

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONERS, on behalf of
[STUDENT],¹

Petitioners,

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: April 5, 2011

Hearing Officer: Peter B. Vaden

Case No:

Hearing Date: February 23, 2011

Student Hearing Office, Room 2006
Washington, D.C.

2011 APR -5 PM 3:58
SSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENTS (the "Parents"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and the District of Columbia Municipal Regulations ("D.C. Regs."), Title 5-E, Chapter 5-E30 and Title 5-B, Rule No. 5-B2510. In their First Amended Due Process Complaint, the Parents allege that District of Columbia Public Schools ("DCPS") denied a free appropriate public education ("FAPE") to Student by developing inappropriate Individualized Education Programs ("IEP") beginning in December

¹ Personal identification information is provided in Appendix A.

2009, by not fully implementing the IEPs, by failing to evaluate Student in all areas of suspected disability, by determining that Student's violations of codes of conduct were not manifestations of his disability, and by not providing a functional behavioral assessment of Student.

Student, an AGE adolescent, has been a resident of the District of Columbia since moving to the District from Prince Georges County, Maryland in January 2009. He has been found eligible for special education services under the classification Specific Learning Disability ("SLD"). The Parents' Due Process Complaint, originally filed on December 13, 2010, named DCPS as respondent. The undersigned Hearing Officer was appointed on December 14, 2010. The parties met for a resolution session on January 4, 2011. No agreement was reached and the parties decided that the case should proceed to a due process hearing. A prehearing conference was held with the Hearing Officer and counsel on January 13, 2010 to discuss the hearing date, issues to be determined and other matters. The Petitioners were permitted to file an amended Due Process Complaint on January 18, 2011, which reset the timelines for the resolution session and the issuance of the Hearing Officer Determination. *See Due Process Hearing Standard Operating Procedures, § 303.A.2.b.*

The due process hearing was held before the undersigned Impartial Hearing Officer on February 23, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording system. The Parents and Student appeared in person and were represented by counsel. Respondent DCPS was represented by counsel. Both Parents testified and called as witnesses SPEECH LANGUAGE PATHOLOGIST ("S/L Pathologist"), CLINICAL PSYCHOLOGIST, EDUCATIONAL ADVOCATE, PRIVATE SCHOOL ASSISTANT EDUCATION DIRECTOR ("Education Director") and Student. DCPS called as witnesses COMPLIANCE CASE MANAGER and

SPECIAL EDUCATION COORDINATOR ("SPED Coordinator"). Parents' Exhibits P-1 through P-6 and P-8 through P-27, and DCPS's Exhibits R-1 through R-26, were admitted into evidence without objection. Parents' Exhibit P-7 was admitted over DCPS's objection.²

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. Titles 5-E, § 3029 and 5-B, Rule No. 2510.14, *et seq.*

ISSUES AND RELIEF SOUGHT

- WHETHER DECEMBER 15, 2009 IEP ("2009 IEP") DENIED STUDENT A FAPE BECAUSE OF INAPPROPRIATE DISABILITY CLASSIFICATION, LACK OF BEHAVIORAL SUPPORT, INADEQUATE ACADEMIC SUPPORT, AND LACK OF BASELINES FOR ANNUAL GOALS;
- WHETHER NOVEMBER 2, 2010 IEP ("2010 IEP") DENIED STUDENT A FAPE BECAUSE OF INAPPROPRIATE DISABILITY CLASSIFICATION, INSUFFICIENT ACADEMIC SUPPORT, AND OMISSION OF BEHAVIOR INTERVENTION PLAN;
- WHETHER DCPS FAILED TO PROVIDE PULL-OUT SERVICES SPECIFIED IN 2009 AND 2010 IEPs;
- WHETHER DCPS IMPROPERLY DETERMINED THAT STUDENT'S VIOLATIONS OF CODE OF STUDENT CONDUCT IN MAY 2010 AND DECEMBER 2010, WERE NOT MANIFESTATIONS OF STUDENT'S DISABILITY;
- WHETHER DCPS FAILED TO EVALUATE STUDENT IN ALL AREAS OF SUSPECTED DISABILITIES; and
- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO CONDUCT FUNCTIONAL BEHAVIOR ASSESSMENT.

Parents seek an order for DCPS to fund Student's placement at Private School and an

² DCPS objected to admission of Parents' Exhibit P-7 (February 7, 2011 independent Comprehensive Psychological Evaluation) on the grounds that the evaluation report was completed after the due process complaint was filed. The Hearing Officer overruled the objection because due process hearing procedures do not bar the admission of evaluations completed after the complaint is filed. The Parents provided the evaluation to DCPS in their prehearing disclosures, as required by the Prehearing Order.

award of compensatory education.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia. He is enrolled in the GRADE at CITY HIGH SCHOOL ("CHS"). Exhibit P-11
2. Student transferred from Prince Georges County, Maryland public schools to DCPS in January 2009. Exhibit P-25 In Prince Georges County, Student had been identified as a child with a disability under the classification SLD. The areas reported affected by Student's disability were Communication, Math Problem Solving, and Reading Comprehension. Exhibit P-18
3. Student's April 14, 2008 Prince Georges County IEP (the "Maryland IEP") provided 13.75 hours weekly of special education instruction and 45 minutes weekly of S/L Therapy. All services were to be provided outside the General Education setting. Exhibit P-18
4. When Student transferred to DCPS in January 2009, he enrolled in ELEMENTARY SCHOOL. Exhibit R-4 DCPS stated that it would continue to provide the type and level of services prescribed on the Maryland IEP. Exhibit R-2
5. Student's IEP was revised at Elementary School on December 15, 2009. The revised IEP provided for 5 hours per week of Specialized Instruction outside General Education, 5 hours per week of Specialized Instruction in General Education and 30 minutes per week of S/L Pathology outside General Education. Father signed the IEP affirming that he agreed with the contents. Exhibit P-10
6. The December 15, 2009 IEP omits baseline information in the Present Levels of

Performance and Annual Goals section. For each academic area of concern, the IEP reported Student's November 16, 2009 results on the relevant parts of the DC Benchmark Assessment System ("DC BAS"). Exhibit P-10

7. Student was reevaluated to determine eligibility for continued special education services in spring 2010. In her April 23, 2010 Psychological Evaluation Report, SCHOOL PSYCHOLOGIST reported, *inter alia*, that Student's academic performance at Elementary School had been very poor and that his previous disability classification of SLD (language-based) was still warranted. Exhibit R-8

8. School Psychologist also reported that Student appeared to be experiencing symptoms of depression and that Student's responses to several items on the Children's Depression Inventory ("CDI") assessment necessitated continued monitoring of his socio-emotional functioning. School Psychologist explained that since no time frame for the symptoms of Student's depression was ascertained, no consideration for a disability classification of Emotional Disturbance ("ED") was warranted at that time. Exhibit R-8

9. Student was reevaluated for S/L on April 19, 2010. The DCPS S/L evaluator recommended that Student's MDT Team should consider continuing S/L services for Student. Exhibit R-7

10. On June 8, 2010, Petitioners' attorney requested, in writing, that Student be evaluated for special education and related services, to include a social emotional assessment, a clinical evaluation to rule out ADHD, a psycho-education evaluation to explore memory loss, a FBA/BIP, as well as cognitive and achievement evaluations to address poor grades, possible retention and possible dyslexia. The Petitioners did not request an Independent Educational Evaluation ("IEE") at that time. Exhibit P-17

11. On June 15, 2010, Student's IEP Team concluded that Student continued to be eligible for special education services under the primary disability classification SLD. The IEP Team reported that Student's disability impacts his participation in the general education curriculum in the areas of mathematics, reading, S/L and emotional, social and behavioral development. The Parents did not attend the eligibility meeting. Exhibit R-6, Exhibit P-12

12. At Elementary School, Student's 2009-2010 end-of-year grades were all F's, except for a D in Health/Physical Education and a C in Music. Exhibit P-14

13. Student matriculated to CHS for the current, 2010-2011, school year. In the current school year, Student is failing all of his courses except for a D in one class. Testimony of Mother, Exhibit R-20

14. Student did not receive counseling services at Elementary School. He has attended only one counseling session at CHS. Student does not desire counseling. Testimony of Student

15. On July 27, 2010, Petitioners' attorney informed DCPS in writing that Petitioners disagreed with the April 23, 2010 Clinical Psychological Evaluation and the April 19, 2010 S/L Evaluation, and requested DCPS to fund an IEE of Student. Exhibit P-16 DCPS did not respond to Petitioners' IEE request until December 10, 2010, when DCPS issued an authorization to Father to obtain an independent psychological evaluation and an independent S/L evaluation. Exhibit R-22

16. Student's IEP Team at CHS met on November 2, 2010 for his annual IEP review. Student and Mother attended this IEP meeting. The IEP Team identified Student's Primary Disability as SLD. The IEP Team identified Academic-Mathematics, Academic-Reading, Communication/Speech and Language and Emotional, Social and Behavioral Development as areas of concern. For Special Education Services, the 2010 IEP provides 13 hours per week of

Specialized Instruction, of which 6.5 hours would be outside the General Education setting. For Related Services, this IEP provides 2 hours per month of S/L Pathology and 30 minutes per week of Behavioral Support Services. Mother signed the IEP to affirm that she agreed with the contents. Exhibit R-16

17. On January 20, 2010, Clinical Psychologist and her associate conducted an independent Comprehensive Psychological Evaluation of Student. Tests administered included, *inter alia*, Woodcock-Johnson III, Tests of Cognitive Abilities (WJ-III, Cognitive), Woodcock-Johnson III, Tests of Achievement, Form B (WJ-III, Achievement), and Behavior Assessment Scale for Children, Second Edition (BASC-2). Exhibit P-7

18. Clinical Psychologist reported that Student's General Intellectual Ability ("GIA") score on the IEE was in the low range, which suggested that he has deficiencies in using cognitive abilities to reason with verbal and non-verbal tasks. Exhibit P-7

19. Clinical Psychologist reported that Student's performance on the achievement tests was commensurate with his GIA scores. His achievement scores indicated academic functioning in the Low Average range in Broad Reading, Broad Math, and Broad Written Language. Exhibit P-7, Testimony of Clinical Psychologist

20. On social-emotional functioning, Clinical Psychologist reported that Student appeared to be struggling with excessive internal and external conflicts about his sense of self with regard to school functioning. She reported that Student's behavioral difficulties meet criteria for Mood Disorder – Not Otherwise Specified. She reported that Student is a young man who has difficulty controlling his behavior, and actually does not see his behavior as a problem. He acts without thinking, and thus, will continue to evidence behavioral difficulties without the appropriate school setting and without possible pharmacological intervention. In her report,

Clinical Psychologist opined that Student should be identified as ED as well as LD in the school system. Exhibit P-7, Testimony of Clinical Psychologist

