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]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: October 6, 2012

Hearing Officer: Peter B. Vaden

Case No: 2012-0509

Hearing Date: September 19, 2012

Student Hearing Office, Room 2003
Washington, D.C.

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STUDENT HEARING OFFICE

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 "MOTHER"), 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 DCPS denied Student a free appropriate public education ("FAPE") by not revising his Individualized Education Program ("IEP") in light of recently completed evaluations and by failing to offer Student a suitable placement.

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[1] Personal identification information is provided in Appendix A.

Student, an AGE young man, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on July 24, 2012, named DCPS as respondent. The undersigned Hearing Officer was appointed on July 25, 2012. The parties met for a resolution session on August 14, 2012 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on August 24, 2012. On August 13, 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 19, 2012 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 CLINICAL PSYCHOLOGIST, EDUCATIONAL ADVOCATE, and ADMISSIONS DIRECTOR from NONPUBLIC PLACEMENT. DCPS called as witnesses FORMER CASE MANAGER and SPECIAL EDUCATION COORDINATOR. Petitioner's Exhibits P-1 through P-27 were admitted into evidence without objection, except for Exhibit P-18 which was withdrawn. DCPS' Exhibits R-1 through R-28 were admitted without objection, except for Exhibits R-9 through R-13, which were admitted over Petitioner's objection to relevance. Counsel for Petitioner made opening and closing statements. Counsel for DCPS waived opening argument and made a closing statement. Neither party requested leave to file a post-hearing brief.

PRIOR PROCEEDINGS and ADJUDICATIONS

Petitioner has brought several prior due process complaints on behalf of Student which were resolved by Hearing Officer Determinations, including Case No. 2010-1113 (Hearing Officer Ruff, Oct. 21, 2010), Case No. 2011-0599 (Hearing Officer Raskin, Aug. 23, 2011), Case No. 2011-0937 (Hearing Officer Leff, Dec. 12, 2011) and Case No. 2011-1215 (Hearing Officer Vaden, Mar. 5, 2012). In the October 21, 2010 HOD[2], Hearing Officer Ruff found, *inter alia*, that DCPS had not made FAPE available to Student, by not offering him an appropriate public school placement before the start of the 2010-2011 school year. In the October 23, 2011 HOD[3], Hearing Officer Raskin found, *inter alia*, that Petitioner had not established that DCPS denied Student a FAPE by placing him at CITY HIGH SCHOOL for the 2011-2012 school year. In the December 12, 2011 HOD[4], Hearing Officer Leff determined, *inter alia*, that DCPS denied Student a FAPE by delaying Student's enrollment at City High School for five days at the beginning of the 2011-2012 school year. In the March 5, 2012 HOD[5], this Hearing Officer found, *inter alia*, that DCPS had denied Student a FAPE by not timely providing the behavioral support services specified in Student's August 1, 2011 IEP and further ordered DCPS to develop a Behavior Intervention Plan ("BIP") to address Student's school attendance issues. Petitioner's last due process complaint, filed March 27, 2012, was resolved by a settlement agreement and voluntary dismissal with prejudice (Case No. 2012-0252). Exhibits R-5 and R-6.

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2 Exhibit R-1

3 Exhibit R-2. Hearing Officer Raskin further ordered DCPS to engage a community service provider to provide various outside-of-school services to Student. DCPS appealed that part of the August 23, 2011 HOD. As of the hearing date, the case was pending before the U.S. District Court for the District of Columbia (Civil Action No. 11-2043). Exhibit R-28.

4 Exhibit R-3

5 Exhibit R-4

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 HAS DENIED STUDENT A FAPE BY NOT REVISING HIS MARCH 14, 2012 IEP[6] TO ADDRESS THE FINDINGS/ RECOMMENDATIONS OF RECENT INDEPENDENT EVALUATIONS AND STUDENT'S LACK OF EDUCATIONAL PROGRESS; and

- WHETHER DCPS HAS DENIED STUDENT A FAPE BY FAILING TO OFFER A PLACEMENT/LOCATION OF SERVICES THAT IS ABLE TO IMPLEMENT HIS MARCH 14, 2012 IEP.

For relief, Petitioner seeks an order for DCPS to convene Student's MDT/IEP team to amend his IEP to provide for full time special education outside of the general education setting, for DCPS to fund Student's nonpublic placement and school transportation for the 2012-2013 school year, and for an award of compensatory education to compensate for alleged deficits in services before the hearing date

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 resident of the District of Columbia, where he lives with his mother. Testimony of Mother.

2. Student was last found eligible, as a child with a disability in need of special education and related services, on June 17, 2010 under the Primary Disability classification

[6] In her complaint for due process, Petitioner alleges that the IEP was developed on March 15, 2012. It appears from the evidence at the hearing that the IEP team developed the IEP at a March 14, 2012 MDT/IEP meeting.

Emotional Disturbance. Exhibit P-5.

3. In a May 17, 2010 Comprehensive Psychological Evaluation Report, Clinical Psychologist reported Student's diagnoses as Dysthymic Disorder, Early Onset; Attention Deficit Hyperactivity Disorder ("ADHD"), combined type; Learning Disorder Not Otherwise Specified; Adjustment Disorder with Mixed Anxiety and Depressed Mood (by history); and Disruptive Behavior Disorder (by history). Exhibit P-9.

4. Since the 2011-2012 School Year, Student has attended City High School, a DCPS public school, where he is now in the GRADE. Prior to the 2011-2012 school year, Student was placed by DCPS at THERAPEUTIC DAY SCHOOL in suburban Virginia. Testimony of Mother.

5. In the 2010-2011 school year, Student's last year at Therapeutic Day School, Student was absent for 77 days, of which 59 days were excused absences. In the 2011 Extended School Year ("ESY") program at Therapeutic Day School, Student was absent for 15 days, of which 12 days were excused absences. Exhibit R-15.

6. Prior to his enrollment at City High School, Student's last IEP was developed on August 1, 2011 at Therapeutic Day School. This IEP provided for full-time special education instruction outside of general education, including 29 hours per week of Specialized Instruction, to address deficits in reading, math and written expression, and 1 hour per week of behavioral support services for psychological counseling to address self-awareness, regulating emotions, following rules and regulations, and exhibiting positive interaction with peers and adults. Exhibit P-6.

7. On March 7, 2012, Petitioner's Counsel wrote the principal of City High School

8. to request that Student be reevaluated for special education and related services, to include a Comprehensive Psychological, Speech and Language and Occupational Therapy evaluations. Exhibit P-19.

9. Student's Multidisciplinary Team ("MDT team") met at City High School on March 14, 2012. The purpose of the meeting was to comply with the August 23, 2011 HOD by finalizing Student's IEP and to comply with the March 5, 2012 HOD by developing a BIP with goals and strategies to address Student's attendance issues. The MDT team also would discuss how Student was receiving extra counseling sessions ordered in the March 5, 2012 HOD and Petitioner's recent request for evaluations. Exhibit P-4.

10. At the March 14, 2012 MDT meeting, Student was reported to have missed 40 out of 100 school days since the beginning of the school year. Most of the absences were excused, usually based on illnesses and physicians' appointments. Exhibit P-4. SPED CASE MANAGER reported that Student had no issues around nondisabled peers and that his biggest issues were attendance and motivation. He reported this was the case in both general education and outside general education settings. SPECIAL EDUCATION TEACHER stated Student would be successful in a regular ed discussion group and would do well in the general education setting. SCHOOL SOCIAL WORKER agreed. Exhibit P-4, Testimony of Former Case Manager, Testimony of Special Education Coordinator.

11. At the March 14, 2012 MDT meeting, the MDT team developed a revised IEP for Student that included goals and objectives in Academic-Mathematics, Academic-Reading, Academic-Written Expression and Emotional, Social and Behavioral Development. The IEP provided 13 hours per week of Specialized Instruction Outside General Education, 13 hours per week of Specialized Instruction in General Education, and 240 minutes per month of Behavioral

Support Services Outside General Education. Exhibits P-5, R-20. Petitioner did not agree with the services to be provided Student in the IEP, including the team's decision not to provide all Specialized Instruction services outside general education. Exhibit P-2.

12. Petitioner filed a due process complaint, on behalf of Student, against DCPS on March 27, 2012. In a May 3, 2012 settlement agreement (the "May 3, 2012 Settlement Agreement"), DCPS agreed to convene an IEP meeting to review an IEE functional behavioral assessment and an IEE psychological assessment. Exhibit R-5.[7] The May 3, 2012 Settlement Agreement recites that it is in full satisfaction and settlement of all claims the Petitioner then asserted or could have asserted as of the date of the fully executed settlement agreement. *Id.*

13. Clinical Psychologist conducted an Independent Educational Evaluation ("IEE") Comprehensive Psychological Evaluation of Student on May 30, 2012 and June 4, 2012. In her June 11, 2012 psychological evaluation report, Clinical Psychologist diagnosed Student with Dysthymic Disorder, Early Onset; Learning Disorder, Not Otherwise Specified; Attention Deficit Hyperactivity Disorder - Combined Type (By History); Dyslexia (By History); Adjustment Disorder with Mixed Anxiety and Depressed Mood (By History); and Disruptive Behavior Disorder (By History). Clinical Psychologist recommended, *inter alia*, that Student should continue to be classified as a student with a Learning Disability and with an Emotional Disturbance, and that Student should receive 2 hours per week of counseling.[8] She recommended that Student be placed in a full time therapeutic school and that Student needs a small class setting. Exhibit P-7.

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[7] The March 27, 2012 complaint for due process was not introduced into evidence. Although not explicitly stated in the settlement agreement, I infer from the evidence that DCPS also paid for the IEE psychological assessment and functional behavioral assessment.

[8] In her request for relief in this case, Petitioner has not asked that Student's Behavioral Support services be increased from 240 minutes per month to 2 hours per week as recommended by Clinical Psychologist. *See* Prehearing Order, August 13, 2012.

14. Clinical Psychologist also conducted an IEE Functional Behavior Assessment ("FBA") of Student. In her June 25, 2012 FBA report, Clinical Psychologist recommended, *inter alia*, that Student should have a Behavior Intervention Plan ("BIP") developed immediately to address his truancy and absenteeism, lack of compliance with classroom routines and relationship building with teachers and peers.[9] Exhibit P-8.

15. Student's MDT/IEP team at City High School met on July 17, 2012 to review the Comprehensive Psychological Evaluation and Functional Behavior Assessment. The team members all agreed that motivating Student to go to school and to do well there was the main issue. At the meeting, Petitioner's counsel requested that Student be provided full-time special education services outside of general education. City High School Special Education Coordinator explained the decision of the March 14, 2012 MDT/IEP team, that Student could succeed in a part-time inclusion and part-time out of general education setting, and that this was the least restrictive environment for Student. The DCPS members of the July 17, 2012 MDT/IEP team decided that Student could succeed in the educational environment provided in the March 14, 2012 IEP, namely 26 hours per week of specialized instruction, of which 13 hours would be provided outside the general education setting. Petitioner did not agree with the MDT/IEP team's decision. Exhibit R-26.

16. On July 15, 2012, a City High School social worker developed a new BIP for Student, which was adopted by the MDT/IEP team. The BIP was designed to target Student's chronic truancy, depressed mood, poor interpersonal relationships and noncompliance with classroom rules. Exhibit R-17.

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[9] On or about March 15, 2012, DCPS had developed a Behavior Intervention Plan for student. *See* Exhibits P-3, P-4, R-21. The record does not show why Clinical Psychologist recommended a new BIP.

17. Nonpublic Placement is a private day school in the District of Columbia that provides instruction to children with Emotional Disabilities and Learning 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 all core courses required for a regular DCPS high school diploma as well as courses in trades, such as barbering, carpentry, cosmetology and computer graphics. Testimony of Admissions Director.

18. All Nonpublic Placement students have access to a staff social worker for counseling on a 1:1 basis. Additionally, the social worker provides separate weekly group sessions for male students and for female students. Testimony of Admissions Director.

19. Nonpublic Placement is approved by the Office of the State Superintendent of Education, Division of Special Education, as a nonpublic day school to serve children with disabilities, including emotional disturbance and specific learning disability. The tuition cost at Nonpublic Placement is $39,163 per year. Testimony of Admissions Director.

20. Student and Mother were interviewed by Admissions Director in summer 2012. Admissions Director determined that the Nonpublic Placement program was appropriate for Student and he was accepted for enrollment. Testimony of Admissions Director, Exhibit P-23.

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

1. DID DCPS DENY STUDENT A FAPE BY NOT REVISING HIS MARCH 14, 2012 IEP TO ADDRESS THE FINDINGS/ RECOMMENDATIONS OF RECENT INDEPENDENT EVALUATIONS AND STUDENT'S LACK OF EDUCATIONAL PROGRESS?

Petitioner's first claim is that DCPS should have revised Student's March 14, 2012 IEP in line with Clinical Psychologist's June 2012 recommendations that he be placed in a full-time therapeutic school with a small class setting. In the March 14, 2012 IEP, the IEP team at City High School concluded that Student should receive 26 hours per week of Specialized Instruction, of which 13 hours would be provided outside of General Education. DCPS reconvened Student's IEP team on July 17, 2012 to review Clinical Psychologist's June 11, 2012 psychological evaluation and June 25, 2012 FBA. The IEP team agreed to adopt a new BIP to address the FBA findings, but did not change the March 14, 2012 IEP. Petitioner contends that the IEP team's decision to not revise the IEP was a denial of FAPE.

The well-established standard for determining the adequacy of an IEP is whether the individualized educational program developed through the IDEA's procedures was reasonably calculated to enable the child to receive educational benefits. *See Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 3051 (1982). *See, also, e.g., Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.

2004) (Whether or not the IEP was reasonably calculated to provide some educational benefit.); *District of Columbia v. Barrie*, 741 F.Supp.2d 250, 253-254 (D.D.C.,2010) (IEP must be formulated in accordance with the terms of the IDEA and should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.) The IEP team, which consists of the child's parents, school officials, and, if appropriate, the disabled child, reviews the child's IEP at least annually to determine whether the annual goals for the child are being met and revises the IEP as appropriate. 20 U.S.C. § 1414(d) (4). While an IEP under the IDEA must be reasonably calculated to furnish educational benefits to the child and must be developed with parental involvement, it does not have to maximize the potential of a disabled child or include all the wishes of a child's parents. *Long v. District of Columbia* 780 F.Supp.2d 49, 58 (D.D.C. 2011). *See, also, Weiss v. Sch. Bd. of Hillsborough County*, 141 F.3d 990, 998 (11th Cir.1998) (School board is not required to provide an education according to the mandates of the parents.)

The present case is the latest in a line of due process complaints filed by Petitioner and her claims must be considered in light of the prior HODs and the May 3, 2012 Settlement Agreement. Notably, in Case No. 2011-0599, Petitioner sought an order for DCPS to continue to fund Student's nonpublic placement at Therapeutic Day School. In her October 23, 2011 HOD, Hearing Officer Raskin found that Petitioner had not established that DCPS denied Student a FAPE by placing him at City High School for the 2011-2012 school year. In the May 3, 2012 Settlement Agreement in Case No. 2012-0252, Petitioner released DCPS from all claims she could have asserted before the settlement date, including, presumably, the alleged inappropriateness of Student's March 14, 2012 IEP. In this case, instead of contesting the appropriateness of the March 14, 2012 IEP, Petitioner claims that DCPS denied Student a FAPE

by not revising the IEP after receiving Clinical Psychologist's June 2012 IEE assessments.

Pursuant to the terms of the May 3, 2012 Settlement Agreement and to the requirements of the IDEA, *see* CFR § 300.324(b), DCPS convened Student's IEP team on July 17, 2012 to review Clinical Psychologist's June 2012 assessments and to consider revisions to Student's March 14, 2012 IEP. In her comprehensive psychological assessment report, Clinical Psychologist recommended Student's placement in a full-time therapeutic school. The IEP team considered this recommendation, as well as contrary views of City High School Special Education Coordinator, who explained the decision of the March 14, 2012 MDT/IEP team that Student could succeed in a less restrictive environment, where he could interact for part of the day with non-disabled peers. I find that on this issue, the opinion of Clinical Psychology merits less weight than the recommendations of Student's City High School educators who worked with Student on a day-to-day basis. From reading Clinical Psychologist's report, it appears that she did not observe Student in the classroom or interview his teachers. Furthermore, Clinical Psychologist testified that Student needs a full-time, outside of general education IEP, largely because of his attendance issues. However, Student was reported to also have chronic attendance problems during the 2010-2011 school year when he was enrolled at Therapeutic Day School. Clinical Psychologist did not explain why placing Student in a different full-time therapeutic private school would ameliorate Student's current nonattendance problem.[10]

The evidence at the hearing did not establish whether Student had made educational progress in the short time since the March 14, 2012 IEP was developed. Clinical Psychologist testified that Student's May 2012 standard scores on the Woodcock Johnson III Tests of

[10] Former Case Manager testified that he has reviewed 10 evaluation reports prepared by Clinical Psychologist and she almost always recommended that the respective students be placed in a full-time special education setting. Assuming this expert witness regularly recommends a full-time special education setting for the students whom she evaluates, I do not find this fact effects her credibility in this case.

Achievement[11] ("WJ-III Ach.") had not improved over his May 2010 scores. The lack of improvement in Student's WJ-III scores from 2010 to 2012 would not show that Student's March 14, 2012 IEP was not reasonably calculated to provide educational benefits. "[B]ecause the question ... is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, ... the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . ." *S.S. ex rel. Shank v. Howard Road Academy,* 585 F.Supp.2d 56, 66 (D.D.C. 2008) (citations omitted.). Put simply, Student's scores on the WJ-III Ach., administered only ten weeks after the March 14, 2012 IEP was developed, shed no light on whether the IEP needed to be revised.

The team at the July 17, 2012 IEP meeting also reviewed and considered Clinical Psychologist's June 25, 2012 Functional Behavioral Assessment of Student. In the FBA, Clinical Psychologist recommended, *inter alia*, that Student should have a Behavior Intervention Plan developed immediately to address truancy and absenteeism, lack of compliance with classroom routines and relationship building with teachers and peers. The July 17, 2012 IEP team discussed a Behavior Intervention Plan for Student developed by a DCPS school social worker, which was later finalized. Petitioner offered no evidence that this BIP was not appropriate or not reasonably calculated to provide educational benefits to Student.

Hearing Officers, like the courts, must afford some deference to the expertise of the school officials responsible for the child's education. *See, e.g., J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010). Under the IDEA, upon review of a child's IEP, the IEP team must revise the IEP "as appropriate." *See* 34 CFR § 300.324(b)(ii). After considering Clinical Psychologist's comprehensive psychological evaluation and functional behavior assessments, as well as the input of Special Education Coordinator and Former Case Manager, the July 17, 2012

[11] Woodcock Johnson III, Tests of Achievement, Normative Update, Form A

IEP team decided it was not appropriate to revise Student's March 14, 2012 IEP. I find that Petitioner has not met her burden of proof to show this decision of the IEP team was not appropriate or that the decision not to revise the IEP denied Student a FAPE. DCPS prevails on this issue.

2. DID DCPS DENY STUDENT A FAPE BY FAILING TO OFFER A PLACEMENT/LOCATION OF SERVICES THAT IS ABLE TO IMPLEMENT HIS MARCH 14, 2012 IEP?

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). In her complaint for due process, Petitioner alleged that City High School is unable to implement the March 14, 2012 IEP because Student had been unable to access his IEP services at the school. At the due process hearing, Petitioner offered no competent evidence that City High School was not capable of fulfilling the requirements of the March 14, 2012 IEP. DCPS prevails on this issue.

SUMMARY

For the foregoing reasons, I find that Petitioner has not met her burden of proof to establish that DCPS denied Student a FAPE by not revising the March 14, 2012 IEP or by failing to offer a placement that was able to implement the IEP. Because I do not find that Student was denied a FAPE, I do not reach Petitioner's claim for a compensatory education award. *See Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir.2005) (Denial of a FAPE is a prerequisite to an award of compensatory services.)

ORDER

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

All relief requested by the Petitioner herein is denied.

Date: October 6, 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).