

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

STUDENT, a minor, by and through
her Parent¹

Petitioner,

v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

OSSE
STUDENT HEARING OFFICE
2011 DEC 12 AM 9:22

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On September 27, 2011 Parent, on behalf of her child ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"), HO 1,² requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education ("FAPE") to Student by District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). Respondent filed a Response to Parent's Administrative Due Process Complaint Notice (HO 6) on October 13, 2011. A resolution meeting was held on October 11, 2011. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form on the same date so indicating. HO 5. Petitioner's counsel forwarded the Form to me by email of

¹ Personal identifying information is provided in Appendix A, attached hereto.

² Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; and Respondent's Exhibits will be referred to as "R" followed by the exhibit number.

October 12, 2011 indicating there was no possibility of agreement, and Petitioner believed the 45 day timeline, therefore, should begin on October 11, 2011. A similar statement was noted on the Form itself. I responded on the same date that any adjustment to the 30 day resolution period required written agreement by the parties. 34 C.F.R. §300.510(c). I added there was no such written agreement and should the parties enter such an agreement in the future, I would adjust the timeline accordingly. The parties never provided me written agreement to adjust the timeline. The 45 day timeline began to run on October 28, 2011, and my Hearing Officer Determination is due on December 11, 2011.

I held a telephone prehearing conference on October 27, 2011. HO 7. By agreement of the parties, the hearing was scheduled for November 15 and 18, 2011. The hearing was held as scheduled in Rooms 2004 and 2006, respectively, of the Student Hearing Office.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUE(S)

The issues are:

Whether DCPS denied Student a free, appropriate public education ("FAPE") by:

- 1) Failing to evaluate Student in all areas of disability, specifically social-emotional. This testing was provided by the court system and has been provided to DCPS;
- 2) Failing to provide an IEP reasonably calculated to provide educational benefit. It was not approved by Petitioner. The IEP does not address Student's emotional needs. The present levels of performance are based only on year old data. It includes only reading goals and no goals in math or written language.

The IEP recognizes Student's need for a low student-teacher ratio but provides for only 7 hours of special instruction outside the general education environment; and

- 3) Failing to provide Student an appropriate placement in a full time, special education, therapeutic environment with small classes, counseling and behavior support and provision of remedial instruction.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:³

- P 4 First Records Request from Ms. Sarah Tomkins to Ms. Faye and Ms. Robinson, School, July 15, 2011
- P 5 Letter providing Independent Psycho-Educational Evaluation and requesting the evaluation be reviewed from Ms. Sarah Tomkins to Ms. Shamele Straughter and Ms. Tonya White, School, August 24, 2011
- P 6 Second Records Request from Ms. Sarah Tomkins to Ms. Faye and Ms. Robinson, School, September 12, 2011
- P 7 E-mail Correspondence between Ms. Sarah Tomkins and Ms. Tonya White, October 4, 2011
- P 8 Psychological Evaluation completed by Dr. Michael E. Barnes, Ph.D. Clinical Psychologist, July 18, 2011
- P 9 Initial Psychiatric Evaluation, Treatment Notes, and Discharge Summaries from Children's National Medical Center, September 21-November 8, 2011⁴
- P 10 Student Final Report Card, June 18, 2010
- P 11 IEP, October 25, 2010⁵
- P 12 Student Progress Report, School, December 3, 2010 - June 20, 2011
- P 13 Transcript, School, September 14, 2011
- P 14 Resume of Dr. Michael E. Barnes, Ph.D.
- P 16 Resume of Ms. Lamar Williams⁶
- P 17 Acceptance Letter to the

³ P 1 through P 3 were not submitted as they duplicated Hearing Officer Exhibits

⁴ This exhibit was admitted over Respondent's objection for the limited purpose of demonstrating Student had been hospitalized. Unexplained medical evidence is not to be considered part of the record. Petitioner was to provide a new version of P 9 on the second day of hearing. I note that second copy of the exhibit continues to include unexplained medical evidence that was not reviewed in reaching my determination herein.

⁵ This exhibit is a draft IEP. Respondent's exhibit 12 is the final version of this IEP. The final version was not provided to Petitioner. The parties agreed there were several differences between the two drafts. The final IEP includes the following items that are not part of the draft IEP: 1) 60 minutes of behavior support services per month; 2) Goals in the area of Emotional, Social, Behavioral Development; 3) A new cell phone number for parent; and 4) A date following Parent's signature on the cover page.

⁶ P 15 was withdrawn at hearing.

- P 18 Program information on the
- P 19 Proposed Compensatory Education Plan

Exhibits admitted on behalf of Respondent are:

- R-1 Parent/Guardian Letter of Invitation – IEP Meeting
- R-2 Contact Details dated October 13, 2011 and October 18, 2011
- R-3 Resolution Session Meeting Notes dated October 11, 2011
- R-4 Attendance Summary dated August 20, 2011 – November 7, 2011
- R-5 Archived Attendance Summary dated 2004-2010
- R-6 Prior Written Notice – Identification dated November 25, 2009
- R-7 Disability Worksheet dated November 25, 2011
- R-8 Summary and Score Report dated September 30, 2009
- R-9 IEP Progress Report – Annual Goals dated June 17, 2010
- R-10 IEP Progress Report – Annual Goals dated January 28, 2011
- R-11 Draft IEP Progress Report – Annual Goals dated November 2, 2011
- R-12 IEP dated October 25, 2010
- R-14 Moira Vera-Peters Resume

Exhibits admitted by Hearing Officer are:⁷

- 1 Administrative Due Process Complaint Notice dated September 27, 2011
- 2 Notice of Hearing Officer Appointment dated September 29, 2011
- 3 Prehearing Conference Scheduling Letter and Timeline Order of October 1, 2011
- 4 Prehearing Conference Notice dated October 5, 2011
- 5 Resolution Period Disposition Form executed October 11, 2011
- 6 District of Columbia Public Schools Response to Petitioner's Complaint dated October 13, 2011
- 7 Prehearing Conference Order dated October 29, 2011
- 8 Miscellaneous emails
- 9 Proposed Hearing Officer Exhibits
- 10 Petitioner's Objections to DCPS' 5-Day Disclosures of November 14, 2011⁸

B. Testimony

Petitioner testified and presented the following witnesses:

⁷ Hearing Officer exhibits below have been renumbered to correct an error in the numbering of the list of proposed hearing officer exhibits provided to the parties on November 16, 2011.

⁸ Petitioner filed written objections (HO 10) to Respondent's Exhibits 1, 2, 6, 7, 8, 10 and 11 on November 14, 2011. HO 10 (added to HO exhibits after the filing of the Proposed Hearing Officer Exhibit List filed on November 16, 2011). Petitioner withdrew her objections to Exhibits 8 and 10. I addressed each of the objections to the remaining exhibits (1, 2, 6 and 7) at hearing and admitted the exhibits into evidence.

began to increase in severity about three years ago. Testimony of Petitioner; Testimony of Barnes; R6.1

a. Prior to attending Student was more engaged in school. She received some passing grades and participated in school activities such as cheerleading and basketball. She also showed behavioral problems Testimony of Petitioner.

b. Student's attendance has dropped precipitously at Between the 2004 – 2005 and 2009 – 2010 school years when she was attending either or

 Student was absent between 6 and 9.5 days of school each year. In the 2010 – 2011 school year, Student's first year at she was absent for 117.5 days of school. In the current school year Student has been absent for most of the school year due to three psychiatric hospitalizations. She had been in school 6 days as of October 11, 2011. Testimony of Petitioner; R 3; R 5.

c. Student eloped from classes even when she attended school. Petitioner received reports that Student was absent on days when she was in school. Testimony of Petitioner.

d. During Student's last year at she received grades ranging from As in Music and Health/Physical Education to Ds in Art, English and Advisory, to Fs in Science, Pre-Algebra, History and geography, and Library. At during the 2010- 2011 school year Student received Fs in all subjects except a music class in which she received a D. P 10; P 12.

e. Student has engaged in fights with her peers for many years. The frequency of these fights has increased over time. Student's disrespectful behavior also has increased over time. Testimony of Petitioner.

