provider is a Medicaid billable program. It offers a maximum of 5-7 hours per week of core services, which would be intensive in-home services provided by a community-based intervention ("CBI") worker, as well as 1-2 hours of community support by a community support worker, 1 hour of medication management, 1-3 hours of family therapy, 1-3 hours of drug counseling, and educational monitoring as often as necessary, even if daily, by the DCPS transitional case manager. As Student's current assisted living facility is also a Medicaid billable core service agency that provides therapy, medication management and crisis intervention, the DCPS

¹⁵ Testimony of clinical social worker.

¹⁶ Testimony of case manager.

¹⁷ Director/Owner of wraparound service provider.

¹⁸ Testimony of clinical social worker; testimony of case manager; testimony of Student.

proposed service provider would not duplicate the services offered by the assisted living facility but Student would still be entitled to receive CBI services. In order for Student to obtain services from the DCPS proposed agency, the agency would have to conduct an assessment and develop a treatment plan.¹⁹

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:

Under IDEIA, a FAPE consists of special education and related services that, *inter alia*, are provided at public expense, under public supervision and direction, and without charge, and are provided in conformity with an IEP. 34 C.F.R. § 300.17. In turn, "related services" are defined as transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes, *inter alia*, psychological services, recreation, including therapeutic recreation, counseling services, including rehabilitation counseling, and parent counseling and training, and medical services for diagnostic or evaluation purposes. 34 C.F.R. § 300.34(a). Recreation includes assessment of leisure function, therapeutic recreation services, recreation programs in school and community agencies, and leisure education. 34 C.F.R. § 300.34(c)(11). Rehabilitation counseling services includes services that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. 34 C.F.R. § 300.34(c)(12).

DCPS must make a FAPE available to all children within the District of Columbia between the ages of 3 and 21, inclusive. 34 C.F.R. § 300.101. However, in providing a FAPE to a child with a disability, DCPS is not required to furnish every special service necessary to maximize the child's potential. Instead, IDEIA merely requires DCPS to provide children with a disability with a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the disabled child. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

Finally, as the party seeking relief in this matter, Petitioner bears the burden of proof. *See* 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

In this case, Petitioner argues that Student needs more than the 34 hours of service provided in his IEP because he will not be successful in school and will not be able to access the general curriculum without an additional 25 hours of supportive services per week. Petitioner contends that to be successful outside of his residential placement, Student must receive supportive services from 3 pm to 8 pm daily, but his hours will be reduced once he has demonstrated success in his community.

¹⁹ Testimony of DCPS program manager; testimony of transitional case manager.

On the other hand, DCPS points out that Petitioner has failed to reveal exactly what services Student is already receiving. DCPS notes that Student is receiving medication management and it appears that he may also be receiving counseling and participating in other activities. DCPS acknowledges that it has an obligation to help Student transition from his residential placement to his new assisted living facility, but DCPS argues that it has met that obligation by providing a transitional case manager to assist Student. DCPS further contends that the fact that Medicaid is reimbursing Student's assisted living facility for the services Student is receiving there demonstrates that the services are medical services that DCPS is not obligated to provide under IDEIA.

The evidence in this case demonstrates that Student is ED and currently takes medication to help manage his behavior. Although Student has a troubled history, he recently attended a residential treatment facility and performed well enough there to meet all the discharge criteria. As a result, Student has been discharged from the residential facility and placed in an apartment in an assisted living facility. Student also attends a private, full-time special education school at DCPS's expense. The treatment team at Student's residential placement recommended at least 25 hours per week of wraparound or supportive services for Student to facilitate his successful reintegration into the community. The treatment team began recommending such services for Student as early as March 23, 2010; however, as of Student's discharge from the residential facility on September 13, 2010, DCPS still had not put any such services in place for Student. Hence, in the instant action, Petitioner is requesting 5 hours per day of wraparound/supportive services for Student, including transportation services, mentoring services, recreation services, socialization skills training, and education support to include GED training.

The evidence in this case further demonstrates that DCPS agreed at a July 15, 2010 MDT meeting to refer Student to a particular provider for transitional services. However, when Student and Guardian attended a meeting to learn what services DCPS's proposed service provider could offer, they were not particularly impressed and decided that they would prefer for Student to receive services from an independent service provider. The independent service provider is willing to provide Student with services 6 to 7 days per week and offers 24 hours/7 days per week availability. Therefore, Petitioner is seeking an Order that requires DCPS to pay the independent service provider per month, in addition to the fees it is already paying for Student to attend his new private, full-time special education school. In the interim, Student is receiving GED training at his private special education school, his IEP requires him to also receive 3 hours per week of psychological services at his new private school, and he is currently receiving medication management and recreation services at his assisted living facility. The evidence tends to suggest that Student may be receiving additional services at the assisted living facility, but it is unclear exactly what and how much services he is receiving.

Upon consideration of the evidence and applicable law, the hearing officer has concluded that while it is possible that Student requires additional related services beyond those listed in his IEP to benefit from the special education he will receive pursuant to the IEP, Petitioner has failed to prove the form and amount of such services that would be required to provide Student with the "basic floor of opportunity" required under IDEIA. Moreover, as the evidence in this case proves that Student is already receiving at least some of the services that Petitioner is requesting through his private special education school and his current assisted living facility, it would be

inappropriate to order DCPS to expend an additional _____ per month over and above the amount it is already paying to provide Student with a full-time private special education to provide Student with an array of additional related services, some of which he is already receiving. Therefore, while the hearing officer declines to award Petitioner the 25 hours per week of "wraparound" services it has requested for Student, the hearing officer will order the parties to participate in an MDT meeting for Student within 30 days of the issuance of this HOD to determine (1) whether Student requires additional related services beyond those listed in his IEP to benefit from the special education he will receive pursuant to the IEP; (2) whether Student is already receiving such services through his educational placement and/or assisted living placement; (3) whether DCPS's proposed supportive service provider can provide any additional related services that Student may require; and (4) if not, whether and/or to what extent DCPS should be required to provide additional related services for Student to provide him with the "basic floor of opportunity" required by IDEIA.

ORDER

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

1. Petitioner's request in its July 14, 2010 Complaint for 5 hours per day of wraparound/supportive services for Student, to include transportation services, mentoring services, recreation services, socialization skills training, and education support to include GED training, is **DENIED**.
2. Within 30 days of the issuance of this HOD, the parties shall participate in an MDT meeting to determine (1) whether Student requires additional related services beyond those listed in his IEP to benefit from the special education he will receive pursuant to the IEP; (2) whether Student is already receiving such services through his educational placement and/or assisted living placement; (3) whether DCPS's proposed supportive service provider can provide any additional related services that Student may require; and (4) if not, whether and/or to what extent DCPS should be required to provide additional related services for Student to provide him with the "basic floor of opportunity" required by IDEIA. In the event said MDT meeting is not held within the time frame specified herein, the conduct of each party and/or its representative(s) shall be examined in determining fault.

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: 9/26/2010

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