21. On February 16, 2011, DCPS authorized Parents to obtain an independent FBA of Student. Testimony of Compliance Case Manager

22. Following a May 25, 2010 disciplinary incident of "Threatening," Student's IEP Team at Elementary School met for a Manifestation Determination Review ("MDR"). The MDR team determined that Student's Threatening behavior was not caused by, and did not have a direct and substantial relationship to his disability. The MDR team further determined that Student's behavior was not the direct result of DCPS's failure to implement Student's IEP. The MDR team concluded that Student's Threatening behavior was not a manifestation of his disability. Exhibit R-10

23. Following a December 15, 2010 disciplinary incident of "Talking back to adults," Student's IEP team at CHS met on January 4, 2011 for a Manifestation Determination Review ("MDR"). This MDR team determined that Student's behavior was not caused by, and did not have a direct and substantial relationship to his disability. The MDR team further determined that Student's behavior was not the direct result of DCPS's failure to implement Student's IEP. The MDR team concluded that Student's behavior was not a manifestation of his disability. Exhibit R-23

24. At the January 4, 2011 MDR meeting, the MDR team considered Student's SLD disability, but not his ED disability. Exhibit R-24

25. Student does not care about school, almost always finds school to be boring, and sometimes hates school. Exhibit P-7

26. Student has been accepted for admission to Private School. Private School operates a full-time therapeutic day program for students classified as ED, LD, S/L and other special education disabilities. The maximum class size at Private School is 10 students. Every class has a lead teacher and an assistant. Private School's professional staff includes a psychologist, a social worker, an art therapist and seven behavioral counselors. Every student at Private School is on a behavior management plan. Testimony of Education Director

27. Student has visited Private School twice, including one day there attending classes. Private School teachers reported that Student "did well" when he visited their classrooms. Private School staff have reviewed Student's records and concluded that he would be an appropriate "fit" for their program. Testimony of Education Director

28. Student liked Private School and appreciated the small class size. Testimony of Student

CONCLUSIONS OF LAW

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

BURDEN OF PROOF

As provided in the Prehearing Order, the parties agreed that the Petitioners carry the burden of proof in this due process hearing. That is because, under the D.C. Regs., the burden of proof in a due process hearing is the responsibility of the party seeking relief, in this case, the Parents. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005) (Burden of proof in an administrative hearing

challenging an IEP placed upon the party seeking relief). However the D.C. Regs. also provide, with respect to an MDR appeal, that the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability. D.C. Regs. tit. 5-B, Rule 2510.16. In sum, while the Petitioners must carry the burden of proof to establish their entitlement to relief generally, with respect to the MDR appeals, DCPS must demonstrate that Student's behavior was not a manifestation of his disability.

DISCUSSION

The Parents raise multiple issues in this case. Although not asserted as a discrete claim, the issue of whether Student has an ED disability underlies and connects all of the Parents' claims. Before reaching the specific hearing issues raised by the Parents, it is appropriate to consider whether Student has an ED disability.

The Parents contend that Student has been denied a FAPE in part because DCPS did not identify ED as a disability category in Student's 2009 and 2010 IEPs. However, so long as Student is eligible for special education services, whether or not his disability is classified as ED in the IEPs is immaterial. A child's entitlement under the IDEA is to FAPE and not to a particular label. The child's identified needs, not the child's disability category, determine the services that must be provided to him. *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006). *See, also, Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE.) When Student moved to the District of Columbia from Maryland in 2009, DCPS accepted Student's entitlement to FAPE under the SLD classification made by his Maryland LEA. DCPS was not required to also label Student as ED. Notwithstanding, DCPS was required to tailor Student's IEP to his unique needs, including any social-emotional needs resulting from an ED disability, even though only the SLD disability was

reported on Student's IEP. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 181, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Furthermore, if Student had an ED disability that was not reported on his IEP, under certain conditions, DCPS would be deemed to have knowledge of the ED disability for disciplinary purposes. *See* 34 CFR § 300.532(c).

The evidence in this case establishes that Student is a child with an ED disability. The IDEA defines "Emotional Disturbance" as a condition exhibiting one or more of the following characteristics, over a long period of time and to a marked degree, that adversely affects a child's educational performance:

- An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- Inappropriate types of behavior or feelings under normal circumstances.
- A general pervasive mood of unhappiness or depression.
- A tendency to develop physical symptoms or fears associated with personal or school problems.

The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

34 CFR § 300.8(c)(4). Both School Psychologist and Clinical Psychologist concluded, independently, that Student experienced symptoms of depression. In her April 23, 2010 Psychological Evaluation Report, School Psychologist reported that Student was experiencing symptoms of depression, which could "underlie his reported lack of motivation, poor self-concept about his academic performance, and irritability, which manifests as anger and defiance." Exhibit R-8 Clinical Psychologist reported on February 7, 2011 that "[Student] experiences anxiety-provoking internal states that are characterized by helplessness, hopelessness, and depression. These internal conflicts, thus, manifest as inattentiveness, and acting-out behaviors.

Inattentiveness, especially, is a hallmark of depressive feelings and can lead to a lack of motivation on a task in which one is not interested.” Exhibit P-7 Clinical Psychologist concluded that Student’s behavioral difficulties meet criteria for Mood Disorder - Not Otherwise Specified. She recommended that Student should be identified as a child with an emotional disturbance.

In her April 23, 2010 report, School Psychologist stated that because no time frame for Student’s depression symptoms was ascertained, no consideration for a classification of ED was warranted.³ School Psychologist did not testify at the due process hearing. Clinical Psychologist testified that Student’s depression symptoms were clinically significant. She opined that Student should be classified ED and that, based upon the data in School Psychologist’s report, School Psychologist also had sufficient information to find Student eligible under the ED classification.

