

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER, on behalf of
[STUDENT],¹

Date Issued: September 4, 2011

Petitioner,

Hearing Officer: Peter B. Vaden

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by MOTHER (the "Petitioner"), 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, the Petitioner alleges that DCPS has denied Student a FAPE (i) by not timely identifying and evaluating him for special education needs, (ii) because Student's May 25, 2010 IEP was not reasonably

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Personal identification information is provided in Appendix A.

calculated to provided educational benefits and (iii) because DCPS has failed to provide an appropriate placement for Student for the 2011-2012 school year.

Student, an AGE child, is a resident of the District of Columbia. The Petitioner's Due Process Complaint, filed on June 21, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on June 22, 2011. The parties met for a resolution session on July 5, 2011, but did not reach an agreement before the end of the 30-day resolution period. The 45-day time line for issuance of this HOD began on July 22, 2011. On July 18, 2011, a prehearing telephone conference was held with the Hearing Officer and 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 August 5 and August 8, 2011 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 witnesses FOSTER MOTHER, AUNT, GUARDIAN *AD LITEM*, DIRECTOR of PRIVATE SCHOOL, PSYCHIATRIST, CLINICAL CASE MANAGER, SCHOOL SOCIAL WORKER and PSYCHOTHERAPIST. DCPS called as its witness SPED COORDINATOR. Petitioner's Exhibits P-1 through P-44 were admitted into evidence without objection. DCPS Exhibits R-1 through R-7 were admitted into evidence without objection.

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

1. Whether DCPS failed in its Child Find responsibilities by not identifying and evaluating Student as a child with a suspected disability until spring 2010;
2. Whether DCPS' May 25, 2010 IEP was not reasonably calculated to provide educational benefits because it contained inadequate annual goals and provided insufficient special education services and insufficient behavioral support services and did not provide a dedicated aide for Student; and
3. Whether DCPS is denying Student a FAPE in the current 2011-2012 school year by not providing an appropriate ongoing full-time special education placement.

At the due process hearing, Petitioner requested that DCPS be ordered to fund Student's placement at Private School, to provide a full-time dedicated aide during the regular school year, and to increase behavioral support services to 4 hours per week. At the beginning of the hearing, Counsel for Petitioner withdrew Petitioner's request for a compensatory education award.

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 child. Since May 31, 2011, Student has resided with Aunt in the District of Columbia. Aunt is approved as Student's Kinship Foster Parent by the District of Columbia Child and Family Services Agency. Testimony of Aunt.
2. Student is a child with a disability, eligible for special education services under the disability category, Other Health Impairment – Attention Deficit Hyperactivity Disorder ("OHI – ADHD"). He was first found eligible for special education by the Multidisciplinary Team ("MDT") at DC PUBLIC CHARTER SCHOOL ("DCPCS") in May 2010. Exhibit P-16.
3. Student began attending school when he was three years old. He matriculated to the Pre-K program at DCPCS in August 2009. Exhibit P-10. For the 2010-2011 school year, Student was enrolled in GRADE at DCPCS.

4. In December 2009, Psychiatrist diagnosed Student as having ADHD-Combined Type; Disruptive. Exhibit P-11. Mother had requested a psychiatric assessment because of her concerns regarding Student's hyperactive and oppositional behavior. Exhibit P-14.

5. DCPS SCHOOL PSYCHOLOGIST reported in an April 2010 Psychological Evaluation Report that Student's full-scale IQ falls within the average range. Psychologist found that Student experiences difficulty following instructions, staying on task, responding to frustration appropriately and remaining safe at school. Student often has tantrums that include harmful physical aggression. Exhibit P-14.

6. Student's first DCPS IEP, dated May 25, 2010, provided Specialized Instruction for 3 hours per week outside of general education and 30 minutes per week of Behavioral Support Services. Exhibit P-17.

7. In Student's classroom at DCPCS, there were 24 students with two teachers. A special education teacher taught Student literacy and math in a pull-out classroom. Testimony of School Social Worker.

8. During the 2010-2011 school year, School Social Worker provided counseling to Student, administered his medications, and provided crises intervention in the classroom. On average, School Social Worker spent four hours per day with Student. Student engaged in inappropriate touching, inappropriate conduct and vocalizations, and aggression especially in the general education classroom. When a crisis rose to the level of Student's becoming a danger, School Social Worker would pick up Student from his classroom and take him out for a walk. When Student reported that he was nervous or upset in his classroom, School Social Worker would keep him in her office. Testimony of School Social Worker.

