DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

2011 MAY 11 AM 10:04
STUDENT HEARING OFFICE

[Parent], on behalf of,
[Student],[1]

Petitioner,

v

Respondent.

Date Issued: May 11, 2011

Hearing Officer: Jim Mortenson

Case No:

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on March 17, 2011. The Petitioner is represented by Miguel Hull, Esq., and the Respondent is represented by Paul Dalton, Esq. A prehearing conference was held on March 31, 2011, and a prehearing order issued on that date. A response was filed on April 5, 2011. A resolution meeting was held via telephone on April 21, 2011, and did not result in a settlement or any other agreements.

The hearing was convened on April 27, 2011, in room 2004 at 810 First Street NE, Washington, D.C. The due date for the hearing officer's determination (HOD) is May 31, 2011. This HOD is issued on May 11, 2011.

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[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

III. ISSUES, RELIEF SOUGHT, AND DETERMINATION

The issues to be determined by the Independent Hearing Officer (IHO) are:[2]

1) Whether the Respondent failed to place the Student in a full time therapeutic placement outside of the general education setting determined necessary by the individualized education program (IEP) team?

2) Whether the Respondent has failed to conduct an evaluation of the Student sufficiently comprehensive to determine all of his special education and related service needs when it did not conduct a functional behavioral assessment (FBA)?

The substantive requested relief includes:

1) Placement at either .

2) An FBA and a behavior intervention plan (BIP).

3) Compensatory education to remedy the loss of educational services suffered from his 25 day removal from school.

Based on the findings of fact and conclusions herein, this IHO has determined that the Respondent placed the Student in the setting determined necessary by the IEP team, and that the Respondent failed to conduct an FBA to determine why he has had such significant attendance problems, why he engaged in the behavior for which he was suspended, and to develop an appropriate behavior intervention plan to address those behaviors.

[2] The issue "Whether the Respondent failed to comply with disciplinary due process procedures when it did not convene a team meeting to determine whether the Student's behavior for which he was disciplined in February, 2011, was a manifestation of his disability?" was withdrawn by the Petitioner.

IV. EVIDENCE

Three witnesses testified at the hearing, two for the Petitioner and one rebuttal witness for the Respondent.[3]

The witnesses for the Petitioner were:

1) Petitioner (P)

2) Francis John, Case Manager (F.J.)[4]

The rebuttal witness for the Respondent was:

1) John Baker, Clinical Supervisor (J.B.)

19 documents were disclosed by the Petitioner and 18 were admitted into evidence.[5] The Petitioner's exhibits are:

Ex. No.	Date	Document
P 2	February 8, 2011	IEP
P 3	February 8, 2011	MDT [IEP team] Meeting Notes
P 4	April 13, 2010	IEP
P 5	December 16, 2010	Multidisciplinary Team (MDT) [IEP team] Meeting Notes
P 6	July 15, 2010	Multidisciplinary Team (MDT) [IEP team] Continuation Meeting Notes
P 7	October 1, 2010	Progress Report
	February 8, 2011	Grade Card
	July 15, 2010	Grade Card
P 8	November 22, 2010	Letter from Staton

[3] The Respondent failed to disclose any witnesses or their proffered testimony as required. During the hearing the IHO permitted a rebuttal witness to respond to testimony provided by the Petitioner's witnesses. The Petitioner objected to any witnesses being presented by the Respondent and the Respondent objected to the limited nature of the testimony as not "proper rebuttal." The IHO permitted limited testimony for rebuttal purposes and noted the objections for the record.

[4] This witness had little credibility with regard to the issues he testified about since he was not an education professional and expressed the opinion that the Student required a behavior intervention plan because "all humans have behaviors and so we all need a behavior modification plan." While this statement may very well be accurate, such testimony does not comport with the fundamentals of the purpose of "special" education and cannot be taken seriously in this context.

[5] The first document, P 1, was the complaint and so the IHO excluded as it was redundant. The other documents were admitted without objection because the Respondent's Counsel did not arrive at the hearing until 45 minutes after it was scheduled to start. The IHO had waited to commence the hearing until a quarter past the hour it was scheduled for. P 14 was listed as a document, but was not in the record received from the Petitioner.

P 9	November 30, 2010	Letter from Allen
P 10	April 1, 2010	Psychiatric Assessment
P 11	December 21, 2008	Psychoeducational Evaluation
P 12	[Undated]	Psychiatric Evaluation
	October 28, 2008	Psychiatric Intake Evaluation
P 13	March 31, 2009	Psychiatric Evaluation
P 15	March 6, 2009	Physician's Discharge/Transition Order
P 16	March 5, 2011	Maryland Treatment Center: Psychiatric Evaluation
P 17	March 14, 2011	Mountain Manor School Progress Report
P 18	March 30, 2011	Letter from Davis
P 19	April 13, 2011	Child/Youth Preliminary Treatment Pla
P 20	[Undated]	Psychiatric Medication Request

No documents were disclosed by the Respondent or offered into evidence.

V. 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 learner with a disability who is eligible for special education and related services under the definition of other health impairment.[6] The Student spent two years at another charter school prior to being enrolled by the Petitioner at the Respondent school for the 2010-2011 school year.[7] The Student was moved from the prior school to the present school because the Petitioner believed the Student could not function at the prior school, despite a small setting.[8] The Student earned Ds and Fs and was suspended several times during the 2009-2010 school year at the prior school.[9]
2. The Student suffers from attention deficit hyperactivity disorder and bipolar disorder.[10] The Student's disability impacts him educationally by causing him to lack impulse control, lack

[6] Testimony (T) of P, P 2.
[7] T of P.
[8] T of P, P 6.
[9] T of P.
[10] P 3, P 8, P 10, P 13, P 19.

an ability to plan and organize, and affects his reading comprehension and ability to retain information.[11] These problems have affected his academic progress overall, leaving him currently at roughly the fifth grade level in reading and mathematics.[12]

3. The Petitioner thought the Student was doing well at until she received the Student's first progress report in October 2010, indicating nearly all Fs and one D grade.[13] A parent/teacher conference was then held and the Petitioner was more fully informed of behavior problems the Student was experiencing.[14] Shortly after the parent/teacher conference the Student was suspended for fighting and cutting class.[15] In December 2010, the Student was caught and arrested, at school, for possession of marijuana which resulted in a 25 day suspension from school.[16]
4. The Student has had significant attendance issues at and was unexcused from class at least 63 times.[17] No FBA has been completed to determine why the Student was skipping class.[18]
5. On February 8, 2011, an IEP team meeting was held, including the Petitioner.[19] The team revised the Student's IEP to increase his specialized instruction time from 10 hours per week in the general education setting to 26 hours per week outside of the general education setting.[20] Related services consisting of behavioral support services were added (replacing

[11] P 2, P 4.
[12] P 2, P 4.
[13] P 7, T of P.
[14] T of P.
[15] T of P, P 9.
[16] T of P, P 3, P 5.
[17] P 2, P 7.
[18] P 3.
[19] T of P, P 3.
[20] P 2, P 3, P 4.

rehabilitation counseling) for one hour per week outside of the general education setting.[21] Other components of the IEP were not significantly changed, if at all.[22]

6. The team determined to place the Student in the Tier III program at Tier III is a locked unit within that includes about eight students in two classrooms.[24] The IEP team determined that the Student would benefit from the routine and structure of the Tier III program.[25] The Student does not leave the Tier III program without permission, but he does not have good attendance in the first place.[26]
7. The Student was enrolled by the Petitioner in a drug treatment program and attended that from February through March, 2011.[27] The Student had surgery on April 1, 2011, and finally returned to school at on April 8, 2011.[28]
8. The Student's IEP includes two behavioral goals.[29] One goal is to use positive socially accepted coping mechanisms to control his anger and frustration, while learning self-monitoring, organizational and planning skills.[30] The other goal is to improve his organizational and planning skills by engaging in self-monitoring of his progress as he completes his work.[31]

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[21] P 2, P 3, P 4.
[22] P 2, P 4.
[23] T of P, P 3.
[24] T of P.
[25] P 3.
[26] T of J.B.
[27] T of P, P 17. (F.J. also provided testimony concerning this, but this testimony could not be relied on because it was very inconsistent and became more so as the witness was questioned.)
[28] T of P.
[29] P 2, P 4.
[30] P 2.
[31] P 2.

VI. 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:

1. Special education and related services must be "provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324." 34 C.F.R. § 300.17(d).
2. The Student's IEP requires 26 hours of specialized instruction per week outside of the general education setting. The Tier III program at the school is a fully segregated special education program, consistent with the requirements of the Student's IEP. The IEP team made changes to the IEP due to the Student's lack of success under the prior revision of the program. The evidence does not support a conclusion that the Student's program or placement is not appropriate at this time as it will take some time for the school staff to collect data on the Student's academic and functional progress under the new program, now that the Student is back in school.
3. An evaluation of a child must be:

   > sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
   > (7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child [must be] provided.

   34 C.F.R. § 300.304(c)(6) & (7).
4. A child with a disability who is removed from school for disciplinary reasons, including for knowingly possessing illegal drugs, must "[r]eceive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur." 34 C.F.R. § 300.530(d)(ii).
5. The Student's attendance issues were likely the first trigger for the need to conduct a functional behavioral assessment (FBA) to gather information on the Student's behavior

(truancy) and to develop a plan to address and stop the behavior. Upon his 25 day suspension the Respondent was also required to conduct an FBA to collect data on his drug possession and would have led order to develop effective interventions to address this significant behavior. No FBAs were ever conducted and no resulting interventions were put in place. The IEP team did increase special education services and placed the Student in a more segregated setting which prevents leaving without permission. However, the Student continues to fail to show for class. This must be investigated and a well designed plan put in place to address this behavior.

VII. DECISON

1. The Respondent did not fail to place the Student in a program in accordance with his IEP.
2. The Respondent did fail to fully and appropriately evaluate the Student when it did not conduct FBAs to examine his behaviors of truancy and possession.

VIII. ORDER

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

1. The Respondent will, within 20 school days of the date of this order but no later than the last day of school for the 2010-2011 school year, conduct a functional behavioral assessment of the Student that incorporates a variety of techniques and strategies to diagnose the causes of the Student's truancy and will identify likely interventions to help address that behavior.

2. The IEP team will meet within one week of the completion of the FBA to review it and the IEP, and revise the IEP accordingly to include an effective behavior intervention plan to address the Student's truancy.[32]
3. All proposed meetings will include three alternative meeting times from which the Petitioner may choose. The Respondent will advise the Petitioner of the meeting time that will go forward if she fails to choose one of the proposed times. If the Respondent fails to complete the FBA in accordance with this order and/or convene the IEP team in accordance with this order, the Petitioner may seek any viable enforcement of this order including, but not limited to, filing a complaint with the Office of the State Superintendent of Education under 34 C.F.R. §§ 300.151-300.153. This order does not address disputes arising from the meeting and revisions of the IEP required herein.

IT IS SO ORDERED.

Date: May 11, 2011

Independent Hearing Officer

[32] This order does not require an FBA to examine the Student's behavior involving drug possession as that has already been addressed by the Petitioner through her enrollment of the Student in a drug treatment program which was completed by the Student.

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).