Upon consideration of the evaluation reports of School Psychologist and Clinical Psychologist, the unrebutted testimony of Clinical Psychologist, as well as Student’s failing educational performance, I find that the evidence establishes that Student is a child with an ED disability, based upon his exhibiting a general pervasive mood of unhappiness and depression, over a long period of time, and to a marked degree, that adversely affects his educational performance.

I next address each of the specific hearing issues raised by the Parents:

1. WAS STUDENT’S 2009 IEP REASONABLY CALCULATED TO PROVIDE FAPE?

DCPS updated Student’s Maryland IEP following an annual review on December 15, 2009. Petitioners contend that Student’s 2009 IEP failed to provide FAPE because of an

³ School Psychologist’s report provides no explanation as to why she did not collect the additional time frame information, if needed. The IDEA requires that the special education evaluations be sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. *See* 34 CFR § 300.304(c)(6).

inappropriate disability classification, lack of behavioral support, inadequate academic support, and an omission of baselines for annual goals. Under the U.S. Supreme Court's decision in *Rowley, supra*, the hearing officer must address two questions that are aimed at DCPS's paralleling responsibilities to comply with the procedural and substantive requirements of the IDEA: First, has DCPS complied with the procedures set forth in the IDEA? And second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Rowley*, 458 U.S. at 206-07, 102 S.Ct. 3034. Accordingly, my inquiry must be (1) whether the 2009 IEP designed for Student was procedurally deficient, and (2) whether the IEP was reasonably calculated for Student to receive sufficient educational benefits to meet the requirements of a FAPE.

The Parents contend that Student's 2009 IEP was procedurally flawed because it omitted baseline data for annual goals. However, the IDEA does not explicitly mandate such specific data. What it requires is "a statement of the child's present levels of educational performance," including "how the child's disability affects the child's involvement and progress in the general curriculum[.]" and "a statement of measurable annual goals, including benchmarks or short-term objectives[.]" 20 U.S.C. § 1414(d)(1)(A). See *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010). The 2009 IEP contains comprehensive present levels statements, in which the IEP Team reported the relevant parts of Student's November 16, 2009 DC BAS results. I find that the IEP Team did not violate any procedural requirements of the IDEA by not also including specific baselines in the present levels statements. DCPS prevails on this issue.

The Parents contend that the 2009 IEP is substantively deficient because (i) it does not classify the Student as ED or provide behavioral supports and (ii) because it provides inadequate

specialized instruction. When an IEP Team conducts an annual review of a child's IEP, the team must revise the IEP to address:

- (A) Any lack of expected progress toward the annual goals described in 34 CFR § 300.320(a)(2), and in the general education curriculum, if appropriate;
- (B) The results of any reevaluation conducted under 34 CFR § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under 34 CFR § 300.305(a)(2);
- (D) The child's anticipated needs; or
- (E) Other matters

34 CFR § 300.324(b).

As explained above in this decision, whether or not Student was classified as ED, *per se*, is immaterial. The 2009 IEP recognized Student's special education eligibility under the primary disability SLD.⁴ DCPS was not required to also label Student as ED. DCPS prevails on this issue.

Nor was the 2009 IEP deficient for not providing behavioral supports. The evidence does not establish that at the time the 2009 IEP was developed, Student's behavioral development should have been an area of concern for the IEP Team. School Psychologist's Psychological Evaluation Report, which reported Student's possible depression symptoms, was not issued until April 23, 2010.⁵ The Parents introduced two "Student Infraction Letters," which show that between January and December 2009, Elementary School contacted the Parents on two occasions

⁴ The 2009 IEP erroneously identifies Student's primary disability as "Speech or Language Impairment." The parties agree that this was a scrivener's error and that the IEP Team intended Student's primary disability to be SLD.

⁵ In their due process complaint, Parents complain that the 2009 IEP contained no counseling services based on the recommendation in the April 23 2010 Psychological Evaluation Report. However the report was not available to the 2009 IEP Team, which met over four months before the report was issued.

regarding Student's involvement in fighting incidents. These letters alone are not sufficient to establish that when Student's IEP Team met in December 2009, the team had reason to address a need for behavioral support services. Furthermore, Father agreed with the content of the 2009 IEP. The Parents did not offer evidence that they had requested the IEP Team to provide behavioral support services at that time. DCPS prevails on this issue.

Parents also contend that the 2009 IEP provided Student insufficient Specialized Instruction services. When analyzing whether an updated IEP is reasonably calculated to provide educational benefits, courts examine the child's intellectual potential and disability and the academic progress the child has made under the existing IEP. *Kevin T. v. Elmhurst Community School Dist. No. 205, et al.*, 36 IDELR 153 (N.D.II. 2002) See, also, *Hall by Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985) (School system could not discharge its duty by providing a program that produces some minimal academic advancement, no matter how trivial.)

Student's April 14 2008 IEP, the Maryland IEP, developed by a Maryland LEA and accepted by DCPS, provided 13.75 hours per week of special education instruction, all outside General Education, and 45 minutes per week of S/L therapy.⁶ Unfortunately, Student cannot be said to have made educational progress under the Maryland IEP. For the first two advisory periods of the 2009-2010 school year at Elementary School, Student's grades were mostly F's,

⁶ The record is unclear as to what special education services Student actually received at Elementary School prior to the December 15, 2009 IEP meeting. When Student transferred to the District, in lieu of initiating its own eligibility process, DCPS opted to continue to provide the type and level of services specified on the Maryland IEP (13.75 hours weekly outside general education). Exhibit R-2 However, in its Transfer IEP Letter to Mother, DCPS stated that it would provide 10 hours per week of specialized instruction, "Percentage Outside General Education: 0.00." Exhibit R-3 Because DCPS was required to provide services comparable to the services provided in the Maryland IEP, despite the contradictory language in the Transfer IEP Letter, I presume that DCPS committed to maintain the level of services and the pull-out setting, provided in the Maryland IEP. See 34 CFR § 300.323(f).

three D's and one C. On the November 16, 2009 DC BAS, Student was reported deficient in all three Academic-Reading strands, Vocabulary Development, Information Text and Literary Text.

Confronted with Student's evident lack of academic progress under the Maryland IEP, Student's IEP Team would have been expected to increase special education services and/or offer a more appropriate placement. Instead, Student's 2009 IEP Team reduced his Specialized Instruction services, by almost 30 per cent, to 10 hours per week. The IEP Team also reduced the percentage of Student's services outside General Education ("pull-out services") from 100 percent to 50 percent. Student's S/L services were reduced to 30 minutes per week. DCPS provided no explanation for the IEP Team's decision to reduce special education services in the face of Student's failing scholastic performance. I find therefore that DCPS's 2009 IEP was not reasonably calculated for Student to receive educational benefits. The Parents prevail on this issue.

2. WAS STUDENT'S 2010 IEP REASONABLY CALCULATED TO PROVIDE FAPE?

Petitioners contend that Student's 2010 IEP is deficient because the IEP (i) does not classify the Student as ED or provide behavioral supports, (ii) provides allegedly inadequate Specialized Instruction, and (iii) lacks a Behavior Intervention Plan.

In the 2010 IEP, Student remains eligible for special education services under the primary disability classification SLD. As explained above in this decision, it is immaterial whether or not Student was also classified ED in the IEP. DCPS prevails on this issue.

When Student's IEP Team met on November 2, 2010 to develop the 2010 IEP, as the IEP Team reported, Student was failing in many subjects under his 2009 IEP. In fact, Student failed all of his 2009-2010 courses except for Physical Education and Music and he was failing all but one of his courses for the 2010-2011 fall term. The 2010 IEP provides behavioral goals and

services not in the 2009 IEP. Evidently, therefore, this IEP Team considered School Psychologist's April 23, 2010 Psychological Evaluation Report, which related teachers' concerns about Student's lack of motivation, refusal to do work and defiant/disrespectful behavior and reported School Psychologist's concern that Student's suspected depression could underlie his failing academic performance.

The IEP Team's response to Student's lack of educational progress under the 2009 IEP was to increase his Specialized Instruction by 3 hours per week, from 10 hours to 13 hours, only half of which would be provided outside the General Education setting. (The 2010 IEP also provides 30 minutes per week of Behavioral Support Services, as a new related service, 120 minutes per month of S/L Pathology.) DCPS offered no evidence at the due process hearing to show how increasing Student's Specialized Instruction by a scant 3 hours per week would suffice to address his generalized failure in school. (Clinical Psychologist, whose IEE, was not available to the 2010 IEP Team, testified that Student requires a "full time IEP" because of his history of "acting out" behavior as well as because of his deficient cognitive and academic skills.) I find that DCPS's 2010 IEP does not appropriately address Student's lack of progress under his 2009 IEP. Therefore the 2010 IEP was not reasonably calculated for Student to receive educational benefits. The Parents prevail on this issue.

The Parents also contend that the 2010 IEP should have provided a Behavior Intervention Plan ("BIP"). The IDEA does not require that a BIP be incorporated into a child's IEP. *See School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006). However, the Act does require, in the case of a child whose behavior impedes his learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i).

School Psychologist recommended in her April 23, 2010 Psychological Evaluation Report that a behavior plan may be necessary to “incentivize” Student’s academic engagement. Student’s CHS English teacher stated at the 2010 IEP meeting that Student “doesn’t do class work, but can’t seem to make himself choose to do it.” The CHS social worker stated that Student is intelligent and that he needs to be reinforced with his school work, homework, etc. Exhibit R-15 I find that the evidence establishes that Student’s behaviors have impeded his learning and that DCPS’s failure to develop appropriate behavior intervention strategies for Student was a denial of FAPE. The Parents prevail on this issue.

3. DID DCPS FAIL TO EVALUATE STUDENT IN ALL AREAS OF SUSPECTED DISABILITIES?

The Parents assert in their due process complaint that DCPS failed to evaluate Student in all areas of suspected disability. However, it appears both from the due process complaint and Parents’ argument at the hearing that Parents’ concern is not failure to evaluate, but rather that DCPS delayed funding the IEE requested by the Parents’ attorney in July 2010. A “parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.” 34 C.F.R. § 300.502(b)(1). When a parent requests an independent educational evaluation, a school district must “without unnecessary delay” either comply or else file a due process complaint to request a hearing to show that its own evaluation is appropriate. *See* 34 C.F.R. § 300.502(b)(2).

On July 27, 2010, Parents’ counsel informed DCPS, in writing, that Parents disagreed with School Psychologist’s April 23, 2010 Psychological Evaluation and the April 19, 2010 S/L Evaluation. The Parents requested authorization “for an independent clinical, comprehensive educational evaluation, vision and hearing.” DCPS did not then file its own due process complaint, as provided in 34 C.F.R. § 300.502(b)(2). DCPS did not authorize the Parents to

obtain an IEE at DCPS expense until December 10, 2010. DCPS has not explained why it took over four months to respond to Parents' IEE request, or why that delay was somehow "necessary." Therefore, I find that DCPS failed to comply with Parents' July 2010 IEE request without unnecessary delay.