9. Student did not have behavior problems when in a 1:1 setting with a teacher or with School Social Worker. Testimony of School Social Worker.

10. Student's IEP team at DCPCS met on October 25, 2010 to update and revise his IEP. At the October 25, 2010 meeting, the IEP team decided that Student would receive 3 hours per week of Specialized Instruction outside general education and 90 minutes per week of Behavioral Support Services in the general education setting. In addition, the IEP team determined that Student required the full-time support of a dedicated aide. Exhibit P-21.

11. On October 25, 2010, DCPCS submitted to DCPS a Justification and Plan for Dedicated Aide. The form indicated that the concern warranting assignment of a dedicated aide was "safety of self and/or others." The request concluded that [I]t does not appear that [Student] is able to adequately access the curriculum in the general [*sic*] due to his behavior and emotional inconsistencies." Exhibit P-21. The request form was prepared by Student's classroom teacher and School Social Worker. Testimony of School Social Worker.

12. OBSERVER from the DCPS Office of Special Education completed an observation of Student at DCPCS on October 28, 2010 to evaluate his need for a dedicated aide. In her November 8, 2010 report, Observer concluded, "In order for [Student] to continue to access the general education curriculum, a one-to-one aide should be put in place. However, it appears that he would benefit from a smaller classroom environment with increased service delivery that would allow him to maximize his strengths and abilities without being dependent on a one-to-one assistant." Exhibit P-22.

13. In spring 2011, Student's behaviors improved after his medications were changed but his inappropriate behaviors did not go away. Testimony of Guardian *ad litem*, School Social Worker.

14. For the rest of the 2010-2011 school year, Student's placement in the general education classroom at DCPCS was not changed and DCPS did not provide a dedicated aide.

Testimony of School Social Worker.

15. Student's MDT team met at DCPCS on June 9, 2011 for a placement meeting. A DCPS representative participated by telephone. The DCPS representative stated that DCPS had two different placements available for children that had Student's needs, PROFFERED SCHOOL A and PROFFERED SCHOOL B. Mother advocated for placement at Private School. The placement issue was not resolved at this meeting. Exhibit P-24.

16. Student's MDT team convened again for an IEP meeting on June 16, 2011. The team agreed that Student needed 26.5 hours per week of Specialized Instruction outside of the general education setting and 90 minutes per week of Behavioral Support Services outside general education. The IEP team also agreed that Extended School Year ("ESY") services and ESY transportation were required for Student. Mother requested that Student be provided a dedicated aide and that he be placed at Private School. She withheld her consent to the IEP because these requests were not met. Exhibits P-25, P-26.

17. Student has been accepted into the program at Private School, pending funding. Exhibit P-28. Private School, which has a capacity of 63 children, serves Kindergarten through Sixth Grade students with emotional disturbances ("ED"). Most children at Private School are classified ED and Learning Disabled ("LD"). Private School also has OHI students. Most children at Private School have severe emotional problems and anger problems. Some students at Private School were placed by DCPS or the D.C. Office of the State Superintendent of Education ("OSSE"). Testimony of Director.

18. All students at Private School are assigned to a special education teacher. There

are no more than 5 children in a classroom. All teachers have masters degrees and are certified and licensed as special education teachers. Testimony of Director.

19. At Private School, every child receives at least one hour per week of individual psychotherapy and one hour per week of group therapy. Private School has on staff eight masters-level social workers and a psychologist. Three part-time psychiatrists are available.

Testimony of Director.

20. Private School works very closely with its students' families. A family must agree to be in weekly physical contact and daily telephone contact with a Private School social worker. Testimony of Director.

21. In May 2011, Private School conducted an intake for Student. A social worker met with Mother. A psychologist met with Student. Private School accepted Student because the staff felt he was a child whom Private School could help. Testimony of Director.

22. At the resolution meeting in this case, on July 5, 2011, DCPS issued a Prior Written Notice proposing to place Student in a self-contained classroom at DC PUBLIC ELEMENTARY SCHOOL ("PES"). Parent, who wanted DCPS to fund and place Student at Private School, was not in agreement with this proposal. Exhibit R-2.

23. PES has two self-contained classrooms for ED students. A full-time social worker is available to assist in the classroom and to provide counseling. The Primary to Grade 3 classroom, where Student would be placed, currently serves 7 students and has a maximum capacity of 10. A special education teacher and an aide are assigned to the classroom. These are specialized instructors who are used to working with ED children and with hyperactivity issues. There are OHI classified students in the class. Students in the self-contained classroom would attend art, physical education and science ("Specials") in classes with their non-disabled peers.

