

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

OSSE
Student Hearing Office
June 05, 2013

STUDENT,¹

Petitioner,
v

SHO Case No:
Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On March 11, 2013 Parent,² on behalf of her child (“Student”), filed an Administrative Due Process Complaint Notice (“Complaint”), HO 1,³ requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education (“FAPE”) to Student by District of Columbia Public Schools (“DCPS”) under the Individuals with Disabilities Education Act, as amended (“IDEA”). 20 U.S.C.A. §1415(f)(1)(A). Respondent DCPS filed a Response to Parent’s Administrative Due Process Complaint Notice (HO 5) on March 18, 2013. This was within the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). A resolution meeting was held on April 18, 2013. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form so indicating.

¹ Personal identifying information is provided in Appendix A, attached hereto.

² Student became after this case was filed. He was substituted as the Petitioner in this matter. See Infra at p. 3.

³ Hearing Officer Exhibits will be referred to as “HO” followed by the exhibit number; Petitioner’s Exhibits will be referred to as “P” followed by the exhibit number; and Respondent’s Exhibits will be referred to as “R” followed by the exhibit number.

HO 7. The 45 day timeline began to run on April 11, 2013, the day after the 30 day resolution period ended. The Prehearing Conference was held on April 15 and April 25, 2013. During the first day of the prehearing conference Respondent's counsel revealed she had not received the appendix filed with the complaint, and Petitioner's counsel indicated he had made requests for student records to which there had been an incomplete response. As neither party was ready to proceed, I scheduled a second conference date and issued Miscellaneous Order on April 15, 2013⁴ (HO 6) regarding the actions that were to occur. I issued a Prehearing Conference Order on April 29, 2013. HO 13. On May 1, 2013 I held a status conference and issued an Order (HO 16) regarding the posture of the matter.

Petitioner filed an unopposed motion for a continuance on April 25, 2013 (HO 8) and an amended motion for continuance on April 26, 2013 (HO 11). I granted the continuance by way of Order dated April 26, 2013.⁵ HO 12. My Hearing Officer Determination is due, therefore, on June 4, 2013.

During the prehearing conference I scheduled an evidentiary hearing to be held on the record on May 15, 2013. The issues to be addressed during the evidentiary hearing were whether the student was an eligible student under the IDEA in 2009⁶ and, if so, whether an exception to the two year statute of limitations applied to the instant matter. I issued an Order on May 16, 2013 following the evidentiary hearing (HO 30) finding Student was not an IDEA eligible student in 2009, and no exception to the two year statute of limitations applied to the instant matter. I also denied Petitioner's Motion for Missing Records Presumption.⁷(HO 17) On May

⁴ This Order was amended to correct the dates scheduled for the due process hearing by email of April 16, 2013.

⁵ The Order is dated May 26, 2013 in error. It was issued April 26, 2013. This date error was noted and corrected on the during the due process hearing.

⁶ Petitioner asserted Student was eligible under IDEA in 2009 because he allegedly had an individualized education program ("IEP") in 2009.

⁷ This motion had been filed on April 30, 2013.

16, 2013, following the evidentiary hearing Petitioner filed a Motion to Strike the testimony of one of the witnesses. HO 32. I denied the motion by Order of the same date. HO 33.

On May 14, 2013 Respondent filed a motion to dismiss the instant complaint because Student's eighteenth birthday would be May 17, 2013 and Petitioner would no longer hold Student's educational rights. HO 29. On May 17, 2013, I issued an Order (HO 34) addressing the issues raised in the Motion to Dismiss and indicating I would resolve it at the beginning of the due process hearing on May 21, 2013. Petitioner filed a Motion for Substitution on May 20, 2013, (HO 35) and after argument I granted the motion on the record on May 21, 2013.⁸

A core element in the complaint was Petitioner's contention that Student had been an eligible student under IDEA with an IEP in 2009. As noted above, Petitioner's counsel indicated Petitioner had been unable to obtain requested school records, including the 2009 IEP. During the progress of the instant matter Petitioner's counsel sought and received an Order from the Superior Court of the District of Columbia for Subpoenas Duces Tecum returnable to that Court. HO 9 and HO 10. According to counsel, the documents returned did not add significant amounts of information to that previously provided by DCPS. Additional procedural matters included granting Petitioner's unopposed motion (HO 28) that his expert witness be allowed to remain in the room during Respondent witness testimony⁹ and denying Petitioner's motion (HO 25) for a notice of location of service.