3. In middle school Student received two hours of special education outside the general education environment per day. She also was able to see the counselor whenever she thought she needed assistance.¹⁰ Testimony of Petitioner.
4. Student's IEP of October 25, 2010 was developed at [redacted] The draft version of this IEP does not address Student's behavior or attendance issues. They were not discussed at the meeting. The [redacted] staff did not have knowledge of these issues at the time the draft was developed. The IEP states Student requires low student to teacher ratio. It provides for 7 hours of specialized instruction outside the general education environment per week and 60 minutes of behavioral support consultation per month. The IEP has academic goals in reading only. The Woodcock Johnson III that was used as the basis for the present levels for the reading goals was completed in September 2009. It also shows Student had similarly low scores in written language, which are not addressed in the IEP. It does show higher scores in math but this was an incomplete administration of the test. It does not include cluster scores which are needed to develop an IEP. When at Student received 2 hours of special instruction outside of general education per day. Petitioner signed the October 25, 2010 IEP but did not check the box indicating she agreed with the contents of the IEP because she did not agree with the contents. Petitioner did not know she could ask the IEP be revised. The final version of the IEP includes

¹⁰ There are no IEPs in the record prior to the October 2010 IEP so the specifics of the content of these IEPs are not available. I have accepted Petitioner's testimony regarding what the prior IEPs provided because the IEPs as well as other records were not made available by DCPS. Petitioner made at least two requests for records, and I ordered DCPS to provide Student's records to Petitioner in my Prehearing Conference Order of October 29, 2011. Few records were provided, however. Therefore the lack of documentary evidence related to prior IEPs is directly attributable to DCPS' failure to comply with IDEA, the Family Educational Rights and Privacy Act ("FERPA") and my Order. I therefore decide issues, when there is a question, that could have been decided based on Student's educational records in Petitioner's favor. To do otherwise would be to reward DCPS for its failure to comply with statutes and my order.

¹¹ There are two versions of this IEP. One is a draft version, P 11, that was introduced into evidence by Petitioner. The other is a final version, R 12, that was introduced into evidence by Respondent. Petitioner was not provided a copy of the final version prior to this due process action.

some items that are not in the draft version. They are: a new cell phone number for Petitioner; a date next to Petitioner's signature; and a social/emotional/behavioral goals section. There are no present levels of performance, completed needs or impact statements in the social/emotional/behavioral goals section of the final version of the IEP.

Testimony of Petitioner; Testimony of Testimony of P 11.

5. The Report to Parent sent by on December 3, 2010 indicates Student is failing all subjects. There are several comments from teachers. They include two requests for parent conferences, three comments related to Student not attending class, a reference to Student's poor behavior and a statement that Student lacks initiative. P 12.
6. Student was involved in a fight at school in February 2011. After the fight Student told Ballou staff she was pregnant with twins, and they had her taken to the hospital despite Petitioner's assuring them Student was not pregnant. The hospital confirmed Student was not pregnant. Student did not return to school after this fight. Petitioner contacted the school attendance staff who said she had no information about Student. She said she would send Petitioner something regarding Student's nonattendance for 6 weeks. Nothing was sent. Petitioner attempted to contact attendance a second time but could not reach her and could leave no voicemail because the voice mailbox was full. In May, filed a Person In Need of Support ("PINS") petition due to Student's truancy. made no other effort to address Student's non-attendance before or after filing the PINS.

Testimony of Petitioner; P 8.

7. As a result of the PINS process Student was referred to the Clinic of the Family Court - Court Social Services Division of the District of Columbia Superior Court ("DC Court") for a psycho-educational evaluation to address Student's intellectual

functioning, academic achievement and personality functioning and to make treatment recommendations. Student was evaluated with the Wechsler Intelligence Test for Children. It revealed Student is in the low average range of cognitive functioning. Student also was evaluated using the Woodcock Johnson Tests of Achievement III. She received low scores in the three basic academic areas. On the broad written language cluster, Student scored at the 7.8 age level with a grade equivalence of 2.7. On the broad reading cluster she scored at an 8.7 age level with a grade equivalence of 3.2. Student's scores in the broad math area were at the 10.6 age level with a grade equivalence of 5.2. Her general academic abilities range from an 8.2 age level with a grade equivalence of 2.9 in academic skills to a 9.8 age level with a grade equivalence of 4.3 in Academic Fluency. Student was found to have learning disabilities in reading, mathematics and written expression. Student's mental health also was assessed. The evaluation revealed Student had notable mental health issues including a major depressive disorder, a possible mood disorder and features of a borderline personality disorder as well as possible cannabis abuse. . Testimony of P 8.

8. Student's school based difficulties, including academic, behavioral and attendance, are attributable to her learning disabilities, her cognitive abilities and her emotional disabilities. All of Student's disabilities have increased in significance and severity in the last three years. However, it is likely they have been present since elementary school. Student requires a full time therapeutic setting to address her academic and school related mental health issues. This psycho-educational report was faxed to on August 24, 2011. Testimony of Testimony of Testimony of Petitioner; Testimony of White; P 5; P 8.

9. Student was hospitalized 9/21/11 for threatening to harm herself and her Mother. She was in the hospital for 10 days. Petitioner notified _____ at _____ of the hospitalization. Student was again hospitalized 10/7/11 when she took a large dose of prescription medication as well as marijuana. She was hospitalized for another 10 days. Petitioner notified an assistant principal at _____ regarding this hospitalization. Student was hospitalized a third time on October 31, 2011. This hospitalization was for threatening her mother. As of the hearing, on 11/15/11, Student remained hospitalized. Petitioner had not notified anyone at _____ of this hospitalization.¹² Testimony of Petitioner;

Testimony of _____ P 9.

10. DCPS scheduled an IEP meeting for October 17, 2011. Petitioner did not attend the meeting. Petitioner was not aware of the meeting. The notice for the meeting is dated October 17, 2011. Petitioner did not receive the notice, and it was not copied to her counsel. No IEP was developed at that meeting. At the Resolution Meeting held on October 11, 2011, the DCPS Compliance Case Manager indicated the team would be available to meet to review the psycho-educational report (ordered by the DC Court) in November. Testimony of Petitioner; R 1; R 3.

11. The _____ of Baltimore ("The _____ is a private special education day school providing programs to students who have emotional disabilities, and other disabilities. Some students have secondary disabilities such as learning disabilities. It offers small classes, individualized instruction and a low student-teacher ratio. The _____ grade has 4 current students all of whom have emotional disabilities with secondary learning disabilities. The _____ provides individual and group counseling, on-site medical management and crisis intervention. A clinical social worker

¹² The second and third hospitalizations were subsequent to the filing of the instant due process complaint.

is assigned to each classroom. The _____ also has established relationships with local hospitals if hospitalization of a student becomes necessary. The academic program is individualized to address each student's learning needs. Student would be able to earn a DCPS diploma at The _____ The _____ has a certificate of approval from the Office of the State Superintendent of Education ("OSSE"). The

Director of Admissions has met with Petitioner and spoken to Student.

Student is willing to attend the _____ Student has been conditionally accepted by the _____ pending a personal interview. Testimony of _____ P 17.

12. DCPS did not provide Petitioner Student's educational records as requested and ordered. P 4; P 6; HO 7.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find witness testimony presented in this matter to be credible for the most part, some witnesses were more persuasive than others. Where these differences in persuasiveness are relevant to my determination, I so indicate.

1) Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of disability, specifically social-emotional. This testing was provided by the court system and has been provided to DCPS.

Under IDEA, a student must be assessed in all areas related to his/her suspected disability. *34 C.F.R. § 300.304(c)(4)*. In conducting the evaluation, the public agency, here, Respondent DCPS, must assure the evaluation is "sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." *34 C.F.R. § 300.304(c)(6)*. The

assessments and other information gathered for the evaluation are used in determining the content of the child's IEP. 34 C.F.R. § 300.304(b)(ii). The assessments thus allow the team to develop an IEP that address all areas of educationally related need. *Id.* A reevaluation conducted in compliance with the evaluation requirements is to occur if the public agency determines the child's educational or related service needs, including improved academic performance and functional performance, warrant such an evaluation. 34 C.F.R. § 300.303(a)(1). A reevaluation also is to occur if the parent or teacher requests one. 34 C.F.R. § 300.303(a)(2). In the instant matter, the need to assess student's social/emotional/behavioral needs is currently clear. Petitioner's allegation is that DCPS should have evaluated Student in the social/emotional area at an earlier time and did not. DCPS responds it had no reason to suspect Student required such an assessment. I agree with both positions. The determination of whether DCPS should have evaluated Student in the social/emotional/behavioral area turns on when the decision to evaluate, or not evaluate her in that area was made.

Student has a documented history of behavior problems in school including fighting, disrespectful behavior, eloping from classrooms, and non-attendance. Petitioner reports receiving calls about Student's behavior for years and reports the behaviors began to increase in severity about three years ago. Student showed some behavioral issues in middle school, particularly fighting, but fighting alone is not, in my opinion, sufficient to alert DCPS to the need for a social-emotional assessment.

Upon moving to senior high school, to a very large school with hundreds of students, significant changes occurred. During the October 2010 IEP meeting, approximately two months into Student's first year in high school, the multidisciplinary team ("MDT") chose to decrease Student's hours of special education outside the general education environment. Rather than

receiving two hours per day of such services as Student had received in middle school, the MDT decided Student was to receive 7 hours per week, a decrease of three hours per week. Student also was to receive only 60 minutes per month of consultative behavioral support services whereas in middle school she had been able to see the counselor when she thought she needed assistance. At the time this IEP was developed Student had not demonstrated behavioral issues at

and the MDT did not have documentation of attendance issues. It is to be expected Student would not yet have demonstrated behavioral issues at at this point in time.

Student was in the midst of her initial adjustment to high school. I, therefore, find the MDT had no reason to suspect a need for social/emotional/behavioral evaluation at this time. I make this finding being fully aware that Petitioner did not indicate approval of the IEP at the meeting.

While good practice suggests it would have been appropriate for the MDT to explore Petitioner's lack of agreement, I find that this failure alone is not sufficient to attribute knowledge of the need for a social/emotional/behavioral evaluation to the MDT.

However, by December 2011, Student was failing all her classes and had excessive absences in most of them. Her behavior was an area of concern in at least one class, and two teachers wanted to meet with her parent. By the beginning of February Student had lied to school staff regarding a pregnancy after a fight and shortly thereafter stopped attending school completely. Petitioner eventually contacted the school regarding Student's ongoing non-attendance seeking assistance. None was provided. In May Student was referred to the District of Columbia Circuit Court for truancy. staff had made no efforts to intercede or address Student's attendance issues in any way prior to this referral. It is ironic that at the resolution meeting held on October 11, 2011, the compliance case manager noted the school had involved the court because student did not have an emotional disability and a less severe route would have

been taken had Student had a more significant disability. When the compliance case manager made these statements she was aware Student had been psychiatrically hospitalized two times since the beginning of the school year. The compliance case manager also indicated the team would be able to meet with Petitioner regarding Student's psycho-educational evaluation performed for the DC court in November. It is clear DCPS did not recognize the need to address Student's needs in an expeditious fashion.

While I agree with Respondent that I cannot retroactively attribute current knowledge to the MDT at the time they wrote the October 2010 IEP, I find the team had many reasons to suspect Student had need of a new evaluation and did not provide it. As required by *34 C.F.R. § 300.303(a)(1)* such an evaluation should have occurred because the conditions warranted it. Student's behavior at deteriorated. She lied regarding a pregnancy and totally stopped attending school. Yet nothing happened until Student was referred to the DC court for truancy, and the court, in turn, referred her for a psycho-educational evaluation. The report of this evaluation was sent to witness White and one other staff member at on August 24, 2011. At hearing White denied having seen this report until the instant due process action. This testimony is not credible. She acknowledged the fax number to which the report was sent was a fax number, and she agreed there was a receipt it had been received. Under these circumstances it is unlikely it was not received by and therefore unlikely it was not received by White. Perhaps it was overlooked, but this does not relieve her of the responsibility to address the information contained in the report. DCPS argues that Petitioner did not do enough to assure delivery, that she should have followed up regarding receipt. I find there is no basis for such an assertion. The report was faxed to an appropriate number and a receipt was generated. This is an action taken in the normal course of business innumerable times on a worldwide basis

daily. The suggestion that each confirmed receipt of a faxed document requires a second action to confirm receipt is not justifiable.

I am also concerned that DCPS has provided a final version of the October 2010 IEP that Petitioner had not seen prior to receipt of the five day disclosures. It was not provided when student records were requested, and it was not provided when I ordered student records be provided to Petitioner. It appears to address one of Petitioner's concerns – namely that Student's social/emotional/behavioral needs had not been identified nor addressed. Yet the goals in this section are not based on any documented present levels of performance, needs or impact statements. It is not possible to determine, therefore, how the goals were developed, nor what they are intended to address. It also is not possible to determine when these goals were developed as these needs were not discussed at the IEP meeting. The generation of this IEP and its use in providing a program to Student was not been explained at hearing.

Finally, the staff's claim of ignorance regarding Student's social/emotional/behavioral needs also cannot be accepted due to her first hospitalization. Student was hospitalized on September 21, 2011. Once this hospitalization occurred and Petitioner contacted White, DCPS was on notice of Student's significant mental health issues. DCPS once again had information that obligated them to perform an evaluation of Student based on newly acquired knowledge, to determine whether her emotional disabilities were affecting her education. They did not. Instead, the compliance case manager, who recognized Student had been hospitalized two times as of the October resolution meeting, stated the team would be available to meet regarding the psycho-educational report from the DC court in November – a time at least three weeks away.

For the reasons noted above, I find by a preponderance of the evidence that DCPS denied Student a FAPE by failing to evaluate her in all areas of suspected disability, specifically in the social/emotional/behavioral area, from December 4, 2010, the date the DCPS progress report identifies specific behavioral and academic concerns, through August 24, 2011, the date the independent psycho-educational report was forwarded to

2) *Whether DCPS denied Student a FAPE by failing to provide an IEP reasonably calculated to provide educational benefit. It was not approved by Petitioner. The IEP does not address Student's emotional needs. The present levels of performance are based only on year old data. It includes only reading goals and no goals in math or written language. The IEP recognizes Student's need for a low student-teacher ratio but provides for only 7 hours of special instruction outside the general education environment.*

Under the IDEA each local education agency is required to provide a FAPE to each student found eligible for special education and related services. A FAPE is:

Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . . [a]re provided in conformity with an . . . IEP that meets the requirements of [the IDEA regulations].

34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the affect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled

peers must be addressed. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id.* An IEP that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982). All students found eligible for services under IDEA are determined to fit in one of 13 eligibility categories. 34 C.F.R. § 300.306. *See also*, D.C. Code § 30.3001.

In the instant matter, Student's last IEP, dated October 25, 2010, contains reading goals only.¹³ It provides for seven hours of special instruction outside the general education environment each week and 60 minutes of behavior support services on a consultative basis each month. The rationale for the seven hours of instruction outside the general education environment is that Student requires a low student teacher ratio. There are no academic goals in other academic areas and there are no goals in the social/emotional/behavioral area. Respondent asserts that this IEP provides Student educational benefit. DCPS attempts to support this position by noting that neither Petitioner nor Student's community based service provider asked DCPS to hold an IEP meeting to revise the IEP and by stating Student's hospitalizations began this year, after the October 2010 IEP was developed.

These arguments appear to be based on a presumption that an IEP, once developed, is set for a year. Yet this view is not supported by IDEA. Rather than supporting the notion that the

¹³ I address here the draft IEP, provided by Petitioner, rather than the final IEP provided by Respondent because Petitioner credibly testified she had not been provided the final IEP prior to the filing of the instant due process complaint. There is no evidence to establish when it was developed.

review and revision of an IEP is an annual event only, the regulations make clear an IEP is to be reviewed and revised, as appropriate, *no less than* once a year. (Emphasis added) 34 C.F.R. § 300.324(b)(1)(i). In addition, the IEP is to be revised to address lack of progress, information from reevaluations, information provided by the parent, the child's anticipated needs or other matters. 34 C.F.R. § 300.324(b)(1)(ii). These requirements make clear that an IEP can be reviewed and revised more than once a year. In the instant matter, the MDT at _____ had many reasons to hold a meeting to revise the IEP. Student was not making progress. Her behavior was deteriorating. Petitioner provided information, the psycho-educational report from the DC Court. Student stopped attending school, and, finally, Student was hospitalized for psychiatric reasons, not once but three times. Any one of these happenings could have and should have been the basis for holding a meeting to discuss the possible revision of the IEP. Yet _____ never called a meeting. Instead, following the filing of this due process action at the mandatory resolution meeting, DCPS indicated it would be willing to meet with Petitioner to review the psycho-educational report in November.¹⁴ This meeting did not occur.

In assessing whether Student's IEP provided a FAPE I look to the October 25, 2010 draft IEP¹⁵, and I find it does not.¹⁶ It is a brief and, in my view, incomplete IEP. It provides academic goals in one academic area for a minimal number of hours per week. The present levels of performance are based on year old data. Yet even these data support a finding of severe academic need. Student who was in ninth grade at the time this IEP was developed is stated to be

¹⁴ Student's then current IEP was dated October 25, 2010. An IEP meeting should have been held by October 24, 2011 to meet the annual review requirement noted *Supra*. DCPS entered into evidence a Letter of Invitation to an IEP meeting to be held on October 17, 2011. The Letter of Invitation also is dated October 17, 2011, the date of the alleged meeting. Thus it could not provide adequate notice of the meeting to Petitioner. Moreover, Petitioner did not receive the Letter of Invitation, and it was not copied to her counsel.

¹⁵ Again, I note Petitioner never received the final version and DCPS never responded to Petitioner's request for documents. As I explained at FN 10, *Supra*, I do not use documents to which Petitioner was denied access to support DCPS' claims as this would unfairly reward DCPS for its lack of compliance with statutory mandates and my order.

¹⁶ I note for the record that the final IEP offered into evidence by DCPS also has some of the flaws identified in the draft IEP discussed herein.

working on a mid-second grade level in reading. There are no other goals. The evaluation subsequently performed by the DC Court showed Student to have similar deficits in mathematics and written language. While I cannot attribute this knowledge of educational deficit back in time to the MDT developing the IEP in October 2010, I am able to postulate that similar results likely would have been found at that point of time as severe learning disabilities do not develop suddenly at age 14, and Dr. Barnes testified that Student's academic needs are long standing. Thus there is no evidence supporting limiting the academic subject matter to be addressed in Student's IEP to reading.¹⁷ The draft IEP also does not address Student's social/emotional/behavioral needs, needs that Dr. Barnes testified are of long duration and of increasing severity.¹⁸ The draft IEP does not provide Student educational benefit as it does not address all her academic needs nor does it address her social/emotional/behavioral needs.¹⁹

Petitioner has also raised her disagreement with the October 25, 2010 IEP as a basis for finding it does not provide FAPE, and with this I disagree. The IDEA requires that parents are participants in the process, 34 C.F.R. 300.322, and Petitioner does not contest her participation. Rather, she asserts, she did not check the box indicating she agreed with the content. This failure to agree with the content is not a basis for finding the IEP denied Student a FAPE. A parent's disagreement with the content of an IEP is to be addressed through the mediation, due process or complaint procedures included in IDEA, 34 C.F.R. §§ 300.153, 300.506, and 300.507.

¹⁷ Again, I note the failure of DCPS to provide student records affects my determination herein. Without the availability of supporting documentation, which was not provided by DCPS, I must, in my view, make determinations based on the credible evidence provided by Petitioner and her witnesses. DCPS has not provided credible contrary evidence.

¹⁸ While the final version of the IEP has social/emotional/behavioral goals without assessment data it is not possible to determine whether these goals address Student's significant social/emotional/behavioral needs as the present level, needs and impact sections are blank..

¹⁹ I would also find the final version of the October IEP does not provide educational benefit as it too does not address all of Student's academic needs and it is not possible to determine whether the added social/emotional/behavioral goals address her identified needs in that area.

For the reasons discussed above, other than Petitioner's disagreement with the IEP, I find, by a preponderance of the evidence that DCPS denied Student a FAPE by failing to provide an IEP reasonably calculated to provide educational benefit.

3) *Whether DCPS denied Student a FAPE by failing to provide Student an appropriate placement in a full time, special education, therapeutic environment with small classes, counseling and behavior support and provision of remedial instruction.*

After a school district develops an IEP that meets all of a student's educational needs, it must identify a placement in which to implement the IEP. The placement is to be in the least restrictive environment in which the IEP can be implemented. 34 C.F.R. §§ 300.114 – 300.118. *See also*, D.C. Code §§ 30.3011 – 30.3013. The removal of a student with disabilities from the regular education environment is to occur “only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii). Each local education agency must have a continuum of alternative placements, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, available. 34 C.F.R. § 300.115. The placement decision is to be made by a group of individuals, including the parents. 34 C.F.R. § 300.116(a)(1); 34 C.F.R. § 300.327; 34 C.F.R. § 300.501(b) and (c). Moreover, the placement decision must conform to the LRE provisions cited above. 34 C.F.R. § 300.116(a)(2). Reviewing these regulations it is clear that placement involves more than the determination of the number of hours of service a student is to receive under his/her IEP. That is, the number of hours of service does not address where along the continuum of services, as identified under IDEA, a student's program will be implemented. See 34 C.F.R. § 300.115. Here, DCPS has proposed a program combining general education classroom placement with a small amount of pull out services in a separate special education classroom.

In the instant matter, the only evidence addressing Student's educational and related service needs was provided by Petitioner. Dr. Barnes' thorough assessment clearly identified Student's multiple and complex needs and the severity of these needs. His testimony was that Student's needs are increasing over time. He stated Student needs a small, therapeutic setting due to her significant, pronounced emotional disorder with concomitant acting out and developing behavior disorder. He stated Student needs interventions before this developing behavior disorder becomes permanent. He added she needs transportation services to address her attendance issues, an aide to address her self-esteem issues and conflict resolution training and counseling on site. He stated Student would continue to avoid school, her depression would continue and she would develop a personality disorder without such programming. In relying on Dr. Barnes opinion, I note he is a particularly credible witness. He does not work for DCPS and he was not hired by Petitioner. He has no affiliation with any nonpublic school. Rather he is a psychologist based in the DC Courts whose job it is to assess students' educational and emotional needs and make recommendations regarding these needs. He is not an expert presenting a party's position. Rather he is an expert presenting an unbiased view of a student's needs. I note, moreover, that the other witnesses who work with Student and/or knew her expressed similar ideas about her needs

[T]he failure of the District to comply with its statutory obligations and provide appropriate educational placements can have a devastating impact on a child's well-being. "Any agency whose appointed mission is to provide for the education and welfare of children fails that mission when it loses sight of the fact that, to a young, growing person, time is critical. While a month in the life of an adult may be insignificant, at the rate at which a child develops and changes, especially one at the onset of biological adolescence with or without special needs like those of our plaintiff, a few months can make a world of difference in the life of that child.

Blackman v. D.C. 278 F. Supp. 2d 1, 4 (D.D.C. 2003) citing *Blackman v. District of Columbia*, 185 F.R.D. 4, 7-8 (D.D.C.1999) (quoting *Foster v. District of Columbia*, Civil Action No. 82-0095, Memorandum Opinion and Order of February 22, 1982 at 4 (D.D.C. Feb. 22, 1982).

In the instant matter, Respondent's failure to identify Student's needs and provide an appropriate program and placement has gone on for more than a year.

I find, by a preponderance of the evidence, DCPS denied Student a FAPE by failing to provide Student an appropriate placement in a full time, special education, therapeutic environment with small classes, counseling and behavior support and provision of remedial instruction.

REMEDY

Petitioner has requested placement at The _____ of Baltimore and _____ compensatory education. The _____ is able to provide Student the program and services she needs. It is small, nonpublic, special education environment. The ninth grade has four other students. All of the ninth grade students have emotional and learning disabilities. Student's classes at The _____ would provide a low student-teacher ratio and Student would have available the supports she needs including counseling, medical management, conflict resolution. In addition The _____ is able to provide education tailored to address Student's learning needs. I find the _____ is an appropriate placement for Student based on her identified needs. The match between Student's needs and the services offered at The _____ meets the *Branham* standard. *Branham v. District of Columbia*, 427 F.3d 7 (D.C.Ct. of App. 2005). I recognized Dr. Barnes also recommended an individual aide to help address Student's needs for increased self-esteem. I find, however, that the exceptionally small classes and particularly low student staff ratio at the _____ provides sufficient support to address Student's needs.

Petitioner's complaint also asked for compensatory services. However, she provided no testimony to support this request at hearing. While she did introduce a compensatory education

plan there was no testimony establishing [redacted] for the plan or an explanation of how its recommendations address Student's needs in specific. *See, Reid v. District of Columbia*, 401 F.3d 516 (D.C. Circuit 2005). As I have already determined The [redacted] is the proper placement for Student and that The [redacted] is able to provide the individualized instruction as well as the therapeutic interventions Student requires I decline to order compensatory education.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. DCPS denied Student a FAPE by failing to evaluate her in all areas of suspected disability, specifically in the social/emotional/behavioral area, from December 4, 2010, the date the DCPS progress report identifies specific behavioral and academic concerns, through August 24, 2011, the date the independent psycho-educational report was forwarded to
2. DCPS denied Student a FAPE by failing to provide an IEP reasonably calculated to provide educational benefit.
3. DCPS denied Student a FAPE by failing to provide Student an appropriate placement in a full time, special education, therapeutic environment with small classes, counseling and behavior support and provision of remedial instruction.
4. The [redacted] is a proper placement for Student based on her identified needs.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

1. Within 10 business days, DCPS shall provide Student a prior notice of placement to The _____ of Baltimore. Student shall attend The _____ of Baltimore Academy at DCPS expense for the remainder of the 2010-2011 school year and for the 2011-2012 school year, at a minimum;
2. DCPS shall provide Student transportation to and from The _____ of Baltimore, as required, for educational and IEP program purposes;
3. DCPS is to convene an MDT meeting, to include relevant The _____ of Baltimore Academy staff and Petitioner and her educational advocate, if Petitioner so chooses, in cooperation with The _____ of Baltimore within 30 days of Student's enrollment at The _____ of Baltimore to review and revise Student's IEP, as appropriate.

IT IS SO ORDERED:

Dec 11, 2011
Date


Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).