

# ***DISTRICT OF COLUMBIA***

Office of the State Superintendent of Education  
Office of Review & Compliance  
Student Hearing Office

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OSSE  
STUDENT HEARING OFFICE  
2010 FEB 17 PM 4: 25

<p>STUDENT<sup>1</sup>, by and through parent,  Petitioner,  us.  District of Columbia Public Schools,  Respondent.</p>	<p><b><u>HEARING OFFICER'S DETERMINATION</u></b></p> <p>Counsel for Petitioner/Parent: Pierre Bergeron, Esq.</p> <p>Asst. Attorney General for DCPS: Laura George, Esq.</p> <p><u>Impartial Hearing Officer</u> Seymour DuBow, Esq.</p>
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<sup>1</sup> Identifying personal information is attached to this decision as Appendix A and must be detached prior to public distribution.

## **PROCEDURAL BACKGROUND**

On December 14, 2009, Counsel for the Parent filed the herein Complaint with the District of Columbia Office of the State Superintendent of Education (OSSE), Student Hearing Office (SHO), alleging the District of Columbia Public Schools (DCPS) denied the student a Free Appropriate Public Education (FAPE). Specifically, Counsel for the Parent alleged DCPS failed to appropriately identify the student, failed to provide an appropriate IEP and failed to provide an appropriate placement.

A Pre-hearing Conference was held on January 21, 2010 and a Pre-Hearing Order was issued in this matter on January 23, 2009. The Order determined the ISSUES as set out below.

A hearing in this matter was scheduled for February 12, 2010 at the Student Hearing Office, OSSE, 1150 Fifth Street, SE - First Floor, Hearing Room 5A , Washington, D.C. 20003. The hearing convened as scheduled. The mother participated for the entire hearing via telephone. All witnesses were sworn in under oath. Petitioner's Documents 1-20 and DCPS Documents 1-5 were admitted into evidence without objection.

## **JURISDICTION**

The hearing convened under Public Law 108-446, The Individuals with Disabilities Education Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300, and Title V of the District of Columbia Municipal Regulations.

***ISSUES: 1. Did DCPS deny a Free Appropriate Public Education(FAPE) by failing to appropriately identify the student?***

***2. Did DCPS deny a FAPE by failing to provide an appropriate IEP?***

***3. Did DCPS deny a FAPE by failing to provide an appropriate placement?***

## **FINDINGS of FACT**

As to issue 1 on eligibility and in consideration of the testimony, and documents herein, the hearing officer found the following facts:

1. The Superior Court of the District of Columbia-Family Court ordered its to conduct a psychological evaluation of the student prior to a disposition hearing after the student plead involved on Possession with Intent to Distribute (Crack) and placed on probation. The purpose of the assessment was to assess the student's intellectual functioning and academic achievement, assess his personality functioning and provide treatment recommendations. The evaluator was a psychology extern under the supervision of a licensed clinical psychologist. The report was dated May 29, 2009 and was signed by the supervisor but not by the evaluator. The evaluator was unable to interview the mother or any DCPS school personnel. The evaluator did an interview of the student. According to the student, the report states: "...his academic performance fluctuates depending on how well he gets along with his teachers. When he was younger, he was reportedly reprimanded for fighting and throwing things. As he became older, he was in trouble for 'everything'. [Student] specifically stated that he has been in trouble for gambling, throwing his book bag, and teasing other youths. It was important to note that he has been gambling every day, making up and losing up to According to [student], he has been spending most of his school day gambling and had consequently been earning 'D's' in most of his classes. He has been expelled twice for unknown reasons." The report also stated that during the mental status exam, the student "denied experiencing depression, anxiety, paranoia, delusions, hallucinations, and other mental health problems, as well as homicidal and suicidal ideation. He did indicate that he is frequently 'mad', attributing this to people talking too much, looking at him, and stinking." The report referred to the psychiatric evaluation of May 22, 2009 that indicated the student made a plan to hang himself around the time his son was born but his mother talked him out of it. The evaluator indicated the student was very fatigued and was constantly distracted by phone interruptions from his mother during the evaluation. The evaluator stated: "Overall, due to [student's] fatigue and phone distractions, the findings the cognitive and achievement portions of this assessment are believed to be at best a low representation of [student's] abilities." The evaluator also administered a Millon Adolescent Clinical Inventory (MACI) and found he meets the criteria for 300.4 Dysthymic Disorder, along Axis I of the DSM-IV (TR), as seen by the clinically elevated Depressive Affect Clinical Syndrome Scale on the MACI. The evaluator stated: "He appears to have been depressed for most of the day for more days than not, for at least the past two years. As [student] stated, he is generally 'mad', upset by even seemingly benign things like people talking, looking at him, or emanating an odor." The evaluator recommended on academics that the school should review her

