

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
1050 First Street, N.E., Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

OSSE
Office of Dispute Resolution
June 05, 2018

Parent, through Student,¹)	
Petitioner,)	Room: 112
)	Hearing: May 21, 22, 2018
v.)	Hearing Officer: Michael Lazan
)	Case No.: 2018-0069
DCPS,)	Issue Date: June 5, 2018
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case brought by the Petitioner, who is the parent of the student (the “Student”). 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 March 12, 2018. A response was filed by Respondent on March 22, 2018. The resolution period ended on April 11, 2018.

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 Education Improvement Act (“IDEIA” or “IDEA”), 20 U.S.C. 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

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

On April 18, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, counsel for Respondent, appeared. A prehearing conference order was issued on April 23, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case.

There were two hearing dates: May 21, 2018, and May 22, 2018. These were closed proceedings. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-40. There were no objections. Exhibits 1-40 were admitted. Respondent moved into evidence Exhibits 1-3 and 5-52. There were no objections. Exhibits 1-3 and 5-52 were admitted. Petitioner presented as witnesses: Witness A, a psychologist; Witness B, a psychiatrist; Witness C, a social worker; and Petitioner. Respondent presented as witnesses: Witness D, a psychologist; Witness E, a social worker; and Witness F, a psychologist. Both sides provided written briefs. Petitioner's written brief was received on May 31, 2018. Respondent's written brief was received on June 1, 2018.

IV. Credibility.

The witnesses for both sides were credible. Especially credible were the psychologist for Petitioner, Witness A, whose testimony was precise, thorough, and believable, and the social worker for Respondent, Witness E, whose testimony reflected a particularly sincere interest in the Student.

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 assess the Student in all areas of suspected disability from spring, 2016, to date? If so, did DCPS violate 28 U.S.C. Sect.1414(b)(3), 34 C.F.R. Sect.300.304(c), and related provisions? If so, did DCPS deny the Student a Free and Appropriate Public Education (“FAPE”)?

Petitioner contended that DCPS should have conducted more assessments, including a psychological evaluation of the Student.

2. Did DCPS fail to provide the Student with an appropriate Individualized Education Program (“IEP”) and corresponding placement/location of services from spring, 2016, to date? If so, did DCPS act in contravention of 34 CFR 300.320, Endrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

As relief, Petitioner is seeking a therapeutic, non-public placement at School C.

VI. Findings of Fact

1. The Student is an X-year-old who was recently determined to be a Student with Emotional Disturbance. The Student was exposed to drugs and alcohol *in utero* and subjected to early childhood trauma. The Student was diagnosed with Post-Traumatic Stress Disorder; Generalized Anxiety Disorder; Attention Deficit Disorder, Combined type; Attachment Disorder; and Mood Disorder NOS. The Student has engaged in recklessness, avoidance, and “cutting.” The Student has had nightmares and suicidal ideations with an intent to act, and recently tried to commit suicide. The Student does not demonstrate sufficient insight and self-control, and has difficulty bonding. The Student requires medications to keep safe. The Student is currently at a high risk for suicide.

(Testimony of Witness A; Testimony of Witness B; Testimony of Witness C; Testimony of Petitioner)

2. The Student requires a setting with access to well-qualified mental health professionals throughout the day, and teachers who can recognize clinical signs of emotional distress and who will not react to the Student in a pejorative way. The Student also requires a behavior plan throughout the day and a predictable environment with a limited amount of children who are reasonably well-behaved and will not engage in bullying. (Testimony of Witness A; Testimony of Witness B; Testimony of Petitioner)

3. During elementary school, the Student was not eligible for services, but had issues with distraction. The Student would leave the classroom and have social problems with other children. For the 2015-2016 school year, the Student attended School A. At that time, Petitioner did not seek to get the Student evaluated and instead took the Student to a pediatrician. At the time, the Student was “wandering the halls” and was tardy to class approximately thirty-one times. Additionally, the Student went into the bathroom for lengthy periods of time. On April 12, 2016, the Student’s homeroom teacher wrote an email to Petitioner indicating that the Student had been distracted, frustrated, and inattentive in class. (Testimony of Petitioner; P-2-3)

4. For the 2016-2017 school year, the Student continued to attend School A. On October 17, 2016, a teacher from School A sent Petitioner an email indicating that the Student was off-task, distracted, not taking notes, and not doing work. Petitioner sent an email back to the teacher indicating that she wanted to have the Student evaluated for special education services. The teacher then advised Petitioner on the appropriate individuals to contact at the school for an evaluation. On October 18, 2016, Petitioner

sent an email to the school indicating that she wanted the Student to be evaluated, suggesting that the Student had a learning disability and also indicating that the Student had difficulty concentrating. Petitioner sought again to have the Student evaluated through a lengthy correspondence dated October 28, 2016, which requested an evaluation pursuant to the IDEA and also Section 504 of the Rehabilitation Act of 1973. This correspondence focused on the Student's perceived issues with reading, writing, and math, but also flagged the Student's perceived social, emotional, and attentional issues. (Testimony of Petitioner; P-4)

5. DCPS responded by requesting assessment data, medical data, and formal reports and documentation that might support the contention that the Student might have a learning disability. DCPS reviewed the Student's "i-Ready" testing data and typed up a report based on formative assessments. A social worker reviewed the Student's social and emotional issues. A meeting was held on October 31, 2016, with Petitioner and representatives from DCPS, including the assistant principal of School A. Also on October 31, 2016, DCPS sent Petitioner a letter indicating that, in some cases, there may not be enough evidence to conduct an evaluation. Also on the same date, DCPS sent Petitioner a "Prior Written Notice" and an "Analysis of Existing Data," both indicating that DCPS had reviewed the Student's existing data, that the Student was at or near grade level in both reading and math, and that the Student's grades were relatively good. As a result, it would not be conducting any further evaluation. (R-1; R-2; R-3; R-4; R-5; R-6; P-7; Testimony of Witness D; Testimony of Petitioner)

6. On November 17, 2016, a "Section 504 Plan" was written for the Student. This plan provided the Student with accommodations including: prompts to begin

assignments; prompts to stay focused; breaking down instructions; use of a fidget; checks for understanding; targeted praise; access to snacks; structured time check-ins; extended time; and frequent breaks. (P-8-3-5)

7. In or about spring, 2017, the Student had difficulties with peers, some of whom called the Student inappropriate names. On April 27, 2017, the Student wrote a letter suggesting suicide, connected to the bullying at the school. (P-11-1; P-11-9)

8. Also on April 27, 2017, the Student's math teacher wrote Petitioner an email expressing concern that the Student was skipping class and spending a lot of time in the hallway. This teacher sent additional emails to Petitioner over the next several days, expressing similar concerns, including the Student's disruptive behavior in class. (P-11-7)

9. The Student's final report card for the 2016-2017 school year reflected B and A grades, but also indicated that the Student was tardy 130 times during the year. (P-12)

10. The Student started the 2017-2018 school year at School A, and immediately had issues with both peers and teachers. As a result, the Student began to have three individual therapy sessions per week with Witness C. These sessions were provided outside of school. (Testimony of Witness C; Testimony of Petitioner)

11. The Section 504 plan was revised on September 6, 2017, to address escalating behavioral concerns, including the Student's depression and anxiety. The Student was given a "flash pass" to a designated safe space, such as a counselor's office, when the Student felt overwhelmed. Teachers were told to communicate with Petitioner when the Student missed a class. The Student was allowed to contact the therapist from

the counselor's office at school, and the Student was encouraged to join an organizational group after school to help keep up with the assignments. The Student was also recommended for "chunking," prompts to begin assignments and stay focused, check-ins, targeted praise, access to snacks, structured time check-ins, extended time, adjustments to homework assignments so that the Student would receive the homework at the start of the week, and "mindfulness" intervention. (P-14)

12. In or about September 26, 2017, Petitioner again asked DCPS for an evaluation pursuant to the IDEA. (P-15-10)

13. The Student was subjected to a sexual assault at School A during this time, though this was not reported to the school until later. The Student was hospitalized for mood stabilization and depression in October, 2017, at Hospital A. The Student was discharged and went into a "partial" hospitalization program for three weeks, where the Student received group therapy, individual therapy, and psychiatric care. (Testimony of Witness B)

14. DCPS then sought an "AED" meeting with Petitioner to review the Student's existing data, which occurred on November 14, 2017. At this meeting, Petitioner discussed the Student's recent hospitalization. DCPS agreed that the Student needed to be tested and recommended a comprehensive psychological evaluation, a speech and language evaluation, and a Functional Behavior Assessment. (P-16-7; P-19; P-20-1)

15. On November 29, 2017, DCPS sent Petitioner a document entitled "Prior Written Notice – Proceed with Evaluation Process," which listed dates and times for

assessments in regard to psycho-educational issues and speech and language issues.

DCPS also sent Petitioner a consent form regarding the evaluation. (R-15)

16. On December 4, 2017, Petitioner indicated that she wanted to conduct the assessment through her own evaluator and would forward the evaluation to DCPS when it was complete. Petitioner also indicated that if additional testing was needed, “we’re happy to make arrangements for that.” On December 20, 2017, DCPS sent Petitioner a document entitled “Prior Written Notice – Do Not Proceed With Evaluation Process (Parent Refusal or Non-response),” informing Petitioner that after she provided the IEP team at School A with the external evaluations, they would reopen the Student’s eligibility and review the evaluations. (R-18)

17. In or about November-December, 2017, Witness A conducted a thorough evaluation of the Student, consisting of fourteen different tests, plus interviews with the Student and mother, and consultations with three mental health professionals. The Student was found to have average to high average intelligence, with a significant weakness in working memory. The Student was found to have executive functioning issues and issues with reading rate, comprehension, and fluency. The Student was also tested by the Student’s science and math teacher on the Connor’s Comprehensive Rating Scale, which reports on social and emotional issues. On this scale, the Student was considered to be “clinically significant” in every tested area except physical symptoms. Other testing found the Student to be tense, restless, anxious, and given to panic. This evaluation also identified that the Student had been sexually assaulted at School A in or about October, 2017. Witness A recommended that the Student receive a “therapeutic

placement” because the Student needs access to mental health professionals and cannot be placed with aggressive or disruptive students. (P-22; Testimony of Witness A)

18. After learning about the sexual abuse at School A, Petitioner sought a safety transfer, and DCPS agreed. The Student was then placed at School B, in or about January, 2018. (Testimony of Petitioner)

19. At School B, the Student frequently met with Witness E, the school social worker. Witness E is the only social worker at this school, which contains approximately 400 students. (Testimony of Witness E)

20. During the Student’s meetings with Witness E, the Student indicated a reluctance to go to class. The Student expressed being anxious, sometimes “in the moment” and sometimes regarding issues at home. (Testimony of Witness E; R-22)

21. On January 19, 2018, Petitioner sent Witness A’s report to the principal of School B. (R-19)

22. On January 31, 2018, DCPS sent Petitioner a document indicating that the Local Education Agency (“LEA”) received an initial referral for special education on January 19, 2018. (R-20)

23. On March 13, 2018, after observing the Student, reviewing Witness A’s evaluation, and assessing additional testing and report cards, DCPS conducted an eligibility meeting on behalf of the Student. At this meeting, DCPS proposed that the Student be deemed eligible for services as a Student with Other Health Impairment. Additionally, Petitioner signed a consent form for the Student to be evaluated by DCPS staff. However, Petitioner did not agree with the proposed eligibility classification and maintained that the Student was eligible as a Student with Emotional Disturbance.

DCPS, through Witness F, then proposed that the Student be given “rating scales” to determine if the Student was eligible as a Student with Emotional Disturbance.

(Testimony of Witness F; R-23; R-24; R-27)

24. Thereafter, a document entitled “Review of Independent Educational Evaluation,” dated April 18, 2018, reported the Student’s performance on BASC testing. This testing evaluates social and emotional issues. The Student was deemed to have “clinically significant” issues with anxiety, depression, somatization, and attention problems, based on responses by a teacher and the school social worker, Witness E. SAED-2 testing, which also reports on social and emotional issues, was also conducted. In connection to this testing, three teachers indicated that the Student showed an inability to learn and unhappiness or depression, indicative of an emotional disturbance. Witness F therefore determined that the Student should be eligible for services as a Student with Emotional Disturbance. (R-28)

25. During this time, the Student frequently asked to be excused to see Witness E, and one of the Student’s teachers said that the Student was barely in class. Sometimes the Student discussed self-harm with Witness E. Also during this time, the Student had several incidents involving a student of the opposite sex. (Testimony of Witness E; R-28)

26. On April 27, 2018, the Student was determined to be eligible for services as a Student with Emotional Disturbance. (P-33)

27. About a week before the first hearing date on May 21, 2018, the Student expressed to Petitioner that s/he would rather die than go to school. Petitioner called Witness C, locked up all the pills and sharp objects in the house, and stayed up with the

Student the entire night. Petitioner also emailed Witness E and the principal of School B. Later that evening, the Student tried to commit suicide by overdosing on a medication at the Student's father's house. (Testimony of Petitioner)

28. As of the date of the hearing, on the advice of the Student's therapist, the Student was attending school for half-days only. The Student is currently failing all courses and is doing very little work in school. (Testimony of Petitioner; Testimony of Witness E; P-40)

VII. Conclusions of Law

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

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

D.C. Code Sect. 38-2571.03(6)(A)(i).

Issue #1, relating to the evaluations that were, or were not, conducted by DCPS in 2016, is not a claim directly relating to the Student's IEP or placement. The burden of persuasion is therefore on Petitioner. Issue #2 directly challenges the IEP and placement. Through her four witnesses and forty documents, Petitioner has met her burden to state a

prima facie case. DCPS does not argue otherwise. Accordingly, on Issue #2, DCPS has the burden of persuasion.

1. Did DCPS fail to assess the Student in all areas of suspected disability from spring, 2016, to date? If so, did DCPS violate 28 U.S.C. Sect.1414(b)(3), 34 C.F.R. Sect.300.304(c), and related provisions? If so, did DCPS deny the Student a FAPE?

Federal regulations at 34 C.F.R. Sect. 300.301(b) provide that, “(c)onsistent with the consent requirements in 34 C.F.R. Sect. 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.” As set forth in the District of Columbia Municipal Regulations, an initial evaluation must “draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.” DCMR 5-E 3005.3(a). The LEA must “carefully consider and document information used as a basis of the team decision.” DCMR 5-E 3005.3(b). After reviewing existing information, the LEA must then identify what additional data, if any, are needed to determine whether the child has a particular category of disability, the present levels of performance and educational needs of the child, and whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services.

The LEA is further required to ensure that the child is assessed in all areas of suspected disability and that the chosen assessment tools and strategies are provided to present relevant information that directly assists persons in determining the educational needs of the child. 28 U.S.C. Sect.1414(b)(3); 34 C.F.R. Sect.300.304(c).

After prior reports of the Student having difficulty with attention and behavior, Petitioner requested an evaluation in October, 2016, just after one of the Student's teachers sent Petitioner an email indicating that the Student was off-task, distracted, not taking notes, and not doing work. On October 18, 2016, Petitioner sent an email to the school indicating that she wanted the Student to be evaluated, suggesting that the Student had a learning disability and difficulty concentrating. In a lengthy correspondence dated October 28, 2016, Petitioner again sought to have the Student evaluated, pursuant to the IDEA and also Section 504 of the Rehabilitation Act of 1973. This letter focused on the Student's perceived issues with reading, writing, and math, but also flagged the Student's perceived social emotional and attentional issues.

Within days thereafter, DCPS finished its evaluation of the Student. On October 31, 2016, DCPS held a meeting with Petitioner in which they reviewed the Student's existing reading inventory data, grades, PARCC data, and work samples. DCPS then determined that the Student was a good student who was above grade level in reading and slightly below level in math. DCPS therefore determined that the Student was not eligible for services. However, those facts, though certainly important, should not automatically lead to the conclusion that the Student did not have a disability. In Lawrence County Sch. Dist. v. McDaniel, 72 IDELR 8 (E.D. Ark. 2018), a student performed well academically but had a number of social and behavioral issues, including avoiding human contact and having tantrums. The school district declined to evaluate that student because of the student's good grades and honors recognitions, but the court ruled that the school district's conclusion was wrong. The court explained that the IDEA requires an evaluation of all students identified as possibly having a disability and that the

evaluation be “full and individual.” The court further explained that evaluating a student is not the same as providing special education services, and ordered the school district to evaluate the student in regard to social and emotional issues.

This concept was explained further in Letter to Anonymous, 55 IDELR 172 (OSEP 2011), where the U.S. Department of Education stated that the IDEA and its regulations do provide protections for students with “high cognition and disabilities who require special education and related services to address their individual needs.” In Letter to Anonymous, the U.S. Department of Education restated its “longstanding position” that the educational needs of a child with a disability include nonacademic as well as academic areas, and that the “educational performance,” as used in the IDEA, “means more than academic standards as determined by standardized measures.”

DCPS argued that they were not on any notice that the Student had behavioral issues at the time, and therefore should not have suspected that the Student may have had a disability in those areas (as was later found to be the case). However, a number of teachers had sent Petitioner emails complaining about the Student’s inattentive and disruptive behaviors in class, giving Petitioner a reasonable basis to be concerned and to request an evaluation. In the 2015-2016 school year, the Student was “wandering the halls” and was tardy to class approximately thirty-one times. Additionally, the Student went into the bathroom for lengthy periods of time. On April 12, 2016, the Student’s homeroom teacher wrote an email to Petitioner indicating that the Student had been distracted, frustrated, and inattentive in class. On October 17, 2016, a teacher from School A sent Petitioner an email indicating that the Student was off-task, distracted, not

taking notes, and not doing work. The Student ended up being tardy 130 times during the 2016-2017 school year.

Under the circumstances, on receipt of the request for an initial evaluation, DCPS should have thoroughly and comprehensively assessed the Student, which assessment should have included more than a passing look at the Student's social and emotional issues. Accordingly, DCPS violated 34 CFR Sect. 300.304(c)(4) when, just three days after Petitioner's correspondence of October 28, 2016, it determined that the Student was not eligible for services.

2. Did DCPS fail to provide the Student with an appropriate IEP and corresponding placement/location of services from spring, 2016 to date? If so, did DCPS act in contravention of 34 CFR 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

In view of the Student's difficulties at the start of the 2017-2018 school year, Petitioner submitted a second request for evaluation on September 26, 2017.

In the District of Columbia, the LEA must conduct an initial evaluation to determine the child's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." D.C. Code Sect. 38-2561.02(a).² Once the eligibility determination has been made, the LEA must conduct a meeting to develop an IEP within 30 days. 34 CFR Sect. 300.323(c)(1); G.G. ex rel. Gersten v. District of Columbia, 924 F.Supp.2d 273, 279 (D.D.C. 2013).

² Though local legislation was passed shortening the time period for evaluation to sixty days, this legislation does not take effect until it is funded. D.C. Official Code Sect. 38-2561.02(2)(a)(b) ("beginning July 1, 2017, or upon funding, whichever occurs later, an LEA shall assess or evaluate a student who may have a disability and who may require special education services within 60 days from the date that the student's parent or guardian provides consent for the evaluation or assessment. The LEA shall make reasonable efforts to obtain parental consent within 30 days from the date the student is referred for an assessment or evaluation").

After Petitioner's request for a second evaluation in September, 2017, DCPS took almost two months to schedule an "AED" meeting to review the Student's data. Thereafter, DCPS agreed to do evaluations of the Student, including a psychological evaluation, a speech and language evaluation, and a Functional Behavior Assessment. Petitioner, understandably concerned about DCPS's previous lack of response, asked DCPS to do the evaluations herself. Petitioner also indicated to DCPS that, if any additional evaluations were needed beyond what she provided, she would arrange for those additional evaluations. DCPS agreed with this approach and indicated that they would wait for Petitioner's evaluations before making a determination about eligibility. Petitioner then sent Witness A's comprehensive evaluation to DCPS in mid-January.

DCPS then took almost two more months before the March 13, 2018, meeting, where it offered the Student eligibility through the Other Health Impaired classification. Petitioner, however, sought an Emotional Disturbance classification. As a result, DCPS conducted its own behavioral assessments of the Student and agreed with Petitioner, on April 27, 2018, that the Student should be deemed eligible as a Student with Emotional Disturbance.

Even using the March 13, 2018, date as the date of eligibility, DCPS was late in determining this Student to be eligible. Given the September 26, 2017, request for evaluation, the eligibility determination should have been made by late January, 2018, and the Student should have had an IEP by late February, 2018.

DCPS argued that Petitioner did not consent to the evaluations that it sought to conduct, which is true. However, DCPS did not object to Petitioner's proposal to conduct the evaluations herself, and in fact sanctioned that approach, as indicated by

language in the Prior Written Notice of December 20, 2017, which said that “once Petitioner provides the [School A] IEP team with the external evaluations, they will reopen the Student’s eligibility and review the evaluations.” DCPS suggested that this document in effect “restarted the clock,” and that the request for an evaluation actually occurred when DCPS received the report of Witness A. However, Petitioner’s second request for evaluation was never withdrawn or revoked, and Petitioner’s letter of January 19, 2018, was clearly not a request to evaluate, since Petitioner enclosed an evaluation with the correspondence. DCPS also contended that it could not conduct the evaluations because the Student was medically unavailable, but Witness A managed to conduct her assessment, even though the Student had been hospitalized, and the Student was present at School A in October, 2017, and at School B by January, 2018. DCPS contended that it was Petitioner who delayed the evaluation and that Petitioner was acting in bad faith, but the record indicates that Petitioner has been an active advocate for the Student and has been engaged in the process. DCPS criticized Petitioner for responding on December 4, 2017, to a DCPS email of November 29, 2017, but this is not a significant delay in the context of the case, and may be understandable since Petitioner was occupied with the Student’s hospitalization at or about that time. DCPS also contended that Petitioner did not inform DCPS about incidents that occurred at school, but, again, the record indicates that Petitioner did her best to inform DCPS about the occurrences at school, which occurred in DCPS’s own setting and should have been monitored by staff at DCPS in any event. DCPS also argued that Witness A’s report was overly reliant on the contentions of Petitioner, but Witness A’s report included fourteen different psychological tests and testing based on input from the Student’s teachers. Therefore, DCPS denied the Student