At all times relevant to these proceedings Petitioner was represented by Pierre Bergeron, Esq., and Tanya Chor, Assistant Attorney General, represented DCPS. By agreement of the

⁸ Following argument Respondent's counsel stated on the record that Respondent did not oppose the substitution.

I note that after approximately one half day of hearing I met with counsel, on the record, for the parties without Petitioner. I expressed my concern that Petitioner did not appear to be following the case and asked his counsel whether he thought Petitioner was able to understand the proceedings and the issues. Respondent's counsel also indicated similar concerns. Petitioner's counsel affirmed Petitioner's understanding of the issues and the process. We proceeded with the matter following receipt of these assurances.

⁹ This did not occur during the testimony despite my having granted the motion.

parties, the hearing was scheduled for May 21 and 22, 2013. The hearing was held as scheduled in Room 2003 of the Student Hearing Office.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C. §§ 1400, *et seq*; District of Columbia Code, §§ 38-2561.01, *et seq.*; federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

ISSUES

The issues are:

- 1) Whether DCPS denied Student a free, appropriate public education (“FAPE”) by failing to provide timely evaluations and re-evaluations in all areas of suspected disability, including a comprehensive psychological assessment, a speech-language assessment and an adaptive functioning assessment;
- 2) Whether DCPS denied Student a FAPE by failing to timely identify Student as having an emotional disability, a specific learning disability and an intellectual disability. This allegation, at least in part, is an assertion that DCPS did not meet its Child Find responsibilities as to Student;
- 3) Whether DCPS denied Student a FAPE by failing to provide him an appropriate IEP. His IEP did not provide sufficient hours of service; Student requires a full time IEP. The IEP did not include, among other items, speech goals, goals addressing the student’s emotional needs or needed interventions for student’s learning disabilities. Petitioner raised concerns about all components of the IEP; and
- 4) Whether Student is entitled to compensatory education.

RELIEF REQUESTED

Petitioner requested:

- 1) Placement in a full time therapeutic day school;
- 2) Wrap around services to include therapeutic transport, individual and family counseling, medication management and therapeutic recreation separate and apart from the services provided in the full time day school placement; and
- 3) Compensatory education.

- P 38 Dr. Resume
- P 39 Dr. Resume
- P 40 Dr. Resume
- P 41 Dr. Resume
- P 42 Court Order : Judge Maribeth Raffinan
- P 43 Client's Wrap Circle
- P 44 Classroom/school observation
- P. 45 Justification and Definition of Wrap Around/Related Services for Supplementing His Academic Placement in a Private Therapeutic Day Program and As Compensatory Education (Compensatory Education Plan).¹¹

At hearing Petitioner asked that two additional exhibits be admitted. P 47, an Email chain with the Office of the State Superintendent of Education (“OSSE”) regarding Dr.

license renewal was admitted because P 41 already provided notice to Respondent of Dr.

licensure status, and she had been identified as a potential expert witness in the 5 day disclosures. Proposed P 48 was not admitted.

Exhibits admitted on behalf of Respondent are:

R1	IEP Signature Sheet	10/11/2012
R2	Student Progress Report	11/12 SY
R3	Attendance Summary	5/9/2012
R4	Letter of Understanding and Transcript	8/23/2012
R5	Student Progress Report	12/13 SY
R6	Letter of Understanding and Transcript	5/2/2013
R7	Student Schedule	5/2/2013
R8	RSM Notes	4/17/2013
R9	Court ordered Psycho-Educational Evaluation	5/12/2012
R10	Court ordered Psychiatric Evaluation	5/1/2012
R 11	Court ordered Competency Evaluation	12/19/2012
R 12	Declaration	4/25/2013
R 13	Data Evaluation Review	2/15/2013
R 14	Data Evaluation Review (revised)	4/19/2013
R 15	Children's Hospital SL Evaluation	12/6/2012
R 16	DCPS' Independent Assessment Review	2/21/2013
R 17	Meeting Notes	2/22/2013
R 18	Correspondence from Health Center	3/5/2013
R 19	Prior Achievement History Report	5/1/2013
R 20	Student Special Education Record List	2005 – current
R 21	CV	

¹¹ P 46 was not admitted.