report and determine whether the student qualifies for special education services under criteria of an emotional disturbance and/or specific learning disabilities in reading and written expression. Regardless [student's] extremely low achievement scores indicate that he will need direct instruction, support, and accommodations in at least these areas. (P-4)

2. The Superior Court also ordered a psychiatric evaluation which was done on May 8, 2009 and the report written on May 22, 2009. The psychiatrist's report states: "[Student] reported a history of depression and anxiety precipitated by the upcoming birth of his son in . On he reported he became so depressed he had a plan to hang himself with an extension cord. [Student] said he told his mother about this and she talked with him and he decided not to hurt himself. He reported a history of suicidal ideation in the past when things did not go his way. This supports a history of Depressive Disorder, NOS." (P-5)
3. On October 15, 2009, DCPS convened an MDT meeting with the mother, her attorney, the student's probation officer, the special education coordinator, a regular teacher, a special education teacher, and a representative of First Home Care and the school psychologist. The purpose of the meeting was to review the independent psychological evaluation dated May 20, 2009. After sharing with the MDT team a summary of the evaluation, the school psychologist found discrepancies in the testing including not being signed by the person who actually conducted the evaluation, and one of the assessments used not appropriate because it was not comprehensive. The MDT team also reviewed the psychiatric evaluation of May 8, 2009. The MDT Notes also state the team reviewed the student's attendance summaries finding the student late to 31 periods and having 72 unexcused absences. The MDT team recommended an expedited WISC-IV evaluation to be conducted by the school psychologist on October 16, 2009 which the parent consented to. On October 28, 2009, the MDT team reconvened to review the school psychologist's evaluation. The MDT Notes state "the school reviewed the checklist for both specific learning disability and multiple disabilities and emotional disturbance. The school psychologist and the rest of the team from the school found the student eligible for services as a student with a specific learning disability...The team agreed to meet again to develop student's IEP. The tentative November 13, 2009 1:30 p.m." (P-2)
4. The DCPS school psychologist conducted a psychological assessment of the student on October 16, 2009. The psychologist's report stated that neither of the above court evaluations included a comprehensive cognitive evaluation to measure the student's reasoning, thinking and problem solving abilities. The school psychologist administered the WISC-IV assessment to the student. The test results were that the student was low average in verbal comprehension and borderline in processing speed. The

report also stated: "We should not ignore his emotional state that was scrutinized in his 05/29/09 psychological evaluation." (P-6)

5. The school psychologist testified that he recommended to the MDT team that the student be found eligible for special education services with the primary disability of a specific learning disability. The school psychologist based on his testing found the student's ability to learn was more related to his learning disability than his emotional issues. The team also recommended counseling and follow up on medications recommended by the psychiatrist. (Testimony of school psychologist)

As to issue 2 on whether DCPS provided an appropriate IEP and in consideration of the testimony, and documents herein, the hearing officer found the following facts:

1. On November 13, 2009 DCPS convened an MDT meeting with the mother, her attorney, the special education coordinator, a regular teacher, the special education teacher, a member of the critical response team, a representative of First Home Care and the school psychologist. The MDT team discussed eligibility for special education services. The MDT team found the student eligible as a student with a specific learning disability (SLD) and reviewed a draft IEP. The MDT Meeting Notes state: "The data used to draft IEP consisted of outside evaluations provided by attorney and an assessment by [redacted]. The team reviewed the student's attendance. Student has missed 165 days. The team discussed p. 4 of the draft IEP. The setting is general education, with behavioral support services. The team discussed behavioral support services for 45 minutes per week. The team discussed classroom accommodations: small group, visual cues and extended time. DCPS found the student did not qualify for transportation services." The parent's notes signed by her attorney state: "The parent objects to the IEP and the MDT Notes, consistent with the Educational Attorney's notes incorporated herein. The mother maintains that the student multihandicapped with emotional and learning disabilities. He is in need of a full time therapeutic day program for emotionally disturbed children. Under learning disability, the parent states that [the student] should have full time inclusion teacher. He should have bus transportation and wrap around services for 100 hours per month. Mother states that [student] should be in the [redacted] grade. Mother states that [student] should have bus transportation to and from school whether he is in the full time school program or the Academy within the program. The mother wishes for the services to begin immediately pending the due process hearing that will be filed."(P-2)
2. The student's IEP calls for 430 minutes a week of specialized instruction in a general education setting and 45 minutes a week of behavioral support services outside general education. The IEP also requires classroom accommodations of small group testing and extended time on subtests.

The IEP includes annual goals on reading and written expression. The IEP states under the area of concern of Emotional, Social and Behavioral Development that present level of educational performance, needs, annual goal, impact on student and baseline will be provided at a later date. (P-3) The psychologist testified he provided social and emotional goals after the MDT meeting and provided them to the school social worker. (Testimony of school psychologist) The IEP does not contain a behavior intervention plan.

3. The student is offered special education services in the course of developmental reading that is taught by a special education teacher for one hour a day. The student received a B in that class for the last advisory. The student is receiving behavioral support in the class Dynamics of Relationships. He received a D in that class for the last advisory. (P-14, Testimony of Special Education Teacher/Case Manager) He is not receiving counseling outside of the general educational setting as required by his IEP.

As to issue 3 on whether DCPS provided an appropriate placement and in consideration of the testimony, and documents herein, the hearing officer found the following facts:

1. The student has been attending \_\_\_\_\_ This school year he has been placed in their Academy program which also started this school year. The Academy is located in a separate wing of \_\_\_\_\_ School. The Academy was set up for students who are older than their grade some over eighteen years of age and have fallen far behind their peers. The Academy has smaller class settings of fifteen students or less in five classes with currently seventy to eighty students. The regular \_\_\_\_\_ class size is between twenty to thirty students. (Testimony of Special Education Teacher/Case Manager)
2. The student's attendance record from August 17<sup>th</sup> 2009 to January 29<sup>th</sup> 2010 states he was present 42.5 days out of 88 school days. He had frequent absences in his classes. (P-12)
3. The student's report card shows he received all Fs in the 2008-2009 School Year. This school year he received an F in English II; D in Dynamics of Relationships; B in Developmental Reading; C in Computer Applications and an Incomplete in Biology. (P-14) He also dropped several courses in November 2009, including Biology IA, Art Intro, Geo A, Spanish IA, and Word IIA. (P-12)

## **CONCLUSIONS of LAW**

The hearing in this matter was convened under *IDEIA 2004* implementing regulation 34 CFR 300.507(a). District of Columbia Municipal Regulation 5 DCMR 3030.3 placed the burden of proof upon the petitioner/parent in this matter, and that burden was by preponderance.

As to issue 1 on eligibility, counsel for the parent has failed to meet his burden of proof that DCPS denied a FAPE in not finding the student eligible as emotionally disturbed as well as with a specific learning disability. The court ordered evaluations do not have factual information that his diagnosis of Dysthymic Disorder or Depressive Disorder adversely affected his educational performance. The "adverse affect on education performance" is a critical element in determining if the student meets the IDEA criteria for emotional disturbance. *34 C.F.R. Section 300.8 (4)(i)* The court ordered psychological evaluation did not include any interviews with school personnel or an interview of the mother, or a review of school records. The purpose of the court ordered evaluations was not to determine eligibility under *IDEA* for special education, but to assist the court in its disposition hearing. The court ordered psychological evaluation was also frequently filled with generalized conclusions based on students with similar profiles and not on facts of this student especially with this student denying he has any depression or anxiety and the student being the only person interviewed. The MDT team after reviewing the outside evaluations also requested their own psychological assessment on the student's cognitive abilities. It was the MDT team's conclusion that the student primary disability was a specific learning disability. As the Supreme Court noted in *Board of Educ. of Hedrick Hudson Cent. Sch. Dist. v. Rowley*, "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the [IDEA] to state and local educational agencies in cooperation with the parents or guardian of the child." 458 U.S. 176, 207 (1982) As the United States Circuit Court of Appeals for the Fourth Circuit in *Springer v. Fairfax County School Bd*, 134 F. 3d 659,664 (4<sup>th</sup> Cir. 1998) stated: "Accordingly, we have held that "[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task." *Hartmann v. Loudoun Cty.*, 118 F. 3d 996, 1000 (4<sup>th</sup> Cir. 1997) This hearing officer, following the above cited dictates of *Rowley* and *Springer*, will not second guess the professional educational judgment of the MDT team that the student was primarily eligible as a student with a learning disability. There is sufficient evidence in the record for the MDT team to conclude that the student's behavior of constant truancy, gambling and substance abuse falls more into the area of social maladjustment than emotional disturbance. The Court in *Springer* held that a student was socially maladjusted and did not meet the *IDEA* criteria for emotional disturbance. This hearing officer finds applicable to this case the Court's following reasoning in *Springer*, at 664 :

