

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parents,¹

On behalf of, Student,

Petitioner,

Date Issued: January 11, 2013

Hearing Officer: Melanie Byrd Chisholm

v.

Case No: 2012-0753

District of Columbia Public Schools,

Respondent.

Hearing Date: December 20, 2012

Room: 2004

OSSE
STUDENT HEARING OFFICE
2013 JAN 11 PM 1:26

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a [REDACTED] who is currently a 7th grade student attending School A. The student's current individualized education program (IEP) lists emotional disturbance (ED) as his primary disability and provides for him to receive twenty-seven (27) hours per week of specialized instruction outside of the general education setting, and one and one half (1.5) hours per week of behavioral support services outside of the general education environment.

On November 1, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to place the student in a program with the structure, supports and strategies needed by the student; and by failing to provide the student with the behavioral support as prescribed by his IEP. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, placement in and funding for an appropriate program.

On November 20, 2012, Respondent filed an untimely Response to the Complaint. In its Response, Respondent asserted that the student's current program/location of services is able to implement the student's IEP and is appropriate; the student's current program/location of services is able to address the student's behavioral concerns; the student is receiving services from a dedicated aide and the program provides a part-time social worker who is also available by phone as needed; the school in which the program is located employs a full-time social worker, access to a psychologist as needed, and program staff trained in various behavioral techniques; the student's

¹ Personal identification information is provided in Appendix A.

current program/location of services provides a small classroom setting, low student-teacher ratios, specialized instruction and related services; the student's current program/location of services uses various behavioral techniques to address the student's behavior; and the student has been provided with his prescribed behavioral support services.

On November 19, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on December 2, 2012, following the conclusion of the 30-day resolution period, and ends on January 15, 2013. The Hearing Officer Determination (HOD) is due on January 15, 2013.

On November 20, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on November 26, 2012. The Prehearing Order clearly outlined the issue to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

On December 13, 2012, Petitioner filed Disclosures including seven (7) exhibits and four (4) witnesses.² On December 13, 2012, Respondent filed Disclosures including one (1) exhibit and four (4) witnesses.

The due process hearing commenced at approximately 9:41 a.m.³ on December 20, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed. Petitioner's Exhibits 1-7 were admitted without objection. Respondent's Exhibit 1 was admitted without objection.

The hearing concluded at approximately 2:00 p.m. following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUES

The issues to be determined are as follows:

² A list of exhibits is attached as Appendix B. A list of witnesses who provided testimony is included in Appendix A.

³ At 9:30 a.m., the scheduled time for the hearing, Petitioner's and Respondent's counsel were present however the Petitioner was not. The hearing began after the arrival of the Petitioner.

1. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate program/location of services, specifically, a program/location of services which provides the student a heightened degree of supervision and does not allow the student opportunities to elope from the classroom?
2. Whether DCPS denied the student a FAPE by failing to implement the student's IEP by failing to provide ninety (90) minutes per week of behavioral support services beginning August 27, 2012 as prescribed in the student's IEP?

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 student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The amount of specialized instruction and the related services on the student's current IEP are appropriate for the student. (Stipulated Fact)
3. The student is dedicated to his work when motivated, has a natural aptitude for math, is eager to be able to read, has a good imagination and is beginning to demonstrate more self-control and less impulsivity. (Petitioner's Exhibit 1)
4. The student enjoys computer games, benefits from kinesthetic learning activities and needs one-on-one instruction. (Petitioner's Exhibits 1, 2 and 3)
5. The student is highly impulsive, easily frustrated, has difficulty following directions, is disrespectful, verbally aggressive and argumentative. (Petitioner's Exhibits 1 and 2; Mother's Testimony; Social Worker's Testimony)
6. The student needs a setting free from distraction and where he is able to take frequent breaks. (Petitioner's Exhibits 1 and 2; Social Worker's Testimony)
7. The student needs a program with a low student teacher ratio and frequent behavior support. (Petitioner's Exhibits 1, 2, 3 and 4; Mother's Testimony; Social Worker's Testimony)
8. Since his attendance in a Head Start program, the student has shown a propensity for walking out of the classroom. (Petitioner's Exhibits 2 and 3)
9. The student elopes from the classroom to avoid or escape academic demands and to gain attention from staff. (Petitioner's Exhibit 3; Student's Testimony)
10. To date, no strategies attempted to extinguish the student's behavior of eloping from the classroom has been successful. (Petitioner's Exhibit 3)
11. The largest impediment to the student's learning is his refusal to remain in the classroom. (Petitioner's Exhibit 3; Mother's Testimony)
12. The student's March 1, 2012 IEP Team reviewed the student's November 16, 2011 Functional Behavioral Assessment (FBA) and developed IEP goals and a behavior intervention plan (BIP) to address the student's inappropriate behaviors. (Petitioner's Exhibit 1)
13. The student's BIP includes rewards for appropriate behavior and consequences for inappropriate behavior. (Petitioner's Exhibit 1)

14. The student's BIP includes a signal for the student to use when the student feels the need to take a break from the class and change his environment. (Petitioner's Exhibit 1; Social Worker's Testimony)
15. The dedicated aide provides "hands on" support when the student needs to take breaks or walks during class time. (Social Worker's Testimony)
16. It is inappropriate for staff members are not to engage in a power struggle with the student when he feels the need to change his environment. (Petitioner's Exhibit 1)
17. The direct behavioral support services prescribed in the student's IEP are to be delivered by a social worker. (Social Worker's Testimony)
18. During the 2012-1013 school year, the social worker has met with the student individually five or six times. (Social Worker's Testimony)
19. The student has missed behavioral support services because of his refusal to attend behavioral support services and suspension days. (Mother's Testimony; Social Worker's Testimony)
20. During the 2012-2013 school year, the student has been suspended for a total of ten (10) days. (Mother's Testimony; Social Worker's Testimony)
21. During the 2012-2013 school year, the social worker was on leave twice on the scheduled day for the student's behavioral support services. (Social Worker's Testimony)
22. During the course of the 2011-2012 school year, School A has attempted multiple strategies, even one developed by the student, to address the student's inappropriate behaviors. (Social Worker's Testimony)
23. The program/location of services to which the student is assigned is a district-wide program for students with disabilities, which offers the shared support of the local school and the DCPS central office. (Petitioner's Exhibit 7)
24. The program to which the student is assigned provides instruction through self-paced, online courses in a small classroom setting. (Petitioner's Exhibit 7)
25. There are four students and two adults assigned to the student's specific classroom. In addition to the two adults assigned to the student's classroom, the student has a dedicated aide. (Mother's Testimony; Social Worker's Testimony)
26. School B is a nonpublic special education day school, located in the State of Maryland, which is approved by the District of Columbia Office of the State Superintendent of Education (OSSE) to serve District of Columbia students with disabilities. (School B Admissions Director's Testimony)
27. School B has a 12:2 student-teacher ratio. (School B Admissions Director's Testimony)

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:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; see *Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. See *N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term “free appropriate public education” means “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped.” The Court in *Rowley* stated that the Act does not require that the special education services “be sufficient to maximize each child’s potential ‘commensurate with the opportunity provided other children.’” Instead, the Act requires no more than a “basic floor of opportunity” which is met with the provision of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Id.* at 200-203. The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C.C. 1991).

Issue #1

Designing an appropriate IEP is necessary but not sufficient. The public agency must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP. See *O.O. v. District of Columbia*, 573 F. Supp. 2d 41 (D.D.C. 2008). Placement decisions must be determined individually based on each child’s abilities, unique needs and IEP, not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. See *Analysis and Comments to the Regulations*, 71 Federal Register 46540:46588 (14 August 2006); see also *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (clarifying that the LEA does not have a “main goal” which it must achieve when making a placement decision and that what is pertinent in making the placement decision will vary based upon the child’s unique and individual needs.)

“Educational placement,” as used in IDEA, means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); see also, *A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) (citing *AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)). The Comments to the Federal Regulations note that “placement” refers to points along the continuum of placement options available for a child with a disability and “location” refers to the physical surrounding, such as the classroom, in which a child with a

disability receives special education and related services. 71 Federal Register 46540:46588 (14 August 2006).