a FAPE when it failed to provide the Student with an IEP after the expiration of the 150-day period in February, 2018.³

RELIEF

When school districts deny students a FAPE, courts have wide discretion to ensure 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.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.”

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 Independent Hearing Officers 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 to 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,

³ Since DCPS failed to provide the Student with an IEP, the school placement must also be deemed inappropriate. Although the LEA has some discretion with respect to school selection, that discretion cannot be exercised in such a manner to deprive a Student of a FAPE. Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006); Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988). Courts can accordingly rule that school assignments violate the IDEA if, for instance, the school contains an environment that allows bullying. Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004)(denial of FAPE based on the likelihood that a proposed placement would subject a student with an emotional disability to continued bullying because of his perceived effeminacy). Here, there was no IEP, the Student had been bullied (without any clear anti-bullying policy in place), and the Student had been failing all classes. Moreover, the Student is now attending school for only half-days.

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 record makes it clear that this Student has severe psychological issues, triggered in part by incidents at the school, including an incident involving sexual assault and incidences of bullying. The United States Department of Education's Office of Special Education and Rehabilitative Services ("OSERS") has expressed concern about the bullying of students with disabilities. Dear Colleague Letter, OSERS, 61 IDELR 263 (August 20, 2013). In this letter, OSERS stated that:

(b)ullying of any student by another student, for any reason, cannot be tolerated in our schools. Bullying is no longer dismissed as an ordinary part of growing up, and every effort should be made to structure environments and provide supports to students and staff so that bullying does not occur. Teachers and adults should respond quickly and consistently to bullying behavior and send a message that bullying is not acceptable. Intervening immediately to stop bullying on the spot can help ensure a safer school environment. Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time.

This Student needs to be in an environment that is free of any bullying. The Student must be placed in a school that is safe, with a significant amount of adult staff and a strict anti-bullying policy that has met with success in the recent past. Additionally, the Student needs to be in a school that has, on site, a substantial number of mental health specialists who are able to provide the Student with *ad hoc* counseling and intervention when necessary. Moreover, teachers at the school must be trained in working with students who have significant psychological issues, so that the Student's issues can be identified during the school day. The Student is currently at a high risk for

suicide, and care must be taken to ensure that this Student can avoid psychological issues at school, so that the Student can learn in school all day.

DCPS contended that the IDEA does not authorize relief in the form of medical treatment, which is true. However, this Hearing Officer Determination does not contain an order that the Student be sent to a hospital for treatment. Mary T. v. School District of Philadelphia, 575 F.3d 235, 243 (3rd Cir. 2009)(“only those residential facilities that provide special education...qualify for reimbursement”).

Still, in this record, it cannot be said that Petitioner has proven that School C is appropriate for the Student. Witness A recommended that the Student attend School C, but no witnesses were called from School C, and no explanation was provided for the failure to call a witness from School C. Accordingly, this order will require that the Student’s IEP be revised to require that the Student receive an educational setting with access to well-qualified mental health professionals throughout the day, teachers who can recognize clinical signs of emotional distress, and a school with a strict anti-bullying policy that contains children who are reasonably well-behaved and likely will not engage in bullying of the Student. Additionally, it is clear from the record that the Student requires a Behavior Intervention Plan (“BIP”), per the recommendations of Witness A. As a result, a BIP will be required as well.

VIII. Order

As a result of the foregoing:

1. The Student’s IEP shall be revised to require an educational setting with access to multiple well-qualified mental health professionals throughout the day, teachers who can recognize clinical signs of emotional distress, and a school with a strict anti-

bullying policy that contains children who are reasonably well-behaved and likely will not engage in bullying of the Student;

2. DCPS shall write a BIP for the Student within thirty calendar days;
3. Petitioner's other requests for relief are denied.

Dated: June 5, 2018

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov

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: June 5, 2018

Michael Lazan
Impartial Hearing Officer