See also *In re Sequoia Union High Sch. Dist.* 1987-88 EHLR Dec. 559:133, 135 N.D. Cal. 1987) ("Socially maladjusted [is] a persistent pattern of violating societal norms with lots of truancy, substance...abuse, ie., a perpetual struggle with authority, easily frustrated, impulsive, and manipulative..") Conduct disorder is marked by a pattern of violating societal norms and 'is often associated with

...drinking, smoking, use of illegal substances, and reckless and risk-taking acts,' ...Courts and special education authorities have routinely declined, however, to equate conduct disorders or social maladjustment with serious emotional disturbance. See e.g., *A.E. v. Independent Sch. Dist. No 25*, 936 F. 2d 472, 476 (10<sup>th</sup> Cir. 1991); *Doe v. Board of Educ.* 753 F. Supp. 65, 71 n.8 ( D.Conn. 1990); *In re Morgan Hill Unified Sch. Dist.* 19 IDELR 557, 564-65 (SEA, Cal. 1992) The fact "[t]hat a child is socially maladjusted is not by itself conclusive evidence that he or she is seriously emotionally disturbed." A.E., 936 F.2d at 476. Indeed, the regulatory framework under IDEA pointedly carves out 'socially maladjusted' behavior from the definition of serious emotional disturbance. This exclusion makes perfect sense when one considers the population targeted by the statute. Teenagers, for instance, can be a wild and unruly bunch. Adolescence is almost by definition, a time of social maladjustment of many people....As one Hearing Officer explained: [I]t is not intended to be the duty of special education to force socially maladjusted children to school by residential placing them if they choose to remain truant. Programs within other political divisions, such as the Juvenile Justice system... must address this serious problem... If they do not, then Congress should act to place this duty clearly. *In re Corpus Christi*, 18 IDELR 1281, 1283 (SEA, Tex. 1992) We agree and find that the conduct at issue falls within the explicit social maladjustment exception to IDEA's coverage.

It is also significant to note that in determining the student was not emotionally disturbed, the Court in *Springer* relied on expert testimony that a diagnosis of Dysthymic Disorder is not sufficient to classify the student as emotionally disturbed. See *Springer* at 666.

As to issue 2, counsel for the parent has met his burden of proof that the IEP is not appropriate. The IEP as written required 430 minutes a week of specialized instruction and 45 minutes a week of counseling. The student's Report Card indicates that has not been implemented for this student. The one class with a special education teacher is not providing the number of minutes required by the IEP. The student is only receiving five hours a week or 300 minutes a week of specialized instruction in the developmental reading course taught by a special education teacher. There is no indication of counseling being provided outside of the regular classroom and the school's case manager testified he is receiving his counseling in the Dynamics of Relationship class. The IEP is also defective in not including current levels of functioning on social, emotional and behavioral areas and includes no social and emotional goals. While there was testimony that the school psychologist developed social and emotional goals and sent them to the social worker, there is no evidence that these goals were included into the student's current IEP or that they were implemented. Courts have held that minor discrepancies between the services provided and the services called for in the IEP do not give rise to a denial of a FAPE. The standard applied is whether the aspects of the IEP not followed were "substantial or significant" or whether the deviations from the IEP were material. *Van Duyn v. Baker School District*, 481 F. 3d 770 (9<sup>th</sup> Cir. 2007) See also *Catalan v. District of Columbia*, 47 IDELR 223 (D.DC. 2007) where not receiving all

speech and language therapy sessions did not result in denial of a FAPE. If it was only DCPS providing 300 minutes of specialized instruction of the 430 minutes in the student's IEP this case would be similar to *Catalan*. The combination, however, of not receiving all his specialized instruction, not receiving any counseling and not having any social and emotional goals in his IEP makes these shortfalls material to this hearing officer resulting in a denial of a FAPE.

