

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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OSSE
Student Hearing Office
October 31, 2013

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: October 16, 2013</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened for one day on October 16, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age fourteen, resides in the District of Columbia with his parents and is a child with a disability pursuant to IDEA with a disability classification of other health impairment (“OHI”).

The student is currently enrolled at a DCPS high school (“School A”) where he is repeating ninth grade for school year (“SY”) 2013-2014. He attended School A for SY 2012-2013 also in the ninth grade. During SY 2011-2012 he attended a DCPS elementary/middle school (“School B”) in eighth grade.

The student’s current individualized educational program (“IEP”) developed on March 7, 2013, at School A prescribes the student be provided 4 hours of specialized instruction in an inclusion setting.

The student’s IEP has goals in the areas of math, reading written expression and health/physical. The IEP indicates the student is operating at approximately third grade level and the baseline statements for each area states that the student is not attending class on a regular basis to ascertain an accurate performance level.

Petitioner asserts DCPS did not conduct a functional behavioral assessment (“FBA”) or develop a behavior intervention plan (“BIP”) during SY 2012-2013 despite the student’s poor attendance and other behavioral problems that impeded his educational progress and resulted in him failing ninth grade.

Petitioner also asserts DCPS failed to develop an appropriate IEP for the student on March 7, 2013, because he requires a higher level of services due to his severe academic deficits. Petitioner asserts the student needs an IEP and placement with all instruction outside general education.

Petitioner seeks as relief an order from the Hearing Officer directing DCPS fund an independent assessment, conduct and FBA and convene a meeting with the parent within 10 days of receipt of all independent evaluations to review and revise the student’s IEP, develop a BIP, determine compensatory education, and determine placement.

DCPS filed a timely response to the complaint on August 21, 2013. DCPS denied any alleged denial of a free and appropriate public education (“FAPE”) and specifically asserted that the student’s IEP was reasonably calculated to provide educational benefit. DCPS denied that it was required to conduct a FBA during SY 2012-2013 and asserts

that it had faithfully targeted the issue of attendance by use of other strategies. The parent did not request the FBA at any time nor did any other member of the multi-disciplinary team (“MDT”) consider the assessment necessary. DCPS asserted that it was working to support the student in addressing issues of behavior its locus of control; yet the student’s parent has admitted herself she has “no control over” the student.

Nevertheless, DCPS stated its willingness to conduct a comprehensive psychological, an FBA, reconvene the MDT to review the assessment and revise the IEP including developing a BIP, as necessary. DCPS maintains that School A is the appropriate location of services.

A resolution meeting was held in August 30, 2013, and all matters were not resolved. The parties expressed no desire to proceed directly to hearing; instead 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 September 16, 2013, and ends (and the Hearing Officer’s Determination (“HOD”) is due) on October 30, 2013.

A pre-hearing conference was held on September 11, 2013, and a pre-hearing conference order was issued September 20, 2013, outlining, inter alia, the issues to be adjudicated.

THE ISSUES ADJUDICATED:²

1. Whether DCPS denied the student a FAPE by failing to conduct a FBA or develop a BIP during SY 2012-2013 despite the student’s continued poor attendance and other behavioral problems that allegedly impeded his educational progress and resulted in him failing ninth grade.
2. Whether DCPS denied the student a FAPE by failing to develop and provide the student an appropriate IEP³ and educational placement at School A on March 7, 2013, that prescribed full-time (all instruction in all areas) outside general education services.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties’ disclosures (Petitioner’s Exhibits 1-18 and Respondent’s Exhibits 1-3) that were admitted into the record and are listed in Appendix A. If any documents were not admitted into the record it is so noted in Exhibit A. Witnesses are listed in Appendix B.

² 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 this was the issue(s) to be adjudicated.

³ The parties acknowledged and agreed at the outset of the hearing that Petitioner’s burden would be met to prove student’s current IEP is inappropriate if Petitioner demonstrated that any instruction outside general education is warranted even if the evidence did not support a full-time special education program.

FINDINGS OF FACT:⁴

1. The student is age fourteen resides in the District of Columbia with his parents and is a child with a disability pursuant to IDEA with a disability classification of OHI. (Parent's testimony, Respondent's Exhibit 1-1)
2. The student is currently enrolled at School A where he is repeating ninth grade for school year SY 2013-2014. He attended School A for SY 2012-2013 also in the ninth grade. During SY 2011-2012 he attended School B in eighth grade. (Parent's testimony)
3. The student attended School B from fourth through eighth grade. During his years at School B the student had no school attendance problems. When the student began attending School A during SY 2012-2013 the student's parent would often accompany him to school but he soon began to leave school soon after arriving and eventually developed significant attendance problems. (Parent's testimony)
4. The student's current IEP developed on March 7, 2013, at School A prescribes the student be provided 4 hours of specialized instruction in an inclusion setting. (Respondent's Exhibit 1-8)
5. The student's previous IEP prescribed 4 hours of specialized instruction inside general education and 2 hours outside general education. (Petitioner's Exhibit 5-5)
6. The student had poor attendance during SY 2012-2013 at School A and when he came to school he often did not go to class. (Witness 5's testimony)
7. The IEP team when it met on March 7, 2013, did not consider giving the student a full-time IEP. The student's attendance was poor at the time. School A provided the student the services that were available at the school. He was in a small classroom with about ten students with a teacher who was dual certified. The student's IEP was amended to eliminate hours of instruction outside general education that he was to be provided because that was what the school could offer him. He was truant therefore he did not avail himself of the services that were provided. (Witness 4's testimony)

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.

8. The student's current IEP has four math goals. The present levels of performance ("PLOP") state that the student has a broad math score on the Woodcock Johnson III ("WJ-III") on the 3.7 grade level, with math calculation skills on the 3.9 grade level. The baseline for all but one of the math goals states that the student is not attending class on a regular basis to ascertain an accurate performance level. (Respondent's Exhibit 1-2)
9. The student has three reading goals in his IEP, and in the PLOP states that his broad reading score is on a 3.4 grade level, with passage comprehension on a 3.8 grade level and reading fluency on a 2.3 grade level. The baselines note that the student is not attending class enough to ascertain an accurate performance level. (Respondent's Exhibit 1-4)
10. The student has three writing goals, with his scores in broad written language on a 2.5 grade level and written expression on a 2.1 grade level. Again the baselines note the student's class attendance as an issue. Exhibit 1-5)
11. The student's parent admitted that "she knows [student] is failing and knows it is because of attendance but she no longer has any control over him." (Respondent's Exhibit 2-2)
12. The student's parent attempted to address the student's school attendance issues but to no avail and he eventually began to stay away from home more and attend school less. The parent worked with the School A staff in an attempt to address the student's behaviors. The interventions attempted included a attendance contract. The counselor at School A helped the parent a great deal regarding the student's poor attendance. However, the efforts were not successful and the student's academic performance suffered such that he failed ninth grade. (Parent's testimony, Witness 1's testimony)
13. The student's parent first became aware that the student was failing school at one of the meetings held at School A. However, the student was given an opportunity to pass ninth grade and be promoted if he attended summer school. The parent attempted to make him attend but he ultimately chose not to attend summer school and thus is repeating ninth grade in SY 2013-2014. (Parent's testimony)
14. No truancy action was ever initiated. However, the student eventually became court involved because of his behaviors in the community and was assigned a probation officer and given a curfew. The student of late has not been in compliance with his probation and is not sticking to his curfew. (Parent's testimony, Witness 1's testimony)
15. At the start SY2013-2014 school year the student was attending School A regularly, doing well and checking in with school staff. However, he was suspended in mid-September and has not been back to school since. (Witness

5's testimony)

16. The student's probation officer is hopeful that the student will be placed in a different school because School A has apparently not been a successful location for the student. (Witness 1's testimony)
17. DCPS referred the student for a FBA on September 9, 2013, and the School A social worker met with the student on September 10, 2013, and had him complete a brief written survey. The social worker then met with the student's teachers but he has not been able to conduct an in-class observation because the student has not returned to school following his suspension. The FBA is to address the student's poor attendance he displayed during the previous school year. (Witness 3's testimony)
18. The parent's educational consultant proposed a compensatory education program to compensate the student for the alleged denials of FAPE that allegedly included the student not having a full time IEP for SY 2012-2013 to present. The consultant is currently engaged to provide the student 80 hours of independent tutoring that DCPS has recently granted the student. The consultant has met with School A principal and one of the student's teacher but has been unable to deliver any of the tutoring services awarded because the student has not recently been at school. He has not yet been able to meet with the student at his home. (Witness' 2's testimony, Petitioner's Exhibits 18)

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.⁵ *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 conduct a FBA or develop a BIP during SY 2012-2013 despite the student's continued poor attendance and other behavioral problems that allegedly impeded his educational progress and resulted in him failing 9th grade.

Conclusion: Petitioner presented insufficient evidence to sustain the burden of proof that DCPS denied the student a FAPE by failing to conduct and FBA and develop a BIP to address his attendance issues.

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

⁵ 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).

The placement and program for each disabled student must be reasonably calculated to confer educational benefit. See *Board of Education of the Hendrick Hudson Central School District Westchester County et al, v. Rowley*, 458 U.S. 276, 102 S.Ct. 3034(1982)

The evidence⁶ indicates that the DCPS took action during SY 2012-2013 including the use of an attendance contract to address the student's attendance issues. There was no evidence that a specific request was made by the parent or any member of the student's IEP team that a FBA be conducted and a BIP developed. There was no evidence or legal authority presented that would indicate that the such strategies are a required course of action or a mandate under IDEA to address the student's attendance issues. The choice of DCPS and the IEP team to address the concerns in another and/or different course should not be subject to Monday morning quarterbacking. Thus, the Hearing Officer concludes that Petitioner did not sustain the burden of proof on this issue.

Issue 2: Whether DCPS denied the student a FAPE by failing to develop and provide the student an appropriate IEP and educational placement at School A on March 7, 2013, that prescribed full-time (all instruction in all areas) outside general education services.

Conclusion: The parties acknowledged at the outset of the hearing that Petitioner's burden would be met that the student's current IEP is inappropriate if Petitioner demonstrated that the student should have been provided some instruction outside general educational even the evidence did not support a full-time special education program.

In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent.*

⁶ Finding of Fact ("FOF") #s 12, 13

Susquehanna Intermediate Unit 16, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.” *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009).

Requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit. *Blackmon v Springfield R-XII Sch. Dist.* 198 F.3d 648, at 653 (8th Cir. 1999)

Petitioner presented sufficient evidence to sustain the burden of proof by a preponderance of the evidence that the student’s current IEP was inappropriate and the level of services in the student’s IEP was insufficient and not designed to address his unique needs. Rather, the evidence demonstrates the student’s IEP was amended on March 7, 2013, to fit the program that was offered at School A. Given the level of the student academic deficits and the student’s poor school attendance, in the Hearing Officer opinion, the evidence did not support a finding that the DCPS’ reduction in the student’s level of services to a less restrictive setting was warranted and resulted in a denial of FAPE.

The evidence indicates that the student’s school attendance was not a problem until he began to attend School A.⁷ Although it was not clear from the evidence just what the cause of the student’s development of attendance issues was, the evidence indicates that the student’s school poor attendance and resulting academic performance⁸ did not warrant a reduction in services and reduction in the student’s least restrictive environment. It seems reasonable that rather than acting to reduce the student’s level of service because he was not attending, the services should have at least been maintained if not increased.

The Hearing Officer concludes that based upon the evidence of the student’s low academic levels, failing grades and poor attendance that the changes made to the student’s IEP on March 7, 2013, were not reasonably calculated to confer educational benefit and the student was denied a FAPE as a result.

Because of the denial of FAPE the Hearing Officer has found herein as remedy the Hearing Officer directs DCPS in the Order below to conduct a comprehensive psychological evaluation and include (in addition to educational assessments to address the student’s current levels of academic performance and IEP goals) that it include social/emotional assessments to address the student’s attendance issues.

⁷ FOF # 3

⁸ FOF #s 8, 9, 10

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. 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." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

However, "*Reid* certainly does not require [a] plaintiff to have a perfect case to be entitled to a compensatory education award"; on the contrary, "[o]nce a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with *Reid*." *Stanton*, 680 F. Supp. 2d at 207.

Petitioner has requested compensatory education for the student allegedly not being provided a full time out of general education curriculum. The Hearing Officer did not conclude that the student was due such a program only that it was inappropriate to have reduced the student's services to exclude the prior instruction that was to be provided outside general education. In addition, DCPS recently awarded the student 80 hours of independent tutoring after the complaint was filed and the consultant has been unable to yet deliver those hours. The evidence does not support a finding that the student would benefit from or be able to use any additional services and the Hearing Officer in this instance concludes that an award any additional tutoring services as compensatory education is warranted.

ORDER:⁹

1. DCPS shall within thirty (30) calendar days of the issuance of this Order, complete a comprehensive psychological evaluation (to include cognitive, academic and social/emotional components that address, inter alia, the student's non-attendance).
2. DCPS shall within fifty (15) calendar days of completion of the above evaluation convene a multi-disciplinary team ("MDT") meeting to determine review the evaluation(s), review and revise the student's IEP as appropriate including the appropriate level of instruction to be provided outside general education.
3. All other requested relief is denied.

⁹ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

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

Coles B. Ruff, Esq.
Hearing Officer
Date: October 30, 2013