The special education teacher and aide from the self-contained classroom accompany their pupils to the Specials classes. Testimony of SPED COORDINATOR.

24. Following the July 5, 2011 resolution meeting, Petitioner settled her claim in this case for compensatory education. Exhibit R-2; Representation of Petitioner's Attorney.

CONCLUSIONS OF LAW

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

DISCUSSION

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).

1. DID DCPS FAIL IN ITS CHILD FIND RESPONSIBILITIES BY NOT IDENTIFYING AND EVALUATING STUDENT AS A CHILD WITH A SUSPECTED DISABILITY UNTIL SPRING 2010?

Petitioner alleges that DCPS denied Student a FAPE and violated its Child Find obligation by not timely identifying and evaluating Student for special education eligibility. Child Find is DCPS' affirmative obligation under the IDEA: 'As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process. Failure to locate and evaluate a potentially disabled child constitutes a denial of FAPE.'" *Long v. District of Columbia*, Civil Action No. 09-2130 (D.D.C. 2011) quoting *N.G.*

v. District of Columbia, 556 F. Supp. 2d 11, 16 (D.D.C. 2008). In this case, DCPCS invited Petitioner to a September 25, 2009 meeting to develop a student evaluation plan (“SEP”) for Student. On September 29, 2009, the SEP was developed and Petitioner gave her consent for the initial evaluations, including a comprehensive psychological evaluation for ADHD. The psychological evaluation was not conducted until March 2010. In her April 19, 2010 Psychological Evaluation Report, School Psychologist reported that Student’s behaviors were indicative and consistent with the behaviors and symptoms associated with ADHD. The MDT team at DCPCS finally met on May 24, 2010 and determined that Student qualified for special education and related services as student with OHI-ADHD.

At the hearing, DCPS provided no explanation for the 8 month gap between Student’s September 2009 referral for evaluation and the MDT team’s eligibility decision.² However, Student was ultimately found eligible for special education and related services and Petitioner has withdrawn her request for a compensatory education award. Hence, even if DCPS failed in its child find obligation, there is no relief that the Hearing Officer can grant. Therefore, this issue is now moot and Petitioner’s child find claim against DCPS must be dismissed. *See, e.g., Theodore v. Government of District of Columbia*, 655 F.Supp.2d 136, 144 (D.D.C. 2009) (If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot).

2. WAS DCPS’ MAY 25, 2010 IEP NOT REASONABLY CALCULATED TO PROVIDE FAPE TO STUDENT?

In her complaint for due process, Petitioner alleged that Student’s May 25, 2010 IEP was not reasonably calculated to provide FAPE because of insufficient special education and related

² See DC St. § 38-2561.02(a) (DCPS shall assess or evaluate a student who may have a disability and who may require special education within 120 days from the date that the student was referred for an evaluation or assessment. *Id.*)

services, failure to provide a dedicated aide and inadequate annual goals. However, the May 25, 2010 IEP was revised on October 25, 2010 and, again, on June 16, 2011. Were I to find that the May 25, 2010 IEP was not reasonably calculated to provide FAPE, the only relief which I could order at this time would be compensatory education. As noted above, Petitioner has withdrawn her request for a compensatory education award. As with the child find claim, there is no relief that the Hearing Officer could grant, if it were proven that the May 25, 2010 IEP denied Student a FAPE. Therefore, this issue is also moot and the claim must be dismissed.

3. HAS DCPS DENIED STUDENT A FAPE IN THE CURRENT SCHOOL YEAR BY NOT PROVIDING AN APPROPRIATE ONGOING FULL-TIME SPECIAL EDUCATION PLACEMENT OR BY NOT PROVIDING A DEDICATED AIDE?

Petitioner contends that under the latest, June 16, 2011, IEP, Student is not being provided a FAPE because (i) the IEP does not provide for a full-time dedicated aide and (ii) DCPS has not offered a school placement capable of fulfilling Student's IEP needs.³ "To be sufficient to confer a [FAPE] upon a given child, an IEP must be 'reasonably calculated to enable the child to receive educational benefits.'" *Suggs v. District of Columbia*, 679 F. Supp.2d 43, 48 (D.D.C., 2010), quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Under the IDEA, DCPS is obligated to devise IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991).

³ In closing argument, Petitioner's Counsel argued that the June 16, 2011 IEP was also deficient because psycho-educational testing of Student has not been done and because Student allegedly requires 4 hours per week of behavioral support services. (The IEP provides 90 minutes per week of behavioral support services.) These issues were not raised in the prehearing conference in this case and will not be considered in this proceeding. *See Amended Prehearing Order*, July 14, 2011. *See, also*, June 16, 2011 IEP (Exhibit P-26). (Basis for Petitioner's written disagreement with IEP stated only that IEP did not place Student at Private School and did not provide dedicated aide.)

a. Requirement for a Dedicated Aide

With regard to Petitioner's request for a full-time dedicated aide, I find that the evidence does not establish that Student would require this service if he is placed in a full-time self-contained classroom in accordance with his June 16, 2011 IEP. The evidence establishes that at DCPCS, Student required a full-time dedicated aide. At DCPCS, student was placed in a general education classroom, taught by a regular education teacher, with some 23 non-disabled peers. In its October 25, 2010 Dedicated Aide Justification, the staff at DCPCS wrote that Student was not able to adequately access the curriculum in the general education setting due to his behavior and emotional inconsistencies. In a November 5, 2010 Observation Report DCPS Observer reported that a one-on-one aide should be put in place in order for Student to access the general education curriculum. However, Observer reported further that Student would benefit from a smaller classroom environment with increased service delivery that would allow Student to maximize his strengths and abilities without being dependent on a one-to-one assistant. Student's June 16, 2011 IEP provides for full-time delivery of Specialized Instruction services outside of general education. Clearly, if Student were to be placed back in a general education classroom, he would require a dedicated 1:1 aide in order to access the general education curriculum. However, the June 16, 2011 IEP provides that Student will receive full-time special education services outside of the general education setting. DCPS' proposed placement for Student at PES would be in a self-contained classroom with a maximum of 10 students, taught by a special education teacher and an aide. I find the evidence does not establish that, for the June 16, 2011 IEP to be sufficient to confer a FAPE, Student also requires a dedicated aide.

b. Placement at PES.

DCPS' June 16, 2011 IEP provides that Student is to receive full-time Specialized

Instruction services outside of general education and 90 minutes per week of behavioral support services. DCPS has offered to place Student at PES in a full-time self-contained classroom for ED and OHI students, with a maximum of 10 students, taught by a teacher and an aide. The teacher and aide are specialized instructors accustomed to working with children who have ED and ADHD characteristics. Although Student would be taught in a self contained classroom, most students at PES are non-disabled and Student would be have the opportunity to interact at PES with nondisabled peers. *See, e.g., Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children a requirement of the IDEA.)

Parent contends that Private School would be a good placement for Student where he would benefit from the very low pupil-to-teacher ratio, small class size, and the large staff of teachers, social workers, psychologists and other professionals. However, DCPS cannot be ordered to pay the costs of sending a child to a private school – even though a private school might be more appropriate or better able to serve the child – if there is an “appropriate” public school program available, *i.e.*, one “reasonably calculated to enable the child to receive educational benefits,” *See, e.g., Jenkins, supra*, 935 F.2d at 305 (D.C.Cir.1991) (citing *Rowley, supra*). In order TO establish entitlement to DCPS funding for Student to attend Private School, the Petitioner’s burden of proof was to establish that DCPS’ proposed placement at PES is not reasonably calculated for Student to receive educational benefits. Here Petitioner did not offer competent evidence – such as the testimony of an expert in special education, knowledgeable about Student’s needs, who had observed the program at PES – that the proposed placement at PES would be inappropriate for Student. For its part, DCPS has established that its proposed

placement at PES is a match to Student's specified IEP needs. I find therefore that Petitioner has not met her burden of proof and DCPS prevails on this issue.

SUMMARY

In summary, I find that due to Petitioner's decision not to seek a compensatory education award, her claims, that DCPS failed in its Child Find obligations and that Student's May 25, 2010 IEP was inadequate, are moot and must be dismissed. I find that Petitioner has not met her burden of proof to establish that DCPS' proposed placement of Student at PES is inappropriate or that Student will continued to require dedicated aide services.

ORDER

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

1. Petitioner's claim that DCPS violated its child find obligation, to timely locate and evaluate Student for eligibility for special education and related services, is dismissed as moot;
2. Petitioner's claim that DCPS' May 25, 2010 IEP denied Student a FAPE is dismissed as moot;
3. All other relief requested by Petitioner herein is denied.

Date: September 4, 2011

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).