As to issue 3 on the appropriateness of the DCPS placement, counsel for the parent argues the student needs a full-time private therapeutic special education program. Counsel for DCPS argues that the student at age seventeen was only found eligible for special education in October 2009 and an IEP developed on November 13, 2009. Counsel argues in her written response there "has been little opportunity to ascertain whether the current level of services will be effective in providing the student with educational benefit." Counsel for DCPS also argues that the Least Restrictive Environment (LRE) requirements of IDEA have to be considered in the student's placement.

This Circuit Court of Appeals has held that DCPS does not have to consider a private school placement when appropriate public placement options are available even if the private placement is better able to serve the child. See *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir 1991). IDEA "does not necessarily guarantee the child [with a disability] the best available education." *Holland v. District of Columbia*, 71 F. 3d 417, 419 (D.C. Cir. 1995). As the Court in *T.T. v. District of Columbia*, 2007 U.S. Dist. LEXIS 52547 ( July 23, 2007) pointed out after citing the above cases:

These established legal propositions are reflected in the District of Columbia Code, which imposes a strict order of priority for special education placement: '(1) DCPS Schools or District of Columbia public charter schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.' D.C. Code Section 38-2501 (2000) (current version at D.C. Code Section 38-2561.02© (2007) A local government meets its federal and local statutory obligations to implement a student's IEP--and thus provide a FAPE—where public placement is 'reasonably calculated to enable the child to receive educational benefits.' *Rowley*, 458 U.S. at 207 Plaintiffs have pointed to no evidence in the record contradicting the MDT's view that IEP could be implemented at , and the Court therefore concludes that placement at those public schools satisfied the statutory requirements.

This hearing officer finds significant that the student who had previously received all Fs in the previous school year, received a B in the one class-developmental reading-taught by a special education teacher and a C in computer applications. While his IEP has not been fully implemented and the student's many absences have contributed to his low grades, there has been some educational benefit shown this last advisory when his IEP was in effect. 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)* In this case based on the student's last advisory report card, DCPS has provided that program. The DCPS placement also complies with the statutory and regulatory preference for the least restrictive environment. *34 C.F.R. Section 300.114*

A hearing officer is responsible for assessing the credibility of witnesses. *Shore Regional High School Bd. of Educ. v. P.S., 381 F.3d 194 (3<sup>rd</sup> Cir. 2004)* This hearing officer gives little weight to the expert testimony of \_\_\_\_\_ for the following reasons: 1.) She did not personally meet and interview the student and only briefly talked to him on the phone; 2.) She did not conduct any evaluation of the student; 3.) When she visited the \_\_\_\_\_ placement, she did not have the student's schedule or current report card and did not see the student in class or indicate she visited his specific classes; and 4.) She is and has done paid consulting work for \_\_\_\_\_, the preferred private placement of the parent, which raises questions of her impartiality.

## **SUMMARY of the DECISION**

In consideration of the foregoing, the hearing officer makes the following

### **ORDER**

**The issues of DCPS not finding the student eligible as emotionally disturbed and not providing an appropriate placement are Dismissed.**

**On the issue of the appropriateness of the IEP, this hearing officer finds a denial of a FAPE in DCPS not fully completing the IEP on the social and emotional section and not fully implementing the IEP on providing forty-five minutes a week of counseling services and 430 minutes a week of specialized instruction. It is further ORDERED that:**

**DCPS shall convene an MDT/IEP meeting by March 5, 2010 to review and revise the IEP to include specific social and emotional goals and to ensure that his counseling services are provided outside of the general education setting. The level of his specialized instruction shall be reviewed and steps taken to ensure the full-level of specialized instruction in the IEP are delivered. The MDT/IEP meeting shall be scheduled at a mutually agreeable time through counsel for the parent.**

Dated this 17th day of February, 2010

*/s/ Seymour DuBow*

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Seymour DuBow Esq., Hearing Officer

**This is THE FINAL ADMINISTRATIVE DECISION. Appeal can be made to a court of competent jurisdiction within ninety (90) days of the issue date of this decision.**