

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

Petitioner

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**¹

Student presently attends a DCPS senior high school. On December 31, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public School (“DCPS”). On January 8, 2014, DCPS filed its Response to the Complaint.

The parties concluded the Resolution Meeting process by participating in a Resolution Session Meeting on January 31, 2014. There was no agreement, but the parties determined not to prematurely end the thirty day resolution period. The resolution period ended on January 30, 2014. Hence, the 45-day timeline for this case started on January 31, 2014 and will end on March 16, 2014, which is the HOD due date.

On February 20, 2014, the hearing officer conducted a prehearing conference and determined, that the claims to be adjudicated, defenses asserted, and relief requested were as follows:

Petitioner’s Claims: (i) Alleged inappropriate IEP and placement. (ii) Alleged failure to comprehensively evaluate Student in all areas of suspected disabilities.

Respondent’s Defenses: (i) DCPS denies each allegation in petitioner’s complaint. (ii) DCPS asserts that there was no failure to provide Student a FAPE due to her placement. (iii) DCPS asserts that Student’s main impediment to her academic success is her persistent truancy. (iv) Petitioner advised DCPS that Student preferred general education classes and would not attend school unless her classes were enjoyable. Student’s teachers reported that Student could be accommodated in the general education setting with numerous supports that were included in Student’s IEP. DCPS asserts that ultimately, Student’s entire IEP team, including Petitioner, determined that Student should be provided special education support in the inclusion setting

moving forward. (v) DCPS asserts that Petitioner agreed with the IEP at the time of its development, failed to request any new IEP meeting, and failed to mention any disagreement with the IEP during any one of her meetings. Overall, Petitioner has not made any attempt to work with Student's current DCPS senior high school prior to filing a complaint. DCPS is happy to meet with Petitioner to discuss her qualms. (vi) Finally, DCPS asserts that Student's current BIP is dated November 5, 2013 and was reviewed with Petitioner in attendance on November 12, 2013. The Student's BIP focuses on helping Student attend and remain in class, and express her frustration instead of leaving the classroom, where appropriate.

Relief Requested: (i) Findings in Petitioner's favor; (ii) Fund placement and transportation to an appropriate non-public or public school; (iii) Compensatory education; and (iv) an FBA and a meeting for BIP.

By their respective letters dated February 25, 2014, Petitioner disclosed sixteen documents (Petitioner's Exhibits 1-16), and DCPS disclosed fourteen documents (Respondent's Exhibits 1-14).

The hearing officer convened the due process hearing on March 4, 2014.² The hearing was convened two hours late, because the District of Columbia government opened with a two-hour delay due to inclement weather. Moreover, Petitioner advised on the morning of the hearing that (1) it was unable to determine whether Student would receive a renewed acceptance for Student at the desired private school, and (2) it would be unable to present testimonial evidence from a representative at the private school because the private school was closed due to inclement weather, but Petitioner wished to proceed with the hearing nevertheless.

All disclosed documents were admitted into the administrative record without objection. Thereafter, the hearing officer received opening statements, testimonial evidence, and closing statements from both parties prior to the concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

1. Did DCPS deny Student a FAPE by providing an inappropriate IEP and placement for SY 2013/14?
2. Did DCPS deny Student a FAPE by failing to comprehensively evaluate Student in all areas of suspected disabilities?

² Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

FINDINGS OF FACT^{3,4}

1. Student attends a DCPS senior high school. Student attended this DCPS for one year, then she attended a different DCPS school for a year prior to returning to the current school at the start of SY 2013/14.⁵
2. Student should be in the twelfth grade during the current school year, but she is actually between tenth and eleventh grades, and she is taking tenth and eleventh grade classes for credit recovery purposes.⁶
3. Student has problems reading and she gets really upset if anyone says anything to her about her reading skills and other academic deficits.⁷
4. Student also has severe truancy problems, in part because she has a hard time keeping up with the lessons in class. Student's truancy issues, which extend back for years, have resulted in a court case, a term of probation, and Student's temporary placement in a group home. The staff at the group home transported Student to and from school each day, so her attendance improved during that period. Ultimately, however, Student was released from the group home after three weeks because her attendance had improved.⁸
5. DCPS has attempted various truancy interventions with Student on and off during the last few years, including (i) a contract that had to be signed by Student's teachers at the end of each class period, together with privileges used as reinforcements, (ii) a preferred schedule that permitted Student to almost pick the teachers she wanted, (iii) items such as earrings and lipsticks that Student could earn, and (iv) bi-weekly meetings with Parent, Student's biological mother, and Student's probation officer. The interventions were not very effective early on, and ultimately the most effective intervention was the bi-weekly meetings.⁹
6. Student's current BIP is dated November 5, 2013. The Plan is designed to encourage Student to (i) attend her classes on time and remain in class unless she is given permission to leave, and (ii) calmly address situations when she is agitated and receive assistance from the teacher. Parent and Student participated in the development of the Plan.¹⁰

³ To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁴ When citing an exhibit that has been submitted by both parties, the hearing officer may only cite to one party's exhibit.

⁵ Testimony of Parent.

⁶ Testimony of Parent.

⁷ Testimony of Parent.

⁸ Testimony of Parent; *see* Respondent's Exhibits 4, 5, 19 and 20.

⁹ Testimony of special education teacher.

¹⁰ Respondent's Exhibit 11; testimony of special education teacher.

7. On November 12, 2013, DCPS convened an attendance meeting for Student, which Student's biological mother attended. The team agreed to continue the behavioral interventions in place even though Student was not attending school. The team also determined that Student was using the excuse of bullying to justify her non-attendance at school and avoid consequences with her probation officer, but that bullying likely was not an actual problem for Student.¹¹
8. At the January 31, 2014 resolution session meeting for Student, the team determined to update Student's IEP to provide for 7 hours of specialized instruction inside general education and 7 hours of specialized instruction outside general education for assistance in math. Parent agreed with this IEP amendment and stated her opinion that Student is doing better and Student's attendance is improving. The team also opined that Student is doing better but noted that Student does not attend her French and Business classes. The team stated that Student has an attendance plan paired with reinforcers at school and home, but the plan will be revised to require debriefs with Student multiple times per day. The goal is to make the plan stricter and help push Student. DCPS also proposed conducting an FBA within 45 school days and conducting a meeting within 15 school days of completion of the FBA. Pursuant to the educational advocate's recommendation, Parent agreed to sign a consent to evaluate form but refrained from agreeing with any of the proposed measures, including the IEP amendment, to give her an opportunity to consult with Petitioner's counsel.¹²
9. In January and February of 2014, DCPS administered FBA Profiler questionnaires to Parent, Student, and three of Student's teachers.¹³
10. Recently, Student's attendance has improved somewhat because of the threat of detention as a result of having been sent back to court for truancy. However, although Student has begun coming to the school building, Student continues to skip approximately two to three classes each day. Moreover, Student is failing several classes, including English, French, and Chemistry.¹⁴
11. A review of Student's transcript reveals that she was in 9th grade during SY 2010/11, and she has been in 10th grade for each of the last three academic years including the current year, SY 2013/14. For SY 2010/11, Student failed two classes, passed five classes with a D, and passed the remaining two classes with a C. For SY 2011/12, Student failed three classes, and she received four Ds, two Cs, and one B-. For SY 2012/13, Student failed all ten of her classes, as well as two summer school classes. For the current school year, SY 13/14, Student has already failed her Government class.¹⁵
12. Student's Full Scale IQ and Perceptual Reasoning skills are in the Borderline range; Student's Perceptual Reasoning skills and General Ability are in the Extremely Low

¹¹ Respondent's Exhibits 12; testimony of special education teacher.

¹² Respondent's Exhibit 14; testimony of special education teacher; *see also* Respondent's Exhibits 15 and 16.

¹³ Respondent's Exhibit 18.

¹⁴ Testimony of Parent; testimony of special education teacher.

¹⁵ Respondent's Exhibit 21.

range; and Student's Working Memory skills and Processing Speed are in the Low Average range. Student's Broad Reading cluster scores are in the Negligible range at the 4th grade level, and her Broad Math cluster scores are in the Very Limited range, with an age equivalency of 8 years and 4 months.¹⁶

13. Student recently has received a provisional diagnosis of Intellectual Disability.¹⁷
14. Student's most recent psychoeducational evaluation was conducted by the Child Guidance Clinic at the Superior Court of the District of Columbia in April 2013.¹⁸
15. Student's April 10, 2013 IEP requires her to receive 14 hours per week of specialized instruction in general education and 120 minutes per month of behavioral support services outside general education. Student's 2014 Draft Amended IEP proposes that Student receive 7 hours of specialized instruction inside general education and 7 hours of specialized instruction outside general education for additional assistance in math with respect to both academics and attendance.¹⁹
16. Student's previous IEPs include the following: April 13, 2012 IEP providing for 25.5 hours of specialized instruction and 30 minutes per week of behavioral support services, both outside general education; August 15, 2011 IEP providing for 26.5 hours per week of specialized instruction and 240 minutes per month of behavioral support services, both outside general education; February 14 2011 IEP providing for 21 hours per week of specialized instruction and 1.5 minutes per week of behavioral support services, both outside general education.²⁰
17. Petitioner is seeking the following compensatory education services in this action: an updated comprehensive psychological assessment; an independent vocational assessment (Level II); an iPad with structural software; 1 hour per week of independent behavioral support services for 50 weeks; and 4 hours per week of independent tutoring services for 50 weeks.²¹

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 an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*;

¹⁶ Petitioner's Exhibit 6.

¹⁷ Petitioner's Exhibit 6 at 17.

¹⁸ Petitioner's Exhibit 6.

¹⁹ Respondent's Exhibits 15 and 16.

²⁰ Petitioner's Exhibits 2, 8, and 9.

²¹ Petitioner's Exhibit 15.

Ridley School District v. M.R., 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner’s claims.

Alleged Inappropriate IEP and Placement for SY 2013/14

The “free appropriate public education” required by the Act is tailored to the unique needs of the handicapped child by means of an “individualized educational program.” Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). The requirement to provide a FAPE is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Id.* Hence, the IEP, and therefore the personalized instruction, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.*

In determining whether a Student’s IEP is appropriate, the hearing officer must determine (1) whether the LEA has complied with the procedures set forth in IDEA, and (2) whether the IEP developed through IDEA’s procedures was reasonably calculated to provide Student with educational benefits. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982) (“*Rowley*”). In turn, in determining whether an IEP is reasonably calculated to provide educational benefit, the measure and adequacy of the IEP is to be determined “as of the time it is offered to the student.” *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009).

IDEIA also requires that a public agency provide an appropriate educational placement/location of services for each child with a disability, so that the child’s needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school and are provided in conformity with the Student’s IEP. *See* 34 C.F.R. § 300.17.

In the instant case, Petitioner argues that Student’s IEP and placement (location of services) for SY 2013/14 are inappropriate because Student is functioning approximately seven years below grade level, has repeated the 10th grade, and is currently experiencing academic failure and behavioral problems. DCPS disagrees, arguing that Student’s lack of success at school is due to poor attendance, and that Student has recently begun to make progress in school in terms of both attendance and academic performance.

A review of the evidence in this case reveals that Student’s Full Scale IQ is in the Borderline range, her broad reading and broad math skills are on the elementary school level, and she recently received a provisional diagnosis of Intellectual Disability. Moreover, for the past few academic years, Student has experienced a history of academic failure in school. Hence, she is repeating the 10th grade for the third time during the current school year, and she has failed more classes with each passing year, ultimately failing all ten of her classes and two summer school classes during SY 2012/13.

Based on the evidence outlined above, it is clear that Student lacks the intellectual ability and academic skills necessary to succeed academically on the high school level without intensive support and accommodations, and DCPS had knowledge of all of these factors at the time it prepared Student's most recent IEP. Nevertheless, Student's current IEP provides for her to receive a mere 14 hours per week of specialized instruction. Under these circumstances, the hearing officer concludes that Student's current IEP was not reasonably calculated to provide Student with educational benefit at the time it was developed, and therefore, Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to provide her with an appropriate IEP for SY 2013/14.

To remedy this denial of FAPE, the hearing officer will order DCPS to convene an IEP meeting to revise Student's IEP to provide for specialized instruction in all academic classes. The hearing officer will leave it to Student's IEP team, which includes teachers and a related service provider who work with Student on a routine basis, to determine what percentage of the specialized instruction should be provided inside general education and what percentage of the specialized instruction should be provided outside general education.

However, as there has been no evidence in this case of the maximum level of special education services Student's current DCPS school can provide, there is no proof that the current school cannot implement an IEP that requires Student to receive specialized instruction in all academic classes. Moreover, although Petitioner has requested relief in the form of a small structured school with a therapeutic component, there was no proof in this case that such a school is the least restrictive environment for Student. *See e.g.*, 34 C.F.R. § 300.114 (a)(2)(ii) (each public agency must ensure that the removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the child's disability requires such removal). Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS denied Student a FAPE by failing to provide Student with an appropriate placement/location of services for SY 2013/14.

Alleged Failure to Comprehensively Evaluate in All Areas of Suspected Disability

IDEA provides that in developing an IEP for a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). Indeed, "sometimes, with certain children, what looks like simple misbehavior is actually a more complicated problem whose remedy should be integrated into the child's overall program of special education." *Independent School Dist. No. 284, Wayzata Area Schools, Wayzata, Minnesota, v. A.C.*, Civil Action No. 00-2346MN (8th Cir. August 3, 2001). If the problem prevents a disabled child from receiving educational benefit, then it should not matter that the problem is not cognitive in nature. What should control is whether it needs to be addressed in order for the child to learn. *Id.*

In the instant case, Petitioner argues that DCPS has failed to conduct an FBA to examine the reasons underlying Student's truancy prior to developing the BIP. DCPS argues that the FBA was underway at the time of the due process hearing and was slated to be completed in time for an IEP meeting scheduled to be held the day after the due process hearing in this case. DCPS

also asserts that the point of conducting an FBA for Student is to develop a BIP to address Student's attendance, which DCPS has already done.

A careful review of the evidence in this case reveals that DCPS has put in place over the past few years various positive behavioral interventions and supports to address Student's truancy, although the interventions generally have been less than successful. DCPS also has referred Student to D.C. Superior Court for truancy on more than one occasion, which resulted in at least a temporary improvement each time in Student's attendance. More recently, in January 2014, DCPS obtained Parent's consent to evaluate Student, and DCPS immediately began gathering FBA data concerning Student. Based on this evidence, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS denied Student a FAPE by failing to conduct an FBA and a BIP based thereon for Student.

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. *See Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 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.*

In the instant case, Petitioner is requesting the following forms and amounts of compensatory education to compensate for the alleged harm of Student's lack of progress: an updated comprehensive psychological assessment; an independent vocational assessment (Level II); an iPad with structural software; 1 hour per week of independent behavioral support services for 50 weeks; and 4 hours per week of independent tutoring services for 50 weeks. However, the hearing officer has found a denial of FAPE only with respect to Student's IEP for SY 2013/14, and the hearing officer has found no denial of FAPE with respect to Petitioner's remaining claims. Moreover, the evidence proves that Student's most recent psychoeducational evaluation was conducted within the last year in April 2013, and there is no evidence that Student requires, or that Petitioner has requested and DCPS has refused to conduct, a vocational assessment for Student.²²

Upon careful consideration of the denial of FAPE in this case and the educational benefits that Student likely would have received had DCPS provided her with an appropriate IEP for the current school year, the hearing officer has determined that an award of compensatory education in the following forms and amounts is appropriate in this case: 1 hour per week of independent behavioral support services and 3 hours per week of independent tutoring services, with such services to be provided to Student for the remainder of SY 2013/14 and throughout the entirety

²² The hearing officer does not deny that a vocational assessment appears to be in order for Student in light of her age; the hearing officer merely holds that there has been no proof in this case that any failure to provide such an assessment to Student results from the harms alleged, and therefore, an award of the requested assessment as compensatory education would be inappropriate.

of summer 2014.²³ Accordingly, the hearing officer will award Petitioner funding for these services.

ORDER

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

1. Within 15 school days of the issuance of this Order, DCPS shall convene an IEP meeting for Student to revise Student's IEP to provide for Student to receive specialized instruction in all academic classes. Student's IEP team, which includes teachers and a related service provider who work with Student on a routine basis, shall determine what percentage of Student's specialized instruction should be provided inside general education and what percentage of the specialized instruction should be provided outside general education.
2. DCPS shall provide funding for Student to receive 1 hour per week of independent behavioral support services and 3 hours per week of independent tutoring services, with such services to begin ten days from the issuance of this Order and to continue for the remainder of SY 2013/14 and throughout the entirety of summer 2014.
3. All remaining claims and requests for relief in Petitioner's December 31, 2013 Complaint are **DENIED AND DISMISSED WITH PREJUDICE**.

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 U.S.C. § 1415(i).

Date: 3/16/14

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer

²³ See *Reid v. District of Columbia, supra* (compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA).