DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

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[STUDENT],[1]
through the Parent,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: June 5, 2010

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: June 1, 2010 Room: 1

HEARING OFFICER DETERMINATION

BACKGROUND

The student is a female ·year old in the grade at a public charter school (hereinafter with the disability classification of multiple disabilities (learning disabled and Other Health Impaired) with a current IEP dated April 14, 2010. Her current IEP calls for ten hours a week of specialized instruction by a special education teacher outside of general education and six hours a week of specialized instruction in general education with one hour a week of speech-language pathology and 45 minutes a week of behavioral support services. On March 23, 2010 counsel for the petitioner filed a due process complaint with the District of Columbia Office of the State Superintendent of Education (OSSE), Student Hearing Office (SHO), alleging the District of Columbia Public Schools (DCPS) denied the student a Free Appropriate Public Education

[1] Personal identification information is provided in Appendix A.

(FAPE). Specifically, the complaint alleged DCPS failed to comply with the terms of a January 4, 2008 Hearing Officer's Determination ("HOD"), failed to develop an appropriate IEP, failed to implement the IEP and failed to provide an appropriate placement.

A Pre-Hearing Conference was held by telephone on April 27, 2010 with counsel for the parties and a Pre-Hearing Order was issued on that date. Counsel for the parties agreed that the issue of failure to comply with the January 4, 2008 HOD was resolved and no longer an issue. The other three above stated issues remained to be addressed at the due process hearing. Counsel for DCPS's Motion to Dismiss the Complaint because the student was now 18 years old and the complaint was brought by the parents was DENIED at the pre-hearing conference.

The hearing convened on June 1, 2010 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Education Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300, and Title V of the District of Columbia Municipal Regulations.*

The hearing was a closed hearing held in Hearing Room 1 at the Student Hearing Office, OSSE, 1150 Fifth Street , S.E., Washington, D.C. 20003. Zachary Nahass represented the petitioner and Daniel Kim represented DCPS. Petitioner's Documents 1-26 and DCPS Documents R-1-49 were admitted into evidence without objection. All witnesses were sworn in under oath. The student, her father, the special education advocate and vice principal of School testified for the petitioner and special education coordinator at testified for DCPS.

ISSUES

The issues to be determined are as follows:

1. Did DCPS deny a FAPE to the student by failing to develop an appropriate IEP?
2. Did DCPS deny a FAPE to the student by failing to implement the student's IEP?
3. Did DCPS deny a FAPE to the student by failing to provide an appropriate placement?

FINDINGS OF FACT

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

As to issue one on the failure to develop an appropriate IEP:

1. An independent comprehensive psychological evaluation was conducted on the student in April 2009 and a written report completed on June 2, 2009. The evaluation found that the student's overall cognitive ability as determined by the Full Scale IQ was in the extremely low range of 66. The student was given the WIAT-II to assess her academic skills in Reading, Math, Oral Language and Written Language. The test results were that the student performed in the extremely low range in all of the above areas. The evaluation concluded: "When compared to her peers, [student] exhibits significantly less developed abilities across all domains of her intellectual functioning. A comparison between [the student's] cognitive and achievement performance indicates significant differences between her actual potential and her predicated academic scores. These discrepancies between her actual and predicated scores are significant and highly unusual for Reading, Reading Comprehension, Math, Writing Expression

and Listening Comprehension. Thus, these significant discrepancies suggest that in these academic areas, [the student] may benefit from specialized instruction and can further develop her reading, math, writing and listening comprehension skills." (P-16 at p. 12) The evaluation did note that "it will be reasonable to assume that the pain she was experiencing during the assessment negatively interfered with the level of motivation, persistence of energy and cognitive abilities she exhibited during this assessment." The evaluator was referring to the pain she suffers from her Sickle Cell disease. The evaluation recommended a smaller more structured academic setting "where she can receive more individualized emotional and academic support. She should be considered for a special education placement as a student with Learning Disability and Emotional Disturbance." (P-16 at p. 14)

2. The student has been attending for the last three school years where she has remained in the ninth grade even with attending summer school.

3. The student's previous IEP of April 27, 2009 indicated her primary disability was a specific learning disability and provided for eight hours per week of specialized instruction outside of general education and eight hours per week of specialized instruction in general education with one hour a week of speech-language pathology and 45 minutes a week of behavioral support services. The IEP stated her present level of educational performance based on the Woodcock Johnson III Achievement Test was 2:6 grade level for Broad Reading and 3:6 grade level for Broad Math. (P-4) These WJ-III test scores were from a January 22, 2008 educational assessment by a certified special education teacher Mary Phillips. The

assessment report stated: "When compared to others at her age level, [the student's] performance is very low in broad reading, mathematics, math calculation skills, written language, and written expression." (P-12)

4. On April 14, 2010 an MDT meeting was convened to review the independent comprehensive psychological evaluation of June 2, 2009, a speech and language evaluation of May 27, 2009, a social history of May 20, 2009, a Functional Behavior Assessment of April 12, 2010 and a Behavior Intervention Plan of April 12, 2010, review and revise the IEP, discuss and determine compensatory education if warranted and resolve any issues pursuant to the Due Process Complaint. The participants were the student, her parents, the educational advocate, and from the special education coordinator, speech language clinician, clinician, behavior counselor, principal, math teacher, counselor, and from DCPS the compliance case manager, DCPS LEA, DCPS psychologist, DCPS speech language clinician, and DCPS social worker. The meeting lasted for seven hours. (Testimony of The independent comprehensive psychological evaluation was reviewed. The May 2009 speech and language evaluation was also reviewed. The DCPS speech and language clinician reported in the meeting notes that "Deficits are most common as learning disability, and as a reading disability." The speech clinician stated there were severe deficits in terms of expressive and receptive language. He stated the student enjoys being pulled out for speech and likes the 1:1 attention, but the student is not in school enough to make strides. Because the student comes in tardy in the morning, her speech and language services were scheduled for the afternoon, but the student

often leaves school early in the afternoon. The MDT team discussed the attendance problems. The MDT team discussed interventions to assist student to get to school on time and DCPS authorized transportation. The MDT Notes state: "Hospitalizations do not account for the total number of absences. Out of 126 days, the student has been present only 47 days as indicated by the school's attendance record." The math teacher reported in the MDT Notes: "The student is far behind, however she gets 1:1 help with me...The student is learning and comprehending with 1:1 support. However, my concern is that this is the only way that the student will be able to learn. [The student], will get one problem done and then will wait for me. [The student] won't do anything or wait for me unless I am with her to probe her. She will only work unless I am with her. Why? I think it is cognitive." The special education coordinator testified that the student does better with one on one help. She further testified the student can do the work when she gets support from someone else and requires one on one help. (Testimony of The MDT team discussed the student's disability classification and agreed to change it from specific learning disability to multiple disabilities for a specific learning disability and Other Health Impaired based on her sickle cell anemia. The MDT team decided that emotional disturbance was not an appropriate classification. The MDT team than reviewed the student's IEP. The MDT team decided to increase to ten hours per week specialized instruction outside of general education and reduce to six hours a week of specialized instruction in general education. The total number of hours of specialized instruction of 16 remained the same as in the previous IEP, but was reconfigured

as stated above. The educational advocate wanted full-time out of general education. The MDT team decided they would like to see how the increase in two hours per week outside of general education would work before increasing her IEP to include all of her hours receiving specialized instruction outside of general education. The related services remained the same amount as in the 2009 IEP. The process of obtaining a dedicated aide was discussed and the special education coordinator indicated the student will benefit from working one-on-one with the student. DCPS stated that they would begin the process of determining if a dedicated aide is appropriate. The special education coordinator testified that a one on one dedicated aide has not been provided. (Testimony of The MDT Notes state: "If the team is open, we can come back to the table at the end of school year to determine if the extra two hours outside of general education has been successful, get an update on attendance, as well as if transportation has been successful." The MDT team also discussed compensatory education and DCPS offered 22 hours of independent tutoring in reading and math to be completed by October 2010 and 11 hours of mentoring to be completed by October 2010. The parents did not stay for the entire meeting. The student who was now years old did along with her educational advocate. The student and educational advocate wanted time to review the compensatory education plan documents. (DCPS-R-34) The parents declined the offer of transportation from DCPS to pick her up at her house as an intervention on improving attendance. (Testimony of

5. The student's academic record at shows failing grades in most of her classes. The special education coordinator testified there were mistakes in the first semester 2009-2010 report card on grades in English and Geometry and the student should have received failing grades since she was not in attendance. (P-8) (Testimony of

6. The student's current April 14, 2010 IEP states: "[The student] is an -year-old female, who is in the grade at of Magnificent Achievers. [The student] has been diagnosed with Sickle Cell anemia and has had many hospitalizations as result of her illness. In addition, [the student] has missed many school days due to pain crises and infections. [The student] exhibits defiant and impulsive behaviors and poor self-control... [The student] also has difficulty establishing positive peer relationships, as her school attendance is poor. In reviewing, [student's] attendance from 1/27/10 to 4/12/2010, [student] has missed approximately 77 days of school. Existing psychological evaluation reveals that some emotional concerns that may be impacting her educational performance coupled with her medical condition, which is preventing her from successfully accessing the curriculum." (P-7 at p. 5)

7. The student did not attend school for the fall semester of the 2009-2010 school year from the end of August 2009 to January 2010. From January 13, 2010 to May 25, 2010 the student was absent from her first class 41 times her second class 20 times and her third and fourth classes 26 times. She is often tardy coming to school after 10:30 a.m. and she also often leaves school at three p.m. when school ends at 4:30 p.m. (Testimony of DCPS-R-49).

As to issue two on the failure to implement the IEP:

1. The current IEP calls for ten hours per week of specialized instruction outside of special education and six hours per week of specialized instruction in general education and one hour a week of speech therapy and 45 minutes a week of counseling. While the student testified she did not receive speech therapy and pull-out specialized instruction, the special education coordinator testified that the IEP is being implemented. The student agrees that she is receiving counseling services and that a special education teacher is in her academic classes. Logs are maintained by the special education teacher and related service providers on pull-out services. (Testimony of Counsel for the petitioner offered no logs to prove that pull-out special education and related services are not being provided. This hearing officer finds the testimony of the special education coordinator more credible than the student on the issue of implementation of the IEP.

As to issue three on the failure to provide an appropriate placement:

1. The student's current placement is at a public charter school. The student is placed in the ninth grade in a general education setting for her academic classes. The student has been at for three years and has repeated the ninth grade for those three years even though she has attended summer school during that time. Pursuant to the student's current IEP, a special education teacher provides specialized instruction in the general education classes for six hours a week and the student is pulled out for specialized instruction with a special education teacher for

ten hours per week. The IEP provides for pull-out related services of speech therapy for one hour a week and counseling for 45 minutes a week.

2. The student has received failing grades in most of her classes for the last three years at (P-8)
3. The student has a long record of unexcused absences and of being tardy at and did not attend from the beginning of this school year until January 2010. She has also many unexcused absences and being tardy from January 2010 to the end of this school year. Some of her absences are due to hospitalizations for her Sickle Cell anemia, but others are unexcused. (See Findings of Fact #7 above)
4. The student has been accepted at in Wheaton, Maryland. is a private therapeutic special education program in Maryland for students with emotional and behavioral disabilities. The student would be placed in a self-contained small class with two teachers certified in special education. The school offers group and individual therapy with a behavior management system. The school also offers transition services with a job coach to help in finding employment. All students but one are on a diploma track. The school also offers speech and language services. (Testimony of

CONCLUSIONS OF LAW

The hearing in this matter was convened under *IDEIA 2004*and implementing regulation *34 C.F.R. 300.507 (a)* District of Columbia Municipal Regulations *5 DCMR 3030.3* places the burden of proof upon the petitioner in this matter, and that burden is by a preponderance of the evidence.

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:

As to issue one, counsel for the petitioner has met his burden of proof that the IEP is not appropriate. The purpose of IDEA is "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. Section 1400 (d) (1)) A).* The Supreme Court in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200(1982) held that implicit in IDEA's guarantee of a free appropriate public education "is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." In determining whether a FAPE was provided as to the substantive requirements of IDEA a court or hearing officer must inquire "is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. The *Rowley* Court described the education that must be provided under IDEA as "meaningful". Courts have held that educational benefit calls for more than a trivial educational benefit and requires the IEP to confer "meaningful benefit". *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3d Cir. 1988), *cert denied*, 488 U.S. 1030 (1989); *Hall v. Vance County Bd. of Educ.* 774 F. 2d 629 (4th Cir. 1985)

Counsel for the petitioner argues that the student's lack of academic progress over the past three years at and her extremely low academic achievement shows that the respondent did not develop an appropriate IEP to meet her unique needs and she needs full-time specialized instruction to enable her to close her gap in achievement. Counsel for DCPS's

counter argument is that the student is not in school to benefit from the education offered through her absences and being tardy many of which are unexcused.

The above Findings of Fact show that the school developed an IEP that is not reasonably calculated to provide educational benefits. Test results from the independent comprehensive psychological evaluation described in Findings of Fact #1 as well as the Woodcock Johnson Achievement scores from the January 2008 educational assessment and stated in the 2009 IEP show the student has significant deficits in all academic areas where she is several years below grade level. The student's primary disability of a specific learning disability is a major reason for these deficits according to the above testing and her teachers' comments in the April 14, 2010 MDT Meeting Notes. The school's only witness Ms. Queen confirmed in her testimony what the math teacher stated in the April 14, 2010 MDT Meeting Notes that the student needs one on one instruction to learn. While the student's current IEP increased by two hours her specialized instruction outside of general education from the previous IEP, the IEP still has the student for most of the week in a general education setting where the student has failed repetitively for the last three years at even with the presence of a special education teacher in the general education classes. The last two IEPs have not resulted in any improvement and the student continues to take the same courses such as Biology and Geometry that are well above her grade level. This hearing officer recognizes that the student's long history of attendance problems has also contributed significantly to this failure. While some of her absences are due to her medical condition of Sickle Cell anemia, others are unexcused. The student's absences however, do not excuse the respondent from developing an IEP that can meet her unique needs. As stated above, the school personnel working directly with the student realize she needs more one on one specialized instruction to learn. This hearing officer concludes that the current IEP even with the

additional two hours of specialized instruction outside of general education will not meet the student's unique needs and provide her "meaningful benefit" to make progress on addressing her severe academic deficits. The respondent has therefore denied a FAPE to the student in failing to develop an appropriate IEP.

As to issue two on the failure to implement the student's IEP, this hearing officer concludes based on the above Findings of Fact that counsel for the petitioner has failed to meet his burden of proof. Counsel for the petitioner has failed to show through logs by special education teachers and related service providers that the services were not provided. Counsel for the petitioner relies on the testimony of the student who denies she received specialized instruction and speech services. The special education coordinator has testified that a special education teacher is in all her academic classes and that pull-out specialized instruction and speech services were offered. The April 14, 2010 MDT Meeting Notes indicate that specialized instruction and speech services were provided when she attended up to that date. A hearing officer is responsible for assessing the credibility of witnesses. *Shore Regional High School Bd. of Educ. v. P.S.,* 381 F. 3d 194 (3rd Cir. 2004) This hearing officer finds the testimony of the special education coordinator more credible than the student on this issue.

As to issue three on the appropriateness of the placement, counsel for the petitioner argues that the student needs a full-time private therapeutic special education program and that the current placement can not meet her unique needs. Counsel for DCPS argues that the current placement can meet the student's needs if she attends school which she has not done on a regular basis with many unexcused absences.

The student's current IEP calls for sixteen hours of specialized instruction a week with ten hours outside of general education and six hours in general education that can be

implemented at This hearing officer has found above that the current IEP is inappropriate because it does not provide sufficient hours of specialized instruction outside of general education for her to receive meaningful educational benefits. Despite the presumption in favor of inclusion at *34 CFR 300.114 (b)*, courts have not required inclusion when the student will not receive a sufficient educational benefit in a regular classroom, even with the provision of supplementary aids and services. *Hartmann by Hartmann v. Loudoun County Bd. of Educ.*, 26 IDELR 167 (4th Cir. 1997); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989) See also the recent case of *N.S. v. District of Columbia* (Civil Action No. 09-621) decided by Judge Kollar-Kotelly on May 4, 2010.

The District of Columbia Code imposes an order of priority for special education placement: "(1) DCPS schools or District of Columbia public charter schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia." D.C. Code Section 38-2561.02 © (2007) A revised IEP that includes more hours of specialized instruction outside of general education may be able to be implemented at the current placement or following the above priority at another DCPS school. The student's long history of attendance problems up to the present time including many unexcused absences and being tardy unrelated to her hospitalizations, and petitioners rejection of DCPS's intervention plan to provide transportation from her home to school also mitigate against finding that the placement is inappropriate at this time.

Counsel for the petitioner has requested placement at a private full-time therapeutic program at in Maryland as an appropriate placement for the student. That placement is for students with emotional and behavioral disabilities, but this student's disability classification of multiple disabilities includes primarily a specific learning disability and Other Health

Impairment. The student has not been coded as emotionally disturbed. This hearing officer concludes that would not be an appropriate placement to address this student's specific disabilities.

ORDER

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

On the issue of the appropriateness of the IEP, this hearing officer finds a denial of a FAPE. The respondent shall reconvene an MDT/IEP meeting at by June 25, 2010 to review and revise the student's IEP consistent with this HOD. The MDT team shall revise the student's current IEP to have all the student's hours of specialized instruction provided outside of general education and also determine if more hours than the current sixteen hours of specialized instruction are necessary to meet the student's needs. The MDT team shall also discuss and determine placement to implement the revised IEP. The MDT meeting shall be scheduled at a mutually agreeable time through counsel for the parent.

It is further ORDERED:

The issue of failure to implement the April 14, 2010 IEP is DISMISSED.

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 USC §1415(i).

Date: June 5, 2010

Seymour DuBow /s/
Hearing Officer