R 22	Student Progress Report	2008-2010
R 23	Student History	2008-2009
R 24	Acknowledgment Letter of Special Education Referral	5/21/2012
R 25	Analysis of Existing Data	6/6/2012
R 26	Attendance Summary	2/22/2013

Exhibits admitted by the Hearing Officer are:¹²

- 1 Administrative Due Process Complaint Notice filed March 11, 2013
- 2 Notice of Hearing Officer Appointment of March 12, 2013
- 3 Prehearing Conference Scheduling Letter of March 14, 2013
- 4 Prehearing Notice dated March 20, 2013
- 5 District of Columbia Public Schools's [sic] Response to Petitioner's Administrative Due Process Complaint dated March 18, 2013
- 6 Miscellaneous Order dated April 15, 2013 with email amendment of April 16, 2013
- 7 Resolution Period Disposition Form dated April 18, 2013
- 8 Motion to Extend the Hearing Officer's Determination from May 25, 2013 to June 4, 2013 with a Statement of Facts and Points and Authorities dated April 25, 2013
- 9 Order of the Superior Court of the District of Columbia, Family Court – Juvenile Branch of April 23, 2013
- 10 Copies of *Subpoenas Duces Tecum* returnable to the Superior Court of the District of Columbia
- 11 Amended Motion to Extend the Hearing Officer's Determination by 10 Days from May 25, 2013 to June 4 2013 with a Statement of Facts and Points and Authorities dated April 26, 2013
- 12 Order granting 10 day continuance of April 26, 2013
- 13 Prehearing Conference Order dated April 29, 2013 with email amendment of
- 14 Petitioner's brief of April 29, 2013 on Waiving the Statute of Limitations
- 15 Petitioner's Motion to withdraw the Motion to Inspect and Copy Records of April 30, 2013
- 16 Order Regarding Status Conference held May 1, 2013
- 17 Motion for Missing Records Presumption of April 30, 2013
- 18 Order Regarding Status conference held May 1, 2013 (amended)
- 19 Respondent's Brief on Statute of Limitations Under IDEA of May 2, 2013
- 20 Petitioner's Reply to DCPS' Opposition on Waiving the Statute of Limitations of May 6, 2013
- 21 Respondent Opposition Motion for Missing Records Presumption of May 6, 2013
- 22 Reply to DCPS Opposition for Missing Records Presumption
- 23 Respondent's Disclosures for May 15, 2013 evidentiary hearing provided May 8, 2013
- 24 Petitioner's Disclosures for May 15, 2013 evidentiary hearing provided May 8, 2013
- 25 Motion of May 10, 2013 for a Notice of Location of Services by May 16, 2013

¹² Emails forwarding the documents of record to counsel and the hearing officer are filed with the documents of record unless otherwise noted.

- 26 Miscellaneous emails
 - Chain re scheduling prehearing conference (3 chains) from March 14, 2013 through March 18, 2013
 - Chain clarifying whether Respondent was filing a motion to dismiss with the response
 - Chain re contact numbers for prehearing conference
 - Chain confirming May 14 and May 15, 2013 for hearing dates
 - 4/25/13 from HO inquiring regarding Motion for Continuance
 - 4/25/13 from Petitioner's counsel re the student's suspected disabilities
 - 4/25/13 from Petitioner's counsel re IEP deficiencies
 - 4/26/13 from HO requesting amended continuance Motion to correct typographical error and clarification
 - Chain re subject matter of complaint
 - Chain re time limitations for May 15, 2013 evidentiary hearing
 - Chain re information for due process hearing
- 27 List of Proposed Hearing Officer Exhibits filed May 11, 2013¹³
- 28 Petitioner's Motion for Dr. _____ to Listen to DCPS testimony filed May 13, 2013
- 29 District of Columbia Public Schools' Motion to Dismiss Petitioner's Due Process complaint filed 5/14/2013
- 30 Order re Evidentiary Hearing of May 15, 2013 filed May 16, 2013
- 31 Petitioner's Opposition to Motion to Dismiss filed May 16, 2013
- 32 Petitioner's Motion to Strike the Testimony of Mr. _____
- 33 Order on Petitioner's Motion to Strike the Testimony of Mr. _____ and _____ Regarding the Filing of Additional Motions filed May 16, 2013
- 34 Order on Motion to Dismiss filed May 17, 2013
- 35 Petitioner's Motion for Substitution filed May 20, 2013

B. Testimony

Petitioner testified and presented the following witnesses:

- _____ counselor
- _____ M.D.
- M. S., testified as an expert in speech-language evaluation
- _____ Ed.D., testified as an educator with expertise in psycho-education
- _____ Ph. D., Executive Director of _____
- _____ Ed. S., M. Ed., Education director,
- _____ Ph. D., testified as an expert in clinical psychology
- Petitioner's mother

DCPS presented the following witnesses:

- _____ Case manager and special education teacher DCPS

¹³ HO exhibits following this exhibit are additions to those included in the proposed list of hearing officer exhibits as they were filed following the filing of the proposed list

education. Possible classification as a student with an intellectual disability was ruled out at this meeting. P 4; P 11; P 12; P 13; P 14; P 16; R 20; R 29; R 31; R 41; R 46.

3. Student's initial IEP is dated October 11, 2012. This IEP requires Student receive 5 hours of specialized instruction in the general education setting and 10 hours of specialized instruction outside the general education setting each week. Student also is to receive 120 minutes of behavior support services outside the general education setting monthly. This IEP includes goals in mathematics, reading and emotional/social/behavioral development. It also has a transition plan. The IEP indicates Student is expected to exit high school with a certificate prior to age 21. The IEP indicates he is expected to take the regular statewide assessments with accommodations. P 17.
4. Student also has a Behavior Intervention Plan ("BIP"). The BIP addresses six areas of behavior: avoidant behaviors, verbalizing the need for assistance, increasing feelings of adequacy, increasing assertiveness, increasing independence and attending power hour to increase academic skills. P 18.
5. Student has borderline intellectual functioning, specific learning disabilities in mathematics and reading, a speech-language impairment and an anxiety disorder. He demonstrates difficulty with emotional regulation, class avoidance and executive functioning. He has limited age appropriate social skills. P 5; P 6; P 7; P 8; P 9; P 10; P 20; P 22; P 23; R 14; Testimony of _____ Testimony of _____ Testimony of _____
Testimony of _____ ; Testimony of _____
6. Student's full scale IQ is 72. His best skills are in the ability to quickly process simple visual information, and his lowest skill area is in the measure of verbally mediated knowledge and reasoning. Student's academic achievement on the Woodcock Johnson

III ranges from a low age equivalent score of 7-3 in reading vocabulary to a high age-equivalent score of 11-4 on the writing skills cluster. Student's low functioning is attributable, in part, to the significant number of school days he has missed. P 5;

Testimony of

7. Student's anxiety disorder is limited to the school setting. It is not a generalized anxiety disorder. Student is unable to understand what is occurring in class and becomes anxious. Student compensates by talking around things or making jokes. He also avoids attending class to avoid the anxiety provoking situation. P 5; Testimony of
8. Student received an independent speech-language assessment on December 6, 2012. This report was reviewed by DCPS at a meeting held on February 22, 2013 following a data review by a DCPS speech-language pathologist. Student is significantly below average in speech, both receptive and expressive. His communication skills are very limited. He demonstrates significant weakness in language comprehension. Student's social pragmatic language skills also are below age level expectation. On the Clinical Evaluation of Language Fundamentals ("CLEF") Student's highest percentile rank of 5 is on a subtest requiring recalling sentences. All of Student's CLEF Core and Index scores are below a percentile rank of 1.0. Percentile ranks of 16 to 84 are average. Student is a visual learner. P 8; P 9; P 10; P 19; Testimony of
9. The independent speech-language assessment does not include an observation of Student in the classroom setting nor interviews with teachers or a description of Student's performance in school. