OSSE
Student Hearing Office
November 18, 2013

District of Columbia

Office of the State Superintendent of Education

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Confidential

Parent on Behalf of Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent.	HEARING OFFICER'S DETERMINATION Hearing Date: October 31, 2013 Representatives: Counsel for Petitioner: Carolyn Houck, Esq. 5614 Connecticut Avenue, N.W. Suite 169 Washington, D.C. 20015 Counsel for DCPS: District of Columbia Assistant Attorney General Linda Smalls, Esq. 1200 First Street, NW Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

BACKGROUND AND PROCEDURAL HISTORY:

The student has been identified as a student with a disability under IDEA with a disability classification of specific learning disability ("SLD"). The student was placed at a DCPS special education school ("School A") when he was in first grade and remained at School A until he completed eighth grade at the end of school year ("SY") 2012-2013. The student's most recent individualized educational program ("IEP), developed on February 11, 2013, while he was attending School A, requires a full-time out of general education placement.

During the student's February 11, 2013, IEP meeting the team discussed the student's school placement for SY 2013-2014. The team determined that DCPS central office would send packages to proposed private placements as the team concluded the student's neighborhood school ("School B") would not be appropriate. Nonetheless, DCPS ultimately determined in July 2013 that the student would be assigned to School B for SY 2013-2014.

Petitioner obtained DCPS funding for a comprehensive psychological evaluation that was conducted in August 2013. The evaluator concluded that because of the student's display of aggressive, oppositional behaviors and symptoms of depression and mania, he met the criteria for Bipolar Disorder. Based on the student's previously diagnosed Attention Deficit Hyperactivity Disorder ("ADHD") the evaluator concluded the student's met the disability classifications of other health impairment ("OHI") and/or emotional disturbance ("ED"). She recommended the student have an educational placement in a therapeutic school intended for student's with ED and OHI classifications with teachers and staff trained in working with students with behavioral dysfunction.

At the start of SY 2013-2014, the parent was not aware that DCPS had assigned the student to School B. She sent the student to a private full time special education school ("School C") hoping to secure DCPS funding. However, because of the student's behavior he was not allowed to stay at School C. The parent sought acceptances to three other private therapeutic day schools. Ultimately, the student was rejected by all three other private schools due to his severe behavior(s).

Petitioner filed the due process complaint asserting the student's current IEP is inappropriate because (1) it is not based on formal evaluations, (2) the student's disability classification is incorrect and should be changed to include at least ED and possibly intellectual disability ("ID"), and (3) the IEP goals are inappropriate, and asserting DCPS failed to provide the student an appropriate educational school placement for SY 2013-2014.

Petitioner originally sought as relief an order directing DCPS to fund an independent evaluation(s) including a functional behavioral assessment ("FBA") and directing DCPS to fund the student's placement at an appropriate private placement identified by the parent.

DCPS filed a timely response to the complaint on September 11, 2013. DCPS denied any alleged denial of a FAPE and specifically asserted that the student's IEP, including its least restrictive environment ("LRE") was reasonably calculated to provide the student educational benefit. DCPS asserted the student's location of services for SY 2013-2014, School B, identified in July 2013, was appropriate.

DCPS also denied that it failed to perform necessary evaluations and that a data evaluation review and a bilingual speech and language re-assessment were conducted in 2011. DCPS asserted that it has received the independent comprehensive psychological evaluation when the complaint was filed and intended to convene an IEP meeting for a team to review of the evaluation.

A resolution meeting was held on September 13, 2013, and all matters were not resolved. The parties expressed no desire to proceed directly to hearing. They expressed a desire to allow the full 30-day resolution period to expire before the 45-day timeline began. The 45-day period began on October 3, 2013, and ends (and the Hearing Officer's Determination ("HOD") is due) on November 17, 2013.

Pre-hearing conferences were held on September 24, 2013, and October 16, 2013, [2] and a pre-hearing conference order was issued on October 17, 2013, outlining, inter alia, the issues to be adjudicated.

After the due process complaint was filed and subsequent to the first pre-hearing conference being held the student's parent enrolled the student at School B. The student began attending School B and was soon suspended from school due to his behavior(s). By the date of the due process hearing the parties had not yet convened an IEP meeting to review the student's recent evaluation and review the student's IEP and school placement.

THE ISSUES ADJUDICATED: [3]

1. Whether DCPS denied the student a free and appropriate public education ("FAPE") by failing to develop an appropriate IEP for the student on February 11, 2013, because the IEP is not based on current evaluation(s), lists an inappropriate disability classification and contains inappropriate goals.

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[2] The initial pre-hearing conference ("PHC") was convened on the first date that both counsel were available following the resolution meeting after several attempts and scheduling conflicts.

[3] The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

2. Whether DCPS denied the student a FAPE by failing to provide the student an appropriate placement/location of services for SY 2013-2014. Petitioner asserts the student's current school (School B) is an inappropriate location of services.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-22 and DCPS Exhibit 1-10) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: [4]

1. The student has been identified as a student with a disability under IDEA with a disability classification SLD. The student was placed at School A when he was in first grade and remained at School A until he completed eighth grade at the end of SY 2012-2013. (Parent's testimony, Petitioner's Exhibit 9-7)

2. The student started having issues with fighting and being disrespectful in the fourth grade. The student's time at School A was punctuated by behavioral outbursts, threats, and suicidal and homicidal ideations. He had difficulty staying in class and at times left the school without permission and his parent often called the police to search for him. He would sometimes take weapons to school despite the parent's attempt to search him for weapons prior to him going to school. On one occasion the student had to be held down by four security personnel because he threatened to hurt another student. (Parent's testimony, Petitioner's Exhibit 9-18))

3. As a result of these types of behaviors at school the student was hospitalized twice at Children's National Medical Center and once at Psychiatric Institute of Washington ("PIW'). He has been prescribed psychiatric medication but often refuses to take it. (Parent's testimony)

4. A community based intervention ("CBI") representative has been working with the student and his family since December 2012 based upon a referral when the student was hospitalized at PIW. The CBI representative typically has three sessions per week with the student with one of the session including the student's other family members. (Witness 2's testimony)

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[4] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

5. The student's most recent IEP developed on February 11, 2013, while he was attending School A, requires a full-time out of general education placement. (Petitioner's Exhibit 6-13)

6. Both the student's parent and the CBI representative attended the student's February 11, 2013, IEP meeting. During the meeting the team discussed the student's school placement for SY 2013-2014. The team determined that DCPS central office would send packages to proposed private placements as the team concluded the student's neighborhood school, School B, would not be appropriate due to the student's severe behavioral difficulties. The team indicated another meeting would be convened but one was never held. (Parent's testimony, Witness 2's testimony, Petitioner's Exhibit 6)

7. Petitioner obtained DCPS funding for a comprehensive psychological evaluation that was conducted in August 2013. The evaluator determined the student's cognitive functioning is very low (cognitive efficiency standard score of 63). The student's academic functioning was low with grade equivalencies in reading and math at the third to fourth grade level. (Petitioner's Exhibit 9-13, 9-23)

8. The evaluator reported that the student was prone to uncontrollable anger in his home when he did not get his way and his parent(s) had difficulty managing his behaviors. In addition, the student has a history of auditory and visual hallucinations both at school and at home which have been ameliorated with the use of medication prescribed by a psychiatrist. (Petitioner's Exhibit 9-1, 9-18)

9. The evaluator concluded that because of the student's the display of aggressive, oppositional behaviors and symptoms of depression and mania, the student met the criteria of Bipolar Disorder. Based on the student's previously diagnosed ADHD the evaluator concluded the student's met the disability classifications of OHI as well as ED.[5] (Petitioner's Exhibit 9-19)

10. The evaluator recommended the student have an educational placement in a therapeutic school intended for student's with ED and OHI classifications with teachers and staff trained in working with students with behavioral dysfunction. (Petitioner's Exhibit 9-20)

11. Despite the fact that the February 11, 2013, team determined School B would not be appropriate placement for the student DCPS ultimately determined that the student would be assigned to School B for SY 2013-2014. (Respondent's Exhibits 2, 3)

12. At the start of SY 2013-2014, the parent was not aware that DCPS had assigned the student to School B. Prior to the due process hearing the parent had not seen any DCPS letter informing her that School B had been selected. Had she known

[5] The evaluator reviewed student data and opined during the hearing that the ED classification should have been evident to the team at the February 11, 2013, IEP meeting.

that School B was the proposed school she would have gone to visit prior to or at the start of SY 2013-2014. (Parent's testimony)

13. The parent sent the student to School C hoping to secure DCPS funding. However, because of the student's behavior School C did not allow the student to stay and did not accept for admission. The student's parent sought acceptances to three other private therapeutic day schools. Ultimately, the student was rejected by all three other private schools due his to his behaviors. (Parent's testimony, Petitioner's Exhibit 18-1, 18-2, 18-3, 18-4)

14. The CBI representative and his parent worked with the student to prepare him for the private school interviews and visits through mock interviews and role-playing. The CBI representative even accompanied the student to some of the school visits. Despite the preparations, during the school visits the student behaviors resulted in him not being accepted. (Witness 2's testimony)

15. The student is generally respectful toward the CBI representative but the student can be volatile. He sometimes becomes physically violent and abusive and will grab for weapons. He has displayed such behaviors at School A, in the community and at home and since he began attending School B. (Witness 2's testimony)

16. The special education coordinator for School B is ready to convene a meeting at School B to review the student's recent evaluation and review the student's IEP and educational placement. (Witness 3's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of a FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an

individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.[6] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

Issue 1: Whether DCPS denied the student a FAPE by failing to perform to develop and appropriate IEP for the student on February 11, 2013, because the IEP is not based on current evaluation(s), lists an inappropriate disability classification and contains inappropriate goals.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence. Petitioner presented insufficient proof that the student's February 11, 2013, IEP was not based on current evaluations, had an in appropriate disability classification or had inappropriate goals.

Congress passed the IDEA to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C.§1400(d)(1)(A). The IDEA provides funding to assist states in implementing a "comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families." 20 U.S.C.§1400(d)(2).

Under the IDEA, all states, including the District of Columbia, receiving federal education assistance must establish policies and procedures to ensure that "[a] free appropriate public education [FAPE] is available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1)(A).

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia*, 561 F.Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1.

"The IEP must, at a minimum, `provide personalized instruction with sufficient support

[6] The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

services to permit the child to benefit educationally from that instruction.'" *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir. 2005), quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009).

Although a recent independent psychological evaluation was conducted there was no evidence the student's IEP while he attended School A was not reasonably calculated to confer educational benefit to the student. The Hearing Officer was not convinced by the testimony of the Witness 1 that prior to her conducting her recent evaluation that it was apparent to a team that the student's disability classification was inappropriate or that his programming and services at School A would have or should have been different had is disability classification been OHI or ED.

Issue 2: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate placement/location of services for SY 2013-2014.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

Petitioner presented sufficient proof that the February 11, 2013, IEP team concluded that School B was an inappropriate placement for the student. Nonetheless DCPS placed the student at his neighborhood school, School B. DCPS presented no testimony to refute the credible testimony of the parent and Witness 2 that the February 11, 2013, IEP team determined School B was an inappropriate school placement for the student.

ORDER:

DCPS shall within ten (10) business days of the issuance of this Order, if it has not already done so, convene an IEP meeting to review the student's recent independent comprehensive psychological evaluation, review and determine the student's disability classification, review and revise the student's IEP and determine an appropriate educational placement and location of services other than School B. The team shall also consider and determine whether the student should simply be provided a day school placement or be referred for and provided a residential placement due to his severe in school and out of school behaviors.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

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Coles B. Ruff, Esq.
Hearing Officer
Date: November 17 , 2013