DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

[STUDENT],[1]
through the Parent/Guardian,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 6/6/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 5/31/11 Room: 2004

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HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

The student is a -year old female currently in the grade at

The student has been found eligible for special education and related services as a student with the disability classification of Emotional Disturbance. (R-8) On April 22, 2011 counsel for petitioner filed a due process complaint alleging that DCPS failed to provide an appropriate placement at (P-3) Counsel for DCPS filed a Motion to Dismiss on May 3, 2011 on the grounds that the due process complaint is re-litigating issues resolved in an executed settlement agreement on January 10, 2011 specifically the failure to provide an appropriate placement at (R-1) Counsel for the petitioner filed an opposition to the motion on May 4, 2011 arguing that the inappropriateness of the placement is ongoing and as a matter of equity should not be barred by the settlement

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

agreement. A resolution meeting was held on May 4, 2011 and the parties failed to reach an agreement. (P-2) A pre-hearing conference was held on May 10, 2011 with counsel for petitioner Alana Hecht and counsel for respondent DCPS Linda Smalls. Counsels presented their arguments on the Motion to Dismiss at the pre-hearing conference. This hearing officer denied the Motion to Dismiss on May 16, 2011 in a written order. On May 19, 2011, a second pre-hearing conference was held with counsel for petitioner Alana Hecht and counsel for respondent DCPS Linda Smalls. A pre-hearing Order was issued on May 19, 2011 that stated the only issue for the hearing was: Did DCPS deny a Free Appropriate Public Education (FAPE) to the student by failing to provide an appropriate placement at the School? The relief requested is placement at the non-public in the District of Columbia. (P-1)

The due process hearing convened at 9 a.m. on May 31, 2011 in Room 2004 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Alana Hecht represented the petitioner and Linda Smalls represented the respondent DCPS. The hearing was closed. At the outset of the hearing, respondent's documents R-1-R-10 were admitted into the record without objection. Counsel for respondent DCPS objected to petitioner's documents P-15 and P-21-24 on relevance grounds. The objections to these documents were overruled after they were presented during the hearing and the hearing officer would determine what weight to give them. Petitioner's documents P-1-P-29 were admitted into the record. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses the parent, the student, and the educational advocate Lawrencia Cole who all testified in person and Dr. Natasha Nelson and of of Washington, D.C. who both testified by

telephone. Counsel for respondent DCPS called as a witness The Coordinator, who testified in person.

JURISDICTION

The hearing was convened on May 31, 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

BACKGROUND

The student is a -year old female currently in the grade at

The student has been found eligible for special education and related services as a student with the disability classification of Emotional Disturbance. (R-8) On April 22, 2011 counsel for petitioner filed a due process complaint alleging that DCPS failed to provide an appropriate placement at Counsel for respondent maintains that is implementing the student's IEP and Behavior Intervention Plan and is providing her with educational benefits. The student is sometimes not engaged in class work and often leaves classes without returning for various reasons and this has affected her grades.

ISSUE AND RELIEF SOUGHT

The issue to be determined is as follows:

1. Did DCPS deny a Free Appropriate Public Education (FAPE) to the student by failing to provide an appropriate placement at the School?

The relief requested is placement at the non-public in the District of Columbia.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The student is a year old female currently in the grade at The student has been found eligible for special education and related services as a student with the disability classification of Emotional Disturbance. (R-8)
2. The student's IEP calls for 31.5 hours a week of specialized instruction outside of general education, four hours per month of behavioral support services and thirty minutes per month of speech-language pathology. (R-8-8)
3. The student is receiving 31.5 hours of specialized instruction per week outside of general education, four hours per month of behavioral support services and thirty minutes per month of speech-language pathology. The student's IEP is being implemented at The (Testimony of
4. The student is in special education classes with eight to ten students taught by a special education teacher or in combination with a regular education teacher certified in the subject area. There are six licensed social workers on staff and one school psychologist. One of the six social workers is there three days a week while the others are there full-time. There are seven to eight behavior technicians who are all trained in therapeutic crisis intervention (TCI). Two of the behavior technicians are instructors in TCI and one of them has a master's degree in special education. The

average daily attendance in The is sixty (60) students, but they have a capacity of ninety to one hundred and ten (90-110) students. The occupies most of the building at except for some administrative offices. (Testimony of The student was observed by Dr. Natasha Nelson in conducting her independent Functional Behavior Assessment in the Geometry class which was a small class of three students and in the Financial Services class where the student was with seven other students. Dr. Nelson observed that the Geometry class was "big, bright and well-lit with natural and artificial light. There were many posters on the wall, related to subject of mathematics. The classroom had ten desks arranged in three rows as well as a table with two computers. There were two other students in the classroom, sitting behind the computers, and working on assignments…[student] did not seem keen on doing work. She continued to text against the directive of She also raised her voice with him and wanted to leave the classroom." (P-18-6) The geometry teacher worked closely with the student and encouraged her "to try the next question and walked her through the steps to solve the problem. [Student] raised her voice again saying, 'When is this going to end because I'm hungry. checked her work and commended her for getting the question partially right. asked [student] to finish copying the notes. She asked, 'Do I have to answer questions after this?' When replied in the negative, she asked, 'Are you sure?' twice and also said, ' I don't want to be in this class. [Student] took out her cell phone and sent a text message. asked her to put it away and she did….She removed her cell phone a second time and sent another text message." She also said she was hungry

and insisted she had to leave because she was hungry and the teacher provided her with juice, cookies and pretzels. (P-18-5 & 6) Dr. Nelson observed in the Financial Services class that the student "had no interest in participating in the class discussion. She focused on using her telephone. She also had difficulty modulating her emotions and demonstrated no appropriate interpersonal skills." (P-18-7)

5. A Behavior Intervention Plan (BIP) was developed for the student on April 7, 2011. The Plan referred to the Parker Diagnostic Solutions Functional Behavior Assessment of February 1, 2011conducted by Dr. Nelson (P-18) and stated that the assessment "places value on Adult Approval, Competitive Approval and Peer Approval and, suggest that she be provided with the right amount of validation and acceptance." (R-6-2) The plan's implementation description is: staff will offer [student] incentives for demonstrating desired behaviors and will consequate (sic) problem behaviors. Positive Intervention Strategies: Teacher Strategies Incentives include time to visit a trusted staff member, opportunities to participate in an appropriate activity of [student's] choosing and tangible rewards such as food items, stickers and posting examples of her completed work. Examples of consequences include ignoring problem behaviors when appropriate, taking away incentives, sending correspondences home, use of the Therapeutic intervention center, in school suspension, out of school suspension and restraint when [student] is physically out of control and a danger to herself and others (given parental consent)." (R-6-2)

6. The Behavior Intervention Plan is being implemented at The , but the incentives including time to visit a trusted staff member, opportunities to

participate in an appropriate activity of [student's] choosing and tangible rewards such as food items, stickers and posting examples of her completed work were already in place prior to the BIP. The consequences listed in the BIP were also being used prior to the BIP. The student has been sent to the Therapeutic Intervention Center (TIC) which has adult supervisors to calm her down and do her work.

was not aware of anything different put in place since the BIP. (Testimony of

7. The student's March 25, 2011 Report Card shows an F in Geometry Part A with a C on the exam, a C in World History with a B on the exam, an F in Reading Workshop and a C+ in Computer Applications. The student received a C in the third advisory in English II and a C in the third advisory in Intro Financial Services, a D in the third advisory in Drawing and Painting and a D in the third advisory in Geometry Part B . (P-7-2)
8. The August 16, 2010 to May 10, 2011 Attendance Summary shows the student was present 118.5 days out of 155 school days. The student had 18 authorized absences for medical appointments, 75 excused absences and 95 unexcused absences with 64 lates to her classes. (R-9-1) She received Fs in Geometry and Reading Workshop where she had a high rate of absences with 20 times in Geometry and 19 times in Reading Workshop. (R-10)
9. The student will leave classes often if she does not get immediate help and gets frustrated because she does not get the material. It is difficult to get her to return to classes. The student will go to a social worker or assistant principal to talk to them when she leaves class and it helps calm her down. (Testimony of student and

When the teachers provide her immediate help she does not leave class. The teachers do give her assistance when she asks for it. The Behavior Technicians in the hallway talk to her and tell her to go back to class, but she often does not go back to class. She is only disrespectful to teachers she does not like. (Testimony of student)

10. The student's IEP Progress Report shows the student is progressing toward meeting her reading and written expression annual goals for both the second and third reporting period. The special education teacher's comments on May 23, 2011were that: "Student has shown a little progress this marking period. She is currently functioning at the below average." (P-29-2) While the student was progressing toward meeting her mathematics annual goals in the second reporting period, she showed no progress in the third reporting period. The special education teacher's comments on May 23, 2011were that student "is not making progress at this time. She is coming to class; however she gets up and walks out without staff permission. She is failing to complete her class work." (P-29-1)

CREDIBILITY FINDING

A hearing officer is responsible for assessing the credibility of witnesses. *See Shore Regional High School Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3rd Cir. 2004) testified in person and this hearing officer had an opportunity to observe him and determine his credibility. was very knowledgeable about the program at at and provided detailed answers to counsels' questions. He also was straightforward and not evasive about the problems in getting the student back to class after she leaves. This hearing officer finds testimony very credible.

DISCUSSION/CONCLUSIONS OF LAW

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

The only issue to address is whether the placement at is appropriate. The Supreme Court held in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 201 (1982) that IDEA was intended to provide a "basic floor of opportunity" and an individualized plan "designed to provide educational benefit to the handicapped child." *See Schoenbach v.District of Columbia*, 309 F. Supp. 2d 71, at 80 (D.D.C. 2004) This Circuit has held that a school has met its obligation to provide a FAPE if the school's program "confers some educational benefit." *Kerkam v. Superintendent, District of Columbia Public Schools*, 931 F 2d 84 (D.C. Cir. 1991) The analysis of the appropriateness of a public school placement "is not comparative." *Jenkins. v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir. 1991) Although IDEA guarantees a FAPE, it "does not necessarily guarantee the child [with the disability] the best available education." *Holland v. District of Columbia*, 71 F.3d 417,419 (D.C.Cir. 1995). Nor does IDEA ensure that a FAPE will consist of the precise plan that the parent desires. *See Shaw v. District of Columbia*, 238 F.Supp. 2d 127,139 (D.D.C. 2002). An IEP must be 'reasonably calculated' to confer educational benefits on the child, ...but it need not "maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Rowley* at 200, 207. , quoted in *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009)

In this case, this hearing officer finds at Findings of Fact #3 and #4 that is implementing the student's current IEP. The student is receiving the 31.5 hours of specialized instruction outside of general education. Her classes are small with eight to

ten students maximum and some as small as three students. In the two classes observed by Dr. Nelson there were only two other students in Geometry and seven other students in Financial Services. She is receiving her instruction from special education teachers or in combination with regular education teachers certified in the subject area. She is also receiving her related services and sees a social worker when she is frustrated. The student's own testimony is that the teachers do provide her with assistance when she asks for it. The classroom observation by Dr. Nelson showed that the teachers worked closely with the student on her work, but that the student frequently was not engaged and was texting messages on her cell phone. If she is provided with immediate help she does not leave the class, but she is easily frustrated and will leave class if the assistance is not immediate. The classroom observation in the Geometry class shows that she will also leave class when she feels like it and that the reasons may not be related to frustration with the class work. In the Geometry class observation, the student wanted to leave the classroom because she was hungry and the teacher provided her with food and drink to accommodate her. (See Findings of Fact #4 & 9)

Her report card shows she is receiving educational benefit with grades of a C in World History with a B on the exam, an a C+ in Computer Applications, a C in the third advisory in English II and a C in the third advisory in Intro Financial Services. (See Findings of Fact #7) She does get frustrated in Geometry and Reading Workshop where she got Fs and has a high level of absences in those classes. The classroom observations in the Geometry and Financial Services classes also shows that she is often not engaged in classroom work and was texting messages on her cell phone. (See Findings of Fact #4 & 8) This hearing officer finds that the student's own voluntary behavior not to engage in classroom work and to leave class and not return contributes to her low grades. The student's IEP Progress Report shows the student is progressing toward

meeting her IEP annual goals in reading and written expression. She is not making progress for the third marking period in mathematics, however, because she is leaving class without permission. (See Findings of Fact #10) The IEP Progress Report is consistent with the student's Report Card that her leaving class in Geometry is affecting her progress. The placement is providing education benefits to the student through implementation of her IEP that is reasonably calculated to provide educational benefit if the student takes advantage of those educational opportunities at

This hearing officer also finds at Findings of Fact #6 that is implementing the student's Behavior Intervention Plan (BIP). Several of the incentives and consequences on the BIP were being implemented prior to the development of the BIP. This hearing officer concludes that the student's current placement is conferring educational benefits to the student and is therefore appropriate. There is no denial of a FAPE.

This Circuit has held in *Jenkins*, 935 F. 3d at 305 "[I]f there is an 'appropriate' public school program available...the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." The Supreme Court in *Burlington School Committee v. Department of Education,* 471 U.S. 359 (1985) and *Florence County School Dist. Four v. Carter*, 510 U.S. 7 at 15 (1993) has held that parents "are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." Since this hearing officer has answered the threshold question that there is no denial of a FAPE with the present placement at it is not necessary to do further analysis on the second prong of the Supreme Court test for reimbursement.

ORDER

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

Counsel for petitioner's request for relief is DENIED and the case is DISMISSED with prejudice.

NOTICE OF RIGHT TO APPEAL

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

Date: 6/6/11 Seymour DuBow /s/

Hearing Officer