A failure to timely provide an IEE when requested by parents is a procedural violation of IDEA. *See, e.g., Taylor v. District of Columbia*, No. 09-175, (D.D.C. Mar. 16, 2011). Procedural violations of the IDEA do not "inexorably lead a court to find a child was denied FAPE." "[A]n IDEA claim is viable only if [DCPS's] procedural violations affected the student's substantive rights." *Id.*, citing *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006).

In this case, I find that DCPS's failure to timely act on Parents' IEE request affected Student's substantive rights. When Student was eventually evaluated after DCPS authorized the Parents to obtain an IEE, Clinical Psychologist recommended, *inter alia*, that Student should be identified as ED and should receive appropriate Related Services. In addition, she opined that the magnitude of Student's behavioral difficulties in school suggest the need for placement in a full-time therapeutic school for children who evidence ED and LD disabilities. The Parents contend that DCPS's delay of 4 1/2 months in authorizing the IEE caused a corresponding delay in securing Student's placement in a full-time therapeutic setting, resulting in a denial of FAPE. I agree. But for DCPS's delay, Student's IEP Team could have received Clinical Psychologist's Comprehensive Psychological Report in time to make an appropriate placement for Student for the 2010 fall term. Instead, Student experienced another failed semester under the inappropriate 2009 IEP. The Parents prevail on this issue.

4. DID DCPS FAIL TO PROVIDE PULL-OUT SERVICES SPECIFIED IN STUDENT'S 2009 AND 2010 IEPS?

The Parents contend that DCPS failed to implement Student's 2009 and 2010 IEPs by failing to provide the pull-out Specialized Instruction services specified in the IEPs. In *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007), U.S. District Judge Kennedy followed the standard for failure-to-implement claims articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 348-49 (5th Cir.2000). In *Bobby R.*, the court wrote:

[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

Bobby R., 200 F.3d at 349. Thus, a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material."

Catalan, supra at 75.

Student's 2009 and 2010 IEPs provide, respectively, for 5 hours and 6.5 hours weekly of Specialized Instruction outside of General Education. The evidence does not establish that DCPS deviated significantly from these pull-out requirements. Student testified that at Elementary School, the special education teacher worked with him in special education class. The amount of pull-out services received by Student at Elementary School was not established. Since matriculating to CHS, Student has been enrolled for one period, five days per week, in Learning Lab, taught by a special education teacher. Student testified that the class period was 1.25 hours. Thus the amount of pull-out services offered to Student in the current school year appears to

exceed the requirements of the 2009 IEP and deviate very little from the 6.5 hours per week specified in the 2010 IEP. The Parents have not met their burden of proof on this issue.⁷

5. WERE STUDENT'S CONDUCT VIOLATIONS IN MAY 2010 AND DECEMBER 2010 MANIFESTATIONS OF HIS DISABILITY?

On May 25, 2010, Elementary School disciplined Student for "Threatening" behavior. On December 15, 2010, CHS disciplined Student for "Talking back to adults." After each incident, Student's IEP teams from the respective schools met and determined that Student's conduct was not a manifestation of his disability. The Parents disagree with these determinations.

Students with disabilities who violate a code of student conduct may be removed to an appropriate interim alternative placement, another setting, or suspended for no more than 10 school days (so long as these are the same standards for students without disabilities). 20 U.S.C.A. § 1415(k)(1)(B). Where removal for more than 10 days cumulative in a school year is sought, the IEP team must meet to determine if the student's disciplinary infraction was a manifestation of his disability. The right to an MDR is granted by the IDEA, 20 U.S.C.A. §1415(k)(1)(E):

Except as provided in subparagraph (b), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local education agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine... (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

Id.

⁷ The Parents offered testimony at the due process hearing on the amount of S/L and counseling services received by Student at Elementary School and CHS. Failure to provide Related Services was not a hearing issue set forth in the Prehearing Order and will not be considered by the Hearing Officer. *See* Prehearing Order, February 7, 2011.

If the child's parents disagree with a determination that the child's behavior was not a manifestation of the child's disability, the parents may request a due process hearing. D.C. Regs. tit. 5-B, Rule No. 2510.14. In reviewing a decision with respect to the manifestation determination, the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability. *Id.*, Rule No. 2510.16. The Parents contend that Student has an ED disability which DCPS has failed to recognize. They allege that in both disciplinary instances, Student's misconduct had a direct and substantial relationship to his ED disability. I have held in this decision that the evidence establishes that Student does in fact have an ED disability.

After the May 25, 2010 Threatening incident, Student's MDR team determined that Student's conduct was not a manifestation of his disability. DCPS offered no evidence of what information was considered by the MDR team in making its negative manifestation determination. Specifically, the record does not establish whether the MDR team considered School Psychologist's April 23, 2010 Psychological Evaluation Report. In this report, School Psychologist reported that Student was experiencing symptoms of depression, which could "underlie his reported lack of motivation, poor self-concept about his academic performance, and irritability, which manifests as anger and defiance." Exhibit R-8 Certainly a symptom of depression which manifests as anger and defiance, could have had a relationship to the Threatening violation. If the MDT Team considered School Psychologist's report and determined that the Threatening incident did not have a direct and substantial relationship to Student's depression symptoms, that fact is not established by the evidence. I find therefore that DCPS has not met its burden of demonstrating that Student's May 25, 2010 Threatening behavior was not a manifestation of his disability. The Parents prevail on this issue.

Following Student's December 15 2010 misconduct, Talking back to adults, the CHS MDR team met on January 4, 2011. The team determined that this incident was not a manifestation of Student's disability. In this decision, I have found that Student has an ED disability. It is clear from the MDR meeting notes that the MDR team considered Student's SLD disability, but not his ED disability. Under the IDEA, DCPS must be deemed to have knowledge of Student's ED disability, even though Clinical Psychologist had not yet issued her Comprehensive Psychological Evaluation Report. See 34 CFR § 300.534(b)(3)⁸ Because the MDT Team failed to consider Student's ED disability in reaching its negative MDR determination, I find that DCPS has not demonstrated that Student's December 15, 2010 "Talking back to adults" misconduct was not a manifestation of his ED disability. The Parents prevail on this issue.

Under 34 CFR § 300.532(b)(2), in making a determination regarding a MDR appeal, my relevant authority as Hearing Officer is limited to ordering that Student be returned to the placement from which he was removed. In this case, the periods of disciplinary suspension imposed on Student are long over. However, I will order DCPS to correct Student's school records to reflect that Student's conduct in both instances was a manifestation of his disability.

REMEDY

In this case, I have found that Student has been denied FAPE by DCPS in the following respects:

⁸ 34 CFR § 300.534(b)(3) provides that an LEA is deemed to have knowledge of the child's disability if, before the behavior that precipitated the disciplinary action occurred, a teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency. Long before the December 15, 2010 Talking back incident, Student's teachers had reported to School Psychologist, *inter alia*, that Student's interpersonal skills with adults were "disrespectful," that he "walks out of class, at will," and that his academic progress was compromised by "negative oppositional behavior." School Psychologist reported that Student's "suspected depression" could underlie these behaviors.

- DCPS's 2009 IEP was not reasonably calculated to provide FAPE to Student;
- DCPS's 2010 IEP was not reasonably calculated to provide FAPE to Student;
- DCPS failed to develop an appropriate BIP for Student;
- DCPS failed to respond timely to Parents' IEE request; and
- DCPS determined, incorrectly, that Student's code of conduct violations on May 25, 2010 and December 15, 2010 were not manifestations of his IDEA disability.

i. Private School Placement

For their requested remedy, Parents seek an order for DCPS to fund Student's placement at Private School and an award of compensatory education. "Where a public school system has defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' if the education provided by said school is 'reasonably calculated to enable the child to receive educational benefits.' *Rowley*, 458 U.S. at 176, 102 S.Ct. at 3034. *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994) *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). An award of private-school placement is "prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA." *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005) (Citations omitted).

In this case, I have found that DCPS has denied Student a FAPE because, *inter alia*, since December 2009, DCPS has failed to provide an IEP to Student that was reasonably calculated to for Student to receive educational benefits. Unfortunately, Student has fared very poorly under his DCPS IEPs, failing almost all of his courses since the 2009 IEP was developed. A private school placement award is appropriate and proper to ensure that Student receives tomorrow the education required by IDEA.

Placement awards, must be tailored to meet the child's specific needs. *Branham, supra.*

To inform this individualized assessment, courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, 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. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student's Disability

The evidence in this case establishes that Student has SLD and ED disabilities. Student has been diagnosed with a mood disorder that makes it difficult for him to control his behavior in the General Education environment. Student is functioning below grade level and age expectations in all academic areas. For the time period at issue in this case, December 2009 through the present, Student's academic performance has been very poor. He is failing almost all classes.

b. Student's Specialized Educational Needs

According to Clinical Psychologist,⁹ if Student is to succeed, he will require specialized instruction for his academic problems, as well as counseling to deal with feelings of incompetence. She reports that it is very difficult for Student to function in a General Education

⁹ This Hearing Officer is mindful that Clinical Psychologist testifies regularly as an expert for parents in due process hearings, and as with all party-retained experts, maintaining professional objectivity may be problematical. However, in this case, DCPS did not offer expert testimony to rebut Clinical Psychologist's opinions. Furthermore, School Psychologist's April 23, 2010 written report supported many of Clinical Psychologist's findings. For example, School Psychologist reported that Student's records revealed very poor performance and that none of his teachers' strategies has evidenced remarkable improvement in Student's academic performance. School Psychologist also opined that Student's suspected depression could underlie his reported lack of motivation, poor self-concept and irritability, which manifests as anger and defiance.

classroom, that Student would benefit from a small private therapeutic school for children with LD/ED disabilities, that he should receive specialized instruction in a classroom with a low teacher to student ratio and that he should also receive cognitive-behavior therapy at school.

c. Link between Student's Needs and the Services Offered by Private School

Education Director testified that Private School provides a full-time special education therapeutic day program serving students with ED, LD, S/L and other special education disabilities. Private School's clinical staff includes a psychologist, a social worker, an art therapist and a visiting psychiatrist. Perhaps most significant for Student, Private School employs seven behavioral counselors and every student is placed on a behavior management plan. Private School offers small class size with a maximum 5 to 1 student-teacher ratio. Student has visited Private School twice, including one day there attending classes. Private School teachers reported that Student "did well" when he visited their classrooms. Private School staff have reviewed Student's records and concluded that he would be an appropriate "fit" for their program. Student testified that he "liked" Private School because of the small class size and because Private School made learning fun.

d. Cost of Placement at Private School

No information on the cost for Student to attend Private School was provided. DCPS offered no evidence that tuition expenses at Private School are higher than costs at other local private schools serving students with disabilities.

e. Least Restrictive Environment

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5); 34 C.F.R. 300.550; D.C. Mun. Regs. tit. 5, § 3011 (2006)).

