

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, ¹)	
Through Student,)	Room: 2006
)	HOD Due Date: December 22, 2015
Petitioner,)	Date Issued: December 22, 2015
)	Case No.: 2015-0332
v.)	Hearing Date: December 4, 2015
)	Hearing Officer: Michael Lazan
)	
District of Columbia Public Schools,)	
)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a [REDACTED]-year old student (“the Student”) who is currently eligible for services as a student with Emotional Disturbance.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on October 8, 2015. On October 20, 2015, Respondent filed a response. A resolution meeting was held on October 23, 2015. The resolution period expired on November 7, 2015.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C.

¹Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On November 12, 2015, a prehearing conference was held. Emily Maloney, Esq., counsel for Petitioner, appeared. Lynette Collins, Esq., counsel for Respondent, appeared. A prehearing conference order issued on November 16, 2015 summarizing the rules to be applied in this hearing and identifying the issues in the case.

On December 4, 2015, the hearing was held. This was a closed proceeding. Petitioner was represented by Emily Maloney, Esq. Respondent was represented by Maya Washington, Esq. Petitioner moved into evidence Exhibits 1-40. Respondent objected to Exhibit 40 on the five-day business rule. This objection was sustained. Exhibits 1-39 were admitted. Respondent moved into evidence Exhibits 1-6. There were no objections. Exhibits 1-6 were admitted.

Petitioner presented as witnesses: Petitioner; Witness A, a therapist; Witness B, Program Director, School B; Witness C, an Evaluator (expert: School and Clinical Psychology); and Witness D, an Advocate (expert: special education programming and placement). Respondent presented no witnesses. The parties presented closing statements at the end of the testimony and evidence. Petitioner sent a supplemental email with a case citation on December 7, 2015.

IV. Credibility

I found the testimony of all witnesses to be credible in this proceeding. All witnesses presented testimony with reasonable candor, and there were no material

inconsistencies established in connection to any witness. Further, no witness was impeached in any meaningful way.

V. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined are as follows:

1. Did DCPS fail to recommend reasonably calculated educational services in the IEP from the meeting in April, 2015? If so, did DCPS act in contravention of the IDEA, specifically 34 CFR Sect. 300.320, 34 CFR Sect. 300.324, and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the student a FAPE?

Petitioner contends that, as of the date of the April 2015 meeting, DCPS was on notice that the student required a therapeutic non-public day school setting, because, *inter alia*, by the April IEP meeting date, DCPS was aware of the student's deteriorating mental health condition, her history of poor academic achievement at School A, her difficulty attending classes caused by her mental health condition, and the parent's stated concerns that the current setting was inappropriate.

2. Did DCPS fail to revise its IEP for the Student, pursuant to 34 CFR Sect. 300.324, after receiving notice prior to start of the 2015-2016 school year of the Student's ongoing emotional and social issues, as well as recommendations for an alternative placement from the student's healthcare providers? If so, did DCPS deny the Student a FAPE?

As relief, the Petitioner is seeking placement in a non-public, therapeutic day school, School B in Laurel, Maryland. She is also seeking compensatory education.

At the prehearing conference DCPS's position was that a Behavior Intervention Plan was written to address the Student's attendance issues, and that the current school, School A, could address her needs. At the hearing, DCPS offered to provide Petitioner all the services that she was seeking at the hearing, including the tuition at School B and the full compensatory education package that was requested in the compensatory education plan.

VI. Findings of Fact

1. The Student is a [REDACTED]-year old who is eligible for services as a student with Emotional Disturbance. She is currently diagnosed with Anxiety Disorder, Mood Disorder, Attention Deficit Hyperactivity Disorder (ADHD), and Bipolar Disorder.

(Testimony of Petitioner)

2. For the first half of the 2014-2015 school year, the Student attended a large public high school, School A. She was placed in special education classes in accord with a "full-time" IEP requiring 27 hours of specialized instruction outside general education. She did not fare especially well at School A during this time. In math, she was excessively absent, though she was prepared when she was present. In reading, she functioned at the 5th grade level, had difficulty with decoding and was excessively absent. In writing, she functioned at the third grade level and needed help to put together a simple paragraph. (Testimony of Witness C; P-1-4-5; P-7-10; P-9-2, P-10-2; R-1)

3. During this time, the Student's grades at School A were mixed. For the first two terms of 2014-2015, the Student failed Health. She failed World History in the second term. Other grades ranged from B+ (Algebra I, first term) to D (English I, first

term, and Art and Culture, second term). Her IEP progress reports showed no progress in *any* academic area for the first reporting period. Though progress was reported for the second reporting period, no details were in the reports although the form calls for “comments.” (Testimony of Witness C; P-1-4-; P-7-10; P-9-2, P-10-2; R-1)

4. On or about the start of the 2015 calendar year, the Student ingested a form of synthetic marijuana. This triggered a series of psychotic episodes which occurred while the Student was not under the influence of the substance. She began to demonstrate acute symptoms of Bipolar Disorder such as decreased need for sleep, little to no appetite, and paranoid and/or actively psychotic behavior. She displayed suicidal tendencies and attempted self-harm. Large settings, in particular, were a trigger for her. (Testimony of Petitioner; Testimony of Witness A)

5. As a result of her psychiatric issues, she was admitted to a hospital in January, 2015. Then again in February, 2015, she was admitted to a hospital for psychiatric issues. This was Hospital A. She stayed at Hospital A through March, 2015, during which time she experienced severe symptoms such as being afraid of food because she thought it was poisonous, and being afraid to sleep because she thought something might happen to her during the night. She was discharged from Hospital A on March 26, 2015. (P-17-1; Testimony of Petitioner)

6. Thereafter, she returned to School A, only to again experience psychotic episodes and to again have difficulty with behavior. She was not ingesting synthetic marijuana or any such substance at this time. (Testimony of Petitioner)

7. On April 20, 2015, a Behavior Intervention Plan was written for the Student. It provided for interventions such as 1:1 assistance, positive verbal and non-

verbal affirmations, opportunities to express her feelings, calm and nurturing verbal correction, breaks, incremental workload, assignments based on the Student's interest, rewarding the Student with positive communication, providing the opportunity to share emotional concerns, daily assessment of behavior, and ongoing data collection to monitor progress. The plan did not directly address the Student's attendance issues and did not touch upon the Student's psychotic episodes. (R-3-1-2)

8. On April 23, 2015, the parent received a call from the school that the Student was "hearing voices" that she should kill herself. The parent rushed to the school and took the Student back to Hospital A. (Testimony of Petitioner)

9. An IEP meeting was held for the Student on April 27, 2015. The meeting was held while the Student was still at Hospital A. At the meeting, there was a discussion of the Student's excessive absences. The Student's hospitalizations were discussed, and the parent expressed concern that School A was not the right placement for the Student in view of her mental issues. (P-19-1-3)

10. The Student's IEP dated April 30, 2014 provides for the same hours of specialized instruction per week as the prior IEP. No additional interventions were recommended in regard to the Student's program except that behavioral support hours were increased sixty minutes a month on a consult basis. (P-7-8, 10)

11. The Student was again discharged from Hospital A on May 8, 2015, and was put on five different medications. At this time, DCPS found that the Student could not attend classes for a full school day in view of her mental health. As a result, DCPS changed the Student's schedule and required that she finish her school day by 12:30pm. (Testimony of Petitioner; P-16-1)

12. There was no improvement in the Student's behavior after the development of the BIP. The Student was absent from at least one class almost every single day for the rest of the school year. At this time, the Student was very depressed and irritable and continued to cut herself. (P-8-4-5; Testimony of Petitioner; Testimony of Witness D)

13. A medical examination on June 3, 2015 found that the Student had Bipolar Disorder MSE with mixed severe psychotic features. The physician found that the Student had severe anxiety and suicidal ideation. The physician recommended home schooling until the student attend a full-time hospital/homebound program with small class size and behavior modification supports. He indicated that the Student's anxiety and mood instability triggered "flight responses" which affecting her ability to remain in the classroom. Again, five different medications were prescribed. (P-12-1, 4-6)

14. For the year, the Student received F grades in General Music, Physical Education, Health Education, World History, Extended Literacy II, and Environmental Science. (P-11-1)

15. The Student was again hospitalized in the summer, 2015 because of psychiatric issues. (Testimony of Petitioner)

16. The Student was again assigned to School A for the 2015-2016 school year. The Student has not attended school for this year. Petitioner sought home instruction from DCPS, but home instruction was not provided because the student was not confined to her home or to a hospital. (Testimony of Petitioner; P-14-1)

17. The Student has been accepted into School B, which provides a therapeutic setting with small class size and at-risk behavioral support staff such as

licensed counselors, speech and language pathologists, occupational therapists, and career and transition staff. The cost of the school is approximately \$35,000 to \$40,000.

(Testimony of Witness B)

18. After the filing of the Due Process Complaint, the Student was evaluated in October-November, 2015 by Witness D. She was found her to have a Full Scale IQ of 79, in the low range. In academic testing (on the Woodcock-Johnson III Tests of Achievement) she scored at the 6.7 grade level equivalent in broad reading, the 8.1 grade level equivalent in broad math, and the 7.6 grade level equivalent in broad written language. (P-1)

VII. 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 burden of proof in a special education due process hearing lies with the party seeking relief. 5-E DCMR 3030.3; Shaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to

benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

1. Did DCPS fail to recommend reasonably calculated educational services in the IEP from the meeting in April, 2015? If so, did DCPS act in contravention of the IDEA, specifically 34 CFR Sect. 300.320, 34 CFR Sect. 300.324, and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the student a FAPE?

The role of the hearing officer is to determine if the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive additional benefits. Gellert v. District of Columbia Public Schools, 435 F.Supp.2d 18, 22 (D.D.C. 2006). The IEP should be both comprehensive and specific and targeted to the Student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533, D.C. Cir. 1985); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B) (the IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv)(the IEP must address the academic, developmental, and functional needs of the child).

The inability to attend school is such a "unique need." As recently stated in a well-reasoned decision:

Under the IDEA, "the door of public education must be opened for a disabled child in a 'meaningful' way." Walczak v. Florida

Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir.1998) (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 192, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). The government must find ways to open the school house doors, by helping children who suffer from emotional problems to attend school. The record shows that during her time in the public school system, L.F. struggled to attend LaGuardia High School. She was absent from school for weeks at a time, and in her last months in the public school system (between September 2007 and January 2008) was unable to attend at all.

M.M. v. New York City Dept. of Educ., 26 F.Supp.3d 249, 256 (S.D.N.Y. 2014); see also Springfield School Committee v. Doe, 623 F.Supp.2d 150 (D. Mass 2009)(“behavior management services” fall within the scope of IDEA); cf. R.B. v. Mastery Charter School, 762 F. Supp.2d 745 (E.D. Pa 2010)(District had duty to respond to absences through educational intervention).

Here, the Student had special education needs as a result of disturbing psychotic episodes that included self-mutilation, extreme paranoia and suicidal ideation. While the Student was attending School A, she was hospitalized for such episodes three different times in a five-month time span. Indeed, the Student was in a hospital because of psychiatric issues at the very time that the April, 2015 IEP was drafted.

Though initially triggered by the ingestion of synthetic marijuana, the record reveals that the Student’s assignment to a large public high school contributed to the Student’s psychotic episodes. The record shows that the Student could not handle the stressors and stimuli in a large public high school setting and required more intensive supervision than had been offered prior to the April, 2015 IEP. In particular, the record indicates that the Student needed services and a reasonable plan to address her psychotic episodes and attendance issues. The parent, in fact, had to rush to school only a week

before the IEP meeting because her child was “hearing voices” at school that told her to kill herself.

Nevertheless, the IEP team did not make any significant changes to the Student’s IEP in April, 2015. Though the Student’s psychiatric and attendance-related needs were discussed at the IEP meeting, the IEP did not address the Student’s psychotic episodes or attendance issues. The District did create a Behavior Intervention Plan for the Student, but a review of the plan reveals that it does not provide any meaningful detail about the Student’s emotional issues and does not address the Student’s attendance issues. The District did add sixty minutes per month of “behavioral consult services” to its IEP, but I find that the Student’s severe problems required programmatic changes going well beyond a mere fifteen additional minutes a week of behavioral support.

It is noted that DCPS in effect conceded the inappropriateness of the IEP when implementing it. After the Student returned to school in May, 2015 after her time at Hospital A, DCPS required that the Student only attend school through 12:30pm. The record makes clear that DCPS was wary that a full day of education at School A would trigger the same kind of psychotic episodes that occurred only a few weeks earlier. This conclusion is completely at odds with the conclusion of the IEP team, which recommended twenty-seven hours of specialized instruction outside general education.

I find that, by failing to make meaningful changes to the Student’s IEP and program, DCPS denied the Student educational benefit through its IEP from April, 2015. As a result, DCPS denied the Student a FAPE.

2. Did DCPS fail to revise its IEP for the Student, pursuant to 34 CFR Sect. 300.324, after receiving notice prior to start of the 2015-2016 school year of the Student’s ongoing emotional and social issues, as well as recommendations for an

alternative placement from the student's healthcare providers? If so, did DCPS deny the Student a FAPE?

34 CFR Sect. 300.324(b)(1)(ii) provides that a school district must revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals, the results of any reevaluation, information about the child provided to, or by, the parents, the child's anticipated needs, other matters. Districts do have a duty to revise IEPs as appropriate. Kevin T. v. Elmhurst Comm. Sch. Dist. No. 205, 36 IDELR 153 (N.D. Ill. 2002)

By the start of the 2015-2016 school year, DCPS had more information that the Student required a more restrictive, intensive program. A medical report by a physician reviewed the Student's profile and specifically recommended that the Student attend a placement with small class size, behavior modification techniques, and a therapeutic setting. Moreover, during the summer, 2015, the Student was again hospitalized because of psychiatric issues. Finally, the Student failed many of her classes for the 2014-2015 school year, when her attendance was poor (even when she was not unable to attend because she was confined to a psychiatric hospital).

Notwithstanding the above, DCPS failed to convene the IEP team or make any meaningful changes to the Student's educational program. There continued to be no meaningful strategy to address the Student's psychotic episodes or attendance issues. The result is that the Student has failed to attend any school for the entirety of the 2015-2016 school year. Compounding this problem, DCPS has refused to provide any home instruction for the Student, who has received no education from DCPS since the start of the school year.

I find that, by failing to revise the Student's IEP and program by the start of the 2015-2016 school year, DCPS denied the Student educational benefit. As a result, DCPS denied the Student a FAPE.

REMEDY

When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated:

The statute directs the court to “grant such relief as [it] determines is appropriate.” The ordinary meaning of these words confer broad discretion on the court. The type of relief is not further specified, except that it must be “appropriate.” Absent other reference, the only possible interpretation is that the relief is to be “appropriate” in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with “a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.

School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that “(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school.” Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief “must be tailored” to meet a student’s “unique needs.” Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider “all relevant factors” including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private

school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

The District presented no alternative to School B, the school proposed by Petitioner. On the contrary, DCPS has agreed to fund the Student's attendance at School B for the 2015-2016 school year. The record supports this decision. The Student is in need of a "therapeutic" placement that is more intensive and supportive than the Student's current location of services, School A. The school has small class sizes and "at-risk" counseling support whenever the Student needs it. The school has related services that will also support the Student. The Student has been accepted at the school, and DCPS did not call any witnesses to rebut the testimony of Petitioner's witnesses that School B is an appropriate placement for her. Moreover, DCPS did not argue during closing argument that School B is inappropriate. No issue raised in terms of cost. Finally, there is no issue here in regard to whether this school would provide the Student with an education in the least restrictive environment. While the mandate for a Least Restrictive Environment ("LRE") is an important one, it does not trump a student's right to a FAPE. Maintaining a less restrictive placement at the expense of educational benefit or safety is not appropriate or required. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996 (4th Cir. 1997); see also Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396 (9th Cir. 1994); MR v. Lincolnwood Bd. of Educ., 843 F. Supp. 1236 (N.D. Ill 1994). Moreover, a parental placement need not be the least restrictive environment for a Student. N.T. v. District of Columbia, 839 F. Supp.2d 29 n.3 (D.D.C. 2012). Under the circumstances, I will order that the Student attend School B for the remainder of the 2015-2016 school year.

Petitioner also seeks compensatory education. One of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, 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. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner's compensatory education plan requests a) eighty hours a week of specialized tutoring; b) thirty hours of counseling; and c) fifty hours of mentoring. The request is supported by a written plan and the testimony of Witness D, an expert in special education programming and placement. The plan specifically applies the standards in Reid. The total amount of hours requested by the plan are considerably less

that the total hours of instruction that the Student missed in the 2015 calendar year. There is a request for counseling and mentoring in the plan, but in view of the Student's significant difficulties with emotional issues, this request is reasonable. Indeed, DCPS has agreed to provide the counseling and mentoring that is being requested by Petitioner. Under the circumstances, Petitioner's request for compensatory education must be granted in all respects.

VIII. Relief

As a result of the foregoing, Respondent is hereby ordered:

1. The Student shall be placed by DCPS in School B for the 2015-2016 school year;
2. The Student's IEP shall be amended to reflect the program at School B;
3. The Student shall receive funding by DCPS for: a) eighty hours a week of specialized tutoring instruction; b) thirty hours of counseling; and c) fifty hours of mentoring. Services shall be provided by a qualified provider at a rate that is usual and customary in the community.

Dated: December 22, 2015

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Emily Maloney, Esq.
Maya Washington, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov
Chief Hearing Officer

IX. Notice of Appeal Rights

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: December 22, 2015

Michael Lazan
Impartial Hearing Officer