

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

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

RECEIVED
SEP 24 2012

STUDENT,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

BY: _____
Date Issued: September 23, 2012

Hearing Officer: Peter B. Vaden

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the “Petitioner” or “STUDENT”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her Due Process Complaint, Petitioner alleges that the April 25, 2012 Individualized Education Program (“IEP”) developed by DCPS denies her a free appropriate public education (“FAPE”), because the IEP

¹ Personal identification information is provided in Appendix A.

does not provide for small classroom size and instruction in a full-time, therapeutic setting, outside of general education.

Student, an AGE young woman, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on July 10, 2012, named DCPS as respondent.² The undersigned Hearing Officer was appointed on July 12, 2012. The parties met for a resolution session on August 2, 2012 and did not reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on August 10, 2012. On July 27, 2012, the Hearing Officer convened a status conference with counsel, following which he ordered the Petitioner to file an appropriate motion to substitute herself, for her parents, as Petitioner in this case. On August 7, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on September 11, 2012 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public³, 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, CLINICAL PSYCHOLOGIST, ADMISSIONS DIRECTOR and EDUCATIONAL ADVOCATE. Petitioner's Exhibits P-1 through P-7 and P-14 through P-23 were admitted into evidence without objection. Exhibit P-8

² The original due process complaint notice was filed by Petitioner's parents. Under District of Columbia law, all rights accorded to parents under Part B of the IDEA transfer to the child upon her 18th birthday. *See* DC Regs. tit. 5-E, § 3013.1 Because Petitioner had reached that age before the complaint was filed, the Hearing Officer granted the parents' motion to substitute Student as Petitioner. *See* Order Granting Motion to Substitute Student as Petitioner, August 9, 2012.

³ At the request of Petitioner's Counsel, and with the consent of DCPS Counsel, COURT APPOINTED SPECIAL ADVOCATE, was permitted to observe the hearing.

was admitted over DCPS' objection. DCPS' objection to Exhibit P-9 was sustained. Exhibits P-10, P-11, P-12 and P-13 were admitted over DCPS' objection, as documents reviewed by Clinical Psychologist and not for the truth of the matters contained therein. DCPS offered no witnesses or exhibits.⁴ Counsel for both parties made opening and closing statements. Neither party requested leave to file a post-hearing brief.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

- Whether DCPS' April 25, 2012 IEP, developed for Student, is inappropriate because it fails to provide full-time, outside of general education, specialized instruction; and
- Whether DCPS has denied Student a FAPE by failing to identify a suitable placement/location of services that can implement an appropriate IEP for her.⁵

For relief, Petitioner seeks an order for DCPS to fund her enrollment at NONPUBLIC PLACEMENT for the 2012-2013 school year.

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:

⁴ Petitioner filed a prehearing motion to strike from the evidentiary record any disclosures or other evidence that would be offered by DCPS, on the grounds that DCPS did not provide a five-day disclosure of potential witnesses or other evidence which it intended to use at the hearing. *See Prehearing Conference Order*, ¶ 9, August 7, 2012. Because counsel for DCPS represented at the hearing that DCPS would not offer any witnesses or exhibits, the Hearing Officer denied, as moot, Petitioner's motion to strike.

⁵ Based upon Petitioner's complaint for due process, the Hearing Officer identified a third issue in the Prehearing Order: Whether DCPS has denied Student a FAPE by failing to develop an appropriate transition services plan to assist the Student's movement toward post-secondary goals and needs. Petitioner did not pursue this claim at the due process hearing.

1. Student is an Age resident of the District of Columbia. She resides with her parents in the District. Testimony of Petitioner.

2. Student was last found eligible as a student with a disability, who continued to need special education and related services, on April 25, 2012 at CITY HIGH SCHOOL under the primary disability, Emotional Disturbance (“ED”). Exhibit P-6.

3. Student began experiencing behavioral problems in school beginning in the 7th grade, leading her to be suspended on several occasions. She was defiant, and disrespectful with teachers; she fought with peers; used foul language; and was often truant from school. Exhibit P-14.

4. During her middle school and high school years, Student transferred among at least 8 schools and institutions due to her behavior issues. During her high school years, she has been enrolled at ALTERNATIVE ACADEMY, THERAPEUTIC DAY SCHOOL, BEHAVIORAL HEALTH SCHOOL, School, and RESIDENTIAL CENTER. Testimony of Student, Exhibits P-8, P-14, P-15. Since January 2012, Student has been re-enrolled at City High School. Testimony of Student.

5. Student has a troubled legal history, including arrests for drug abuse, assault, shoplifting, and probation violation. In the fall of 2010, she was confined in DETENTION CENTER 1 and DETENTION CENTER 2 in suburban Maryland. Exhibit P-14.

6. Student was hospitalized at BEHAVIORAL HEALTH CENTER on two occasions in Spring 2010 for a total confinement of over 6 weeks. Her discharge diagnoses included Mood Disorder - Not Otherwise Specified, Cannabis Abuse, Alcohol Abuse and Polysubstance Abuse. Exhibit P-13.

7. Despite her problematic school history, Student has demonstrated academic aptitude. For her 2010-2011 school year at Residential Center, she earned mostly A's and B's.

Exhibit P-19.

8. After returning to School in January 2012, Student had a record of excessive absences. As of March 30, 2012, she had 16 unexcused absences in English IV, 12 unexcused absences in Spanish II, 13 unexcused absences in Chemistry 1 and 12 unexcused absences in Geometry. Student was failing two courses due to her excessive absences. Exhibit

P-18.

9. In the current 2012-2013 school year, Student is doing "OK" academically and could earn four credits in the fall semester. Student needs six credits to graduate from high school with a regular DCPS diploma. Testimony of Student.

10. On November 1, 2010, Clinical Psychologist evaluated Student at Children's Detention Center 2. Clinical Psychologist administered a battery of cognitive and achievement tests and behavior assessments. Clinical Psychologist reported that Student's general intellectual ability, measured using the Woodcock Johnson Tests of Cognitive Abilities, Normative Update (WJ-III-Cognitive), was in the Low Average range when compared to others in her age range. On the Woodcock Johnson Tests of Achievement, Normative Update, Form A (WJ-III-Achievement), Student attained an Average standard score in Broad Reading, a Low Average score in Broad Math and a Low Average score in Broad Written Language. Exhibit P-14.

11. In the social-emotional functioning domain, Clinical Psychologist reported that Student met the criteria for Mood Disorder - Not Otherwise Specified. She reported that Student's moods are fraught with unpredictable and pessimistic moods, an edgy irritability, a tendency to engage in obstructive behavior, and the feelings of being misunderstood and

unappreciated. Exhibit P-14.

12. In her November 2010 report, Clinical Psychologist diagnosed Student with Mood Disorder - Not Otherwise Specified, Cannabis Abuse and Alcohol Abuse. Clinical Psychologist reported that Student's academic scores did not indicate difficulties due to a Learning Disability and that Student did not meet the criteria for Attention-Deficit Hyperactivity Disorder (ADHD). Clinical Psychologist predicted that Student would continue to evidence behavioral difficulties without the appropriate school setting and without pharmacological intervention. Clinical Psychologist recommended that Student would benefit from a secure, structured residential program that would offer educational opportunities, individual counseling and drug counseling. She recommended that in this setting, Student should receive specialized instruction in a classroom with a low teacher to student ratio [*sic*] and Student should also receive cognitive-behavioral therapy. Clinical Psychologist recommended that Student's special education programming should continue to include specialized instruction in Math, Reading and Written Language because Student's Emotional Disturbance affects all aspects of her academic functioning in the classroom setting. Exhibit P-14. Clinical Psychologist has had no interaction with Student since she issued her November 2010 report. Testimony of Clinical Psychologist.

13. Student's April 25, 2012 Individualized Education Program ("IEP") for City High School provides that she would receive 6.5 hours per week of Specialized Instruction and 30 minutes per week of Behavioral Support Services, all in an Outside General Education setting. Exhibit P-6.

14. At School, Student is very non-compliant, is easily angered and frustrated, is constantly truant and exhibits passive resistance to learning. Less than one month

into the current school year, she has already been suspended for allegedly bringing marijuana to school. Testimony of Educational Advocate.

15. NONPUBLIC PLACEMENT is a private day school in the District of Columbia that provides instruction exclusively to children with ED and secondary disabilities. There are some 45 students in the upper school program. All teachers are certified in special education and the course content area. There are 8-10 students per classroom, with less students in some classes. Nonpublic Placement offers a regular DCPS high school diploma as well as courses in trades, such as barbering, carpentry, cosmetology and computer graphics. Testimony of Admissions Director.

16. All Nonpublic Placement students have access to a staff social worker on a 1:1 basis for 30 to 60 minutes weekly. Additionally, the social worker provides separate weekly group sessions for male students and for female students. Nonpublic Placement does not have a psychologist on staff. Testimony of Admissions Director.

17. The tuition cost at Nonpublic Placement is \$39,733.20 per year. Testimony of Admissions Director.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel.*

Schaffer v. Weast, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

ANALYSIS

- IS DCPS’ APRIL 25, 2012 IEP, DEVELOPED FOR STUDENT, INAPPROPRIATE BECAUSE IT FAILS TO PROVIDE FULL-TIME, OUTSIDE OF GENERAL EDUCATION, SPECIALIZED INSTRUCTION;
- HAS DCPS DENIED STUDENT A FAPE BY FAILING TO IDENTIFY AN APPROPRIATE PLACEMENT/LOCATION OF SERVICES THAT CAN IMPLEMENT AN APPROPRIATE IEP FOR HER

I address these two issues together because the alleged denial of FAPE is the same in both issues – that DCPS has failed to provide Student an appropriate IEP, with a suitable placement, for the 2012-2013 school year. The U.S. Supreme Court has established a two-part test for courts reviewing an IEP under the IDEA. First, courts consider whether the State has met the IDEA’s procedural requirements. Second, courts review the IEP – including the child’s placement – to determine if it is “reasonably calculated to enable the child to receive educational benefits.” *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 39 (D.D.C. 2006), citing *Bd. of Educ. Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206-207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In this case, Petitioner has not raised a procedural objection to her IEP, focusing her claims only on the second prong – whether DCPS’ April 25, 2012 IEP was reasonably calculated to enable her to receive educational benefits.

Prior to enrolling at _____ School in January 2012, Student was placed for 1½ years at a residential treatment center for adolescents. After Student transferred to _____ School from the full-time residential program, DCPS offered her an IEP that provided 6.5 hours of Specialized Instruction and 30 minutes per week of Behavioral Support Services. Petitioner contends that the services provided in the April 25, 2012 IEP are not adequate and that she

requires a full-time special education program, in a therapeutic setting, outside of the general education classroom.

Student's expert, Clinical Psychologist, administered a comprehensive psychological evaluation to Student in November 2010, when Student was confined to Children's Detention Center 2. In her November 3, 2010 report, Clinical Psychologist diagnosed Student with Mood Disorder Not Otherwise Specified, Cannabis Abuse and Alcohol Abuse. Clinical Psychologist recommended that because of the magnitude of Student's then-current behaviors, she needed placement in a residential setting for young people with an Emotional Disturbance. She recommended that in this setting, Student should receive specialized instruction in a classroom with a low student to teacher ratio and Student should also receive cognitive-behavioral therapy. Clinical Psychologist recommended that Student's special education programming should continue to include specialized instruction in Math, Reading and Written Language because Student's Emotional Disturbance affects all aspects of her academic functioning in the classroom setting. In her testimony at the due process hearing, Clinical Psychologist opined that the services offered to Student in the April 25, 2012 IEP were insufficient.

Counsel for DCPS argues that Clinical Psychologist is not credible because, *inter alia*, she has not spoken to the staff at City High School about Student. I find that Clinical Psychologist had a sufficient basis for her opinion. *See, e.g., Ohio Valley Const. Co., Inc. v. Dew*, 354 A.2d 518, 523 (D.C. 1976) (An expert may offer an opinion within the area of his expertise so long as it has some reasonable basis.) When Clinical Psychologist evaluated Student in November 2010, she reviewed prior evaluations and records, conducted an extensive battery of tests, interviewed Student and the superintendent of the Detention Center where Student was confined, and administered a questionnaire, on Student's progress in the classroom,

to one of Student's teacher/counselors. Her findings and recommendations, set forth in the November 3, 2010 report, have not been challenged. Further, there was no "battle of experts" here which would, arguably, support deference to DCPS' views. *See, e.g., Kerkam v. McKenzie*, 862 F.2d 884, 887 (D.C.Cir.1988) (Deference to local school district's expertise.) DCPS offered no evidence to refute Clinical Psychologist's testimony or in support of the appropriateness of the April 25, 2012 IEP. I find, therefore, that Petitioner has met her burden of proof to establish that the April 25, 2012 IEP, with only 6.5 hours of Specialized Instruction services and 1 hour of behavioral support services, was not reasonably calculated to provide her educational benefits and Petitioner has been denied a FAPE. Petitioner prevails on this issue.

At the due process hearing, Clinical Psychologist also opined that Student now needs to be in a small, self-contained therapeutic environment and should be placed in a stand-alone special education day school. However, Clinical Psychologist has had no interaction with Student since conducting her November 2010 evaluation and no reasonable basis was shown for this updated opinion. For that reason, I do not accord weight to Clinical Psychologist's testimony that Student now needs to be placed in a stand-alone special education day school.

Remedy

For relief in this case, Student requests that DCPS be ordered to fund her enrollment at Nonpublic Placement for the remainder of the 2012-2013 school year. "Where a public school system has defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' if the education provided by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley, supra*, 458 U.S. at 176, 102 S.Ct. at 3034. *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). I have found that DCPS "defaulted on its

obligations” to provide Student appropriate services in the April 25, 2012 IEP. However, the evidence does not establish that the education offered by Private Placement is reasonably calculated to enable Student to receive educational benefits.

Placement awards, must be tailored to meet the child’s specific needs. *Branham v. Gov’t of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005). To inform this individualized assessment, the *Branham* decision 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 private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. In this case, the evidence does not establish the requisite link between Student’s specialized educational needs and the services offered by Private Placement. In her November 3, 2010 Comprehensive Psychological Evaluation Report, Clinical Psychologist reported that the magnitude of Student’s then current behavior – violating probation, using drugs daily and alcohol on a bi-weekly basis, and uncontrollable behaviors at home and at school (running away and truancy) – suggested the need for placement at a residential setting for young people with an Emotional Disturbance. In her testimony, Clinical Psychologist added that Student needs to be in direct 1:1 counseling for at least 2 hours per week. Nonpublic Placement does not offer a residential setting. It does not have a psychologist on staff and students there normally receive no more than one hour per week of 1:1 counseling with a social worker.

Because no updated evaluations were offered by either party at the due process hearing, it would be speculation to infer that Student’s mental health and substance abuse concerns, as identified by Clinical Psychologist in her 2010 report, are now less severe. However,

Educational Advocate, who has worked with Student for close to five years and should be knowledgeable about her present levels of performance, testified that Student is very non-compliant, is easily angered and frustrated, is constantly truant and exhibits passive resistance to learning. Substance abuse is apparently also still a concern. Less than one month into the current school year, Student was suspended for allegedly bringing marijuana to school. I conclude, therefore, that in the absence of updated psychological and educational evaluations which establish Student's current specific educational and related services needs, placement of Student at Private Placement would not be proper under the IDEA.

Because I have found that Student was denied a FAPE by DCPS' April 25, 2012 IEP, I will order DCPS to convene Student's IEP team to develop a revised IEP for Student that provides, on an interim basis, instruction in a classroom with a low student to teacher ratio, to include specialized instruction in Math, Reading and Written Language, as recommended by Clinical Psychologist in her 2010 report, and two hours per week of 1:1 counseling. I also will order DCPS to conduct a special education reevaluation of Student. Student has not been formally reevaluated, except for a vocational assessment, since Clinical Psychologist completed the comprehensive psychological evaluation in November 2010. Since that time, Student was served for 1½ years at Residential Treatment Facility and, since January 2012, at DC High School. I find that these changes in Student's circumstances warrant a full reevaluation of her educational and related services needs, including an updated comprehensive psychological evaluation (to include academic functioning). *See* 34 CFR § 300.303(a).⁶ Upon receipt of the reevaluation data, Student's MDT/IEP team shall be reconvened to consider the evaluations and

⁶ A public agency must ensure that a reevaluation of each child with a disability is conducted . . . if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation. 34 CFR § 300.303(a)

further revise Student's IEP as appropriate.

ORDER

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

1. Within 10 school days of entry of this order DCPS shall reconvene Student's IEP team to develop a revised IEP that provides, on an interim basis, all instruction in a classroom with a low student to teacher ratio, to include specialized instruction in any Math, Reading and Written Language classes, and a minimum of 2 hours weekly of 1:1 counseling services. DCPS shall ensure Student's placement at a location of services that is capable of implementing the revised IEP.
2. Subject to obtaining the informed consent of Student pursuant to 34 CFR § 300.300(c), DCPS shall promptly undertake a reevaluation of Student's educational and related services needs and shall conduct a comprehensive psychological reevaluation. The psychological reevaluation may be conducted by DCPS staff or by an independent evaluator, at DCPS' discretion. Upon receipt of the reevaluation reports, DCPS shall, within 5 school days, convene Student's MDT/IEP team to revise and update her IEP and placement as appropriate.
3. All other relief requested by the parties herein is denied.

Date: September 23, 2012

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(I).