“In determining the least restrictive environment, consideration is given to the types of services that the child requires.” *Id.* (citing 34 C.F.R. § 300.552(d)). According to Clinical Psychologist, it is very difficult for Student to function in a general education classroom. Clinical Psychologist opined that Student needs a placement in a full time therapeutic school for children with LD and Ed problems, because of his history of acting-out behavior as well as because of his cognitive and academic deficits. As a full time special education school, Private School is a very restrictive environment. In this case, DCPS has failed to offer a FAPE to Student. DCPS has proposed no alternative to Student’s current placement CHS, where Student is failing under his current IEP.

As the U.S. District Court held, in *Schoenbach v. District of Columbia*, 46 IDELR 67 (D.D.C. 2006), “[M]ainstreaming is not proper for every disabled child. The key consideration is whether a proposed placement is appropriate under the IDEA.” *Id.* (citing *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983)). Considering all of the above factors, as well as Clinical Psychologist’s expert testimony that Student requires a full-time therapeutic placement and the failure by DCPS to offer a less restrictive placement tailored to meet to Student’s educational needs, I conclude that Private School is an appropriate placement for Student.

ii. Compensatory Education

As the D.C. Circuit Court observed in *Branham, supra*, private school placement does not “compensate for yesterday’s IDEA violations.” *Id.*, 427 F.3d at 11. Parents also seek an award of compensatory education to compensate for DCPS’s past denial of FAPE to Student. In this decision, I have found that DCPS has failed to provide FAPE to Student since developing Student’s 2009 IEP in December 2009 and that Student was harmed by DCPS’s delay in funding an IEE.

In her recent decision in *Gill v. District of Columbia*, Case No. 09-1608 (D.D.C. March 16, 2011), U.S. District Judge Collyer restated the standards for an award of compensatory education, set out in *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005).

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. Remedying the deprivation of FAPE carries a qualitative rather than quantitative focus. [A]wards compensating past violations [must] rely on individualized assessments. In every case . . . , 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. In addition, whereas ordinary Individual Education Plans need only provide some benefit, compensatory awards must do more — they must compensate.

Gill, supra (Citations and internal quotations omitted.)

On the November 16, 2009, DC BAS, Student scored “Basic” in geometry and data analysis and was deficit in vocabulary development, information text and literary text. An appropriate 2009 IEP would have addressed Student’s DC BAS deficits with the goal of bringing Student up to grade level. However, in her February 7, 2011 Comprehensive Psychological Report, Clinical Psychologist reported that Student’s academic achievement scores were all then three to four grades behind his current grade placement at CHS. An appropriate compensatory award therefore must be aimed at supporting Student to progress academically closer to his current grade level.

Clinical Psychologist recommended that tutoring services outside the school setting would be beneficial to Student. In their proposed compensatory education plan (Exhibit P-1), Parents seek an award of 120 hours of tutoring by an independent provider. The Parents contend that 120 hours of individual tutoring services would be appropriate because, by Educational Advocate’s calculation, if DCPS had provided a full-time IEP for Student beginning in December 2009, Student would have received, to-date, an additional 195.75 hours of specialized instruction.

However, the presumption that Student required a full-time IEP in December 2009 was not established by the evidence. I therefore discount that analysis.

Furthermore, on the January 2011 BASC-2 evaluation, Student endorsed items that indicated that he does not care about school, he almost always finds school to be boring and he “sometimes” hates school. It is unrealistic to expect that, during the regular school year, Student would receive incremental educational benefit from extensive one-on-one tutoring, on top of the intensive academic instruction he will receive at Private School. However, Student would be likely to benefit from individual tutoring when school is closed for the summer. I find that an award of tutoring during DCPS’s 2011 summer break would be an appropriate remedy to compensate Student for the services that DCPS failed to provide in the 2009 and 2010 IEPs. A reasonable award, taking account both of Student’s needs and his negative feelings about school, would be 2 hours per week of individual tutoring, beginning the week of June 27, 2011 through the week beginning August 8, 2011, for a total of 14 hours. DCPS may provide the services using its own staff or through outside contractors.

The Parents also seek an award of private counseling as compensation for the lack of behavioral support services in the 2009 IEP. However, I have found that the 2009 IEP was not deficient for omitting behavioral support services. Furthermore under Private School’s behavior management plan, Student will receive ongoing, day-to-day, behavior intervention far more intensive than the weekly counseling sessions provided in Student’s 2010 IEP. Accordingly I decline to award compensatory counseling services.

ORDER

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

Within 10 school days of the date of this HOD, DCPS shall convene Student's IEP team to effect Student's placement at Private School, at DCPS' expense, for the remainder of the 2010-2011 school year. Private School staff shall attend the IEP meeting;

DCPS shall provide school transportation as needed for Student to attend Private School in accordance with DCPS's school transportation policy;

DCPS shall provide individual academic tutoring for Student during the DCPS summer break beginning the week of June 27, 2011, for a total of 14 hours of tutoring; and

DCPS shall amend Student's school records to report that his violations of the Student Code of Conduct on May 25, 2010 and December 15, 2010 were manifestations of his special education disability.

All other relief requested by the Parents in their Due Process Complaint is denied.

Date: April 5, 2011

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

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).