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. *Id.*

In the present matter, the student is dedicated to his work when motivated, has a natural aptitude for math, is eager to be able to read, has a good imagination and is beginning to demonstrate more self-control and less impulsivity. The student is also highly impulsive, easily frustrated and has difficulty following directions. The student's March 1, 2012 IEP and November 16, 2011 Psychological Evaluation indicate the student's need for a program with a low student teacher ratio and frequent behavior support. The Petitioner alleged that DCPS denied the student a FAPE by failing to provide the student an appropriate program/location of services, specifically, a program/location of services which provides the student a heightened degree of supervision and does not allow the student opportunities to elope from the classroom.

The program/location of services to which the student is assigned is a district-wide program for students with disabilities, which offers the shared support of the local school and the DCPS central office. The program provides instruction through self-paced, online courses in a small classroom setting. There are four students and two adults assigned to the student's specific classroom. Additionally, the student has a dedicated aide, increasing the student-teacher ratio in the student's classroom to 4:3. There was no evidence presented which suggested that the adults in the student's classroom do not supervise the student. Therefore, the Hearing Officer concludes that DCPS has provided the student with a program/location of services which provides the student a heightened degree of supervision.

Since his attendance in a Head Start program, the student has shown a propensity for walking out of the classroom. While the Petitioner alleged that the student is in need of a program/location of services which "does not allow the student opportunities to elope from the classroom," given the student's eight year history of eloping from classrooms, the "opportunity" for the student to elope is constant regardless of the program unless the student were to be placed in a locked facility. There was no evidence presented, or allegation made, that the student requires education in a locked facility. Even School B, the school proposed by Petitioner, did not offer strategies, in addition to those used by School A, for keeping a student in the classroom. In this case, it is more appropriate to determine if the adequacy of the student's program/location given the student's unique needs and his IEP.

The student's November 16, 2011 FBA focused on the analysis of the student leaving his assigned classroom without permission. The FBA noted that no strategy attempted with the student has been successful in extinguishing this behavior and concluded that the student elopes from the classroom to avoid or escape demands and to gain attention from staff. The student's

March 1, 2012 IEP Team reviewed the November 16, 2011 FBA and developed an IEP goal and strategies within a BIP to address the student's tendency to elope from the classroom. The BIP highlights that staff members are not to engage in a power struggle with the student when he feels the need to change his environment and includes a signal for the student to use when the student feels the need to take a break from class.

The student's March 1, 2012 IEP indicates that the student enjoys computer games, benefits from kinesthetic learning activities, needs one-on-one instruction and exhibits behaviors which impacts his ability to master material in a whole class or small group setting. Likewise, the student's March 1, 2012 indicates that the student needs a setting free from distraction and where he is able to take frequent breaks. The program/location of services to which the student is assigned addresses these needs. The program is computer based, offers individualized instruction, has a 4:3 student-teacher ratio and allows the student to work at his own pace. Additionally, DCPS has provided the student with dedicated aide to provide "hands on" support when the student needs to take breaks or walks during class time. During the course of the 2011-2012 school year, School A has also attempted other positive behavioral supports, even one developed by the student, to address the student's inappropriate behaviors.

Under *Rowley*, the factual showing required to establish that a student received some educational benefit is not demanding. A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. *Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist.*, No. 196 (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450.

The Hearing Officer concludes that although the student has not mastered his IEP goal which includes requesting a pass to take space, DCPS offered the student an educational program/location of services which is designed to meet the student's unique needs, comports with the student's IEP, and is reasonably calculated to provide the student with some educational benefit in the least restrictive environment. While the student's mother testified that she does not believe that the student is making progress in his academics or with his behavior, the Petitioner did not present the requisite evidence to support the contention that the student is not making progress in his assigned program. While the student continues to exhibit inappropriate behaviors, the student is classified as a student with an emotional disturbance based on his significant history of behavioral and mental health issues.

The Petitioner did not meet its burden with respect to Issue #1.

Issue #2

The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. A material failure to implement a

student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

In failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. *E.g., S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), the Fifth Circuit held that “to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant provisions of the IEP.” *Id.* at 349; *see also Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (“[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.”). “[C]ourts applying [this] standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on “whether the IEP services that were provided actually conferred an educational benefit.” *Bobby R.*, 200 F.3d at 349, n. 2. Failure to provide the services must deprive the student of educational benefit. *See Savoy v. District of Columbia*, 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012).

In the present matter, it is uncontested that the student is in need of behavioral support services. The student has difficulty following directions, is disrespectful, verbally aggressive and argumentative. The student is also dedicated to his work when he is motivated and is eager to learn to read. When the student exhibits inappropriate behaviors, the student loses instructional time and is thus deprived of educational benefit. The largest impediment to the student's learning is his refusal to remain in the classroom which serves to relieve the anxiety associated with his academic skills deficits and his need for attention from staff members. The student's March 1, 2012 IEP prescribes, *inter alia*, one and one half (1.5) hours per week of behavioral support services.

The student testified that during the 2012-2013 school year, he has not met with the social worker consistently. The student explained that he does not have a specific time each week scheduled to meet with the social worker and that the social worker is not consistently at the school at times when he is frustrated. The social worker testified that she observes the student in the classroom and assists the student's teacher when necessary. The social worker also testified that she has met with the student individually five or six times since the beginning of the school year. She explained that she has not provided individual behavioral support during the remaining weeks because at her scheduled time to meet with the student, the student has been suspended from school or refused to meet with the social worker. The social worker indicated that she has been on leave twice during the student's scheduled time.

The student has a dedicated aide to assist with his inappropriate behaviors but the direct behavioral support services prescribed in the student's IEP are to be delivered by a social worker. The social worker is charged with providing the student with support to address his anxiety and

need for attention as well as addressing the student's emotional/social/behavioral IEP goals and the strategies in the student's BIP.

The Hearing Officer concludes that the failure of DCPS to provide behavioral support services to the student for 11 of 17 weeks of school from the beginning of the 2012-2013 school year through the date of the due process hearing, is more than a de minimis failure to implement all elements of his IEP. Instead, the failure is a material failure, in that significant provisions of the student's March 1, 2012 IEP were not implemented and deprived the student of educational benefit.

Where a student does not avail himself of the benefits of his IEP because he is frequently absent from classes, a local education agency cannot be found to deny FAPE to the student. *Nguyen v. District of Columbia* 681 F.Supp.2d 49, 54 IDELR 18 (D.D.C. February 1, 2010). While the Hearing Officer acknowledges that the student, at times, refused to avail himself to behavioral support services, this obstinate behavior is a fundamental element of the basis for the student's need for behavioral support services. Additionally, at times the behavioral support services missed by the student were during days of suspension. These suspensions were for behavior the behavioral support services are meant to address. The specific facts of this case do not alleviate DCPS from its obligation to provide the student with behavioral support services even though the student may not have been available on the day the social worker scheduled to see the student.

The Petitioner has met its burden with respect to Issue #2.

Relief

The Petitioner met its burden of proving that DCPS denied the student a FAPE by failing to implement the student's March 1, 2012 IEP, specifically the behavioral support services prescribed by the IEP. If an IDEA violation results in denial of a FAPE, a district court has discretion to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005).

In the present matter, the Petitioner only requested, as relief, placement in and funding for School B. The Hearing Officer concludes that this remedy is inappropriate for DCPS' failure to provide behavioral support services one and one half (1.5) hours per week for 11 weeks during the 2012-2013 school year. However, when an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. See also *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

In crafting the remedy, the Hearing Officer must engage in a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student's unique needs. *Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland*, 555 F. Supp. 2d 130, 50 IDELR 134 (D.D.C. 2008) (quoting *Reid*, 401 F.3d 524). The failure of DCPS to provide the student with the behavioral support services prescribed on his IEP represents a failure larger than missed hours with the social worker. The student's behavioral support services are in place to assist the student with support needed to manage his behavior in order to access instruction in the classroom. The largest impediment to the student's learning is his behavior and neglecting the student's need for behavior support affects his ability to improve his academic skills which, in turn, exacerbates the student's behaviors.

ORDER

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

1. DCPS provide the student with twenty-two (22) hours of one-on-one tutoring, at a rate not to exceed \$65.00 per hour, to be completed by August 23, 2013.
2. All other relief sought by Petitioner herein is **denied**.

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: January 11, 2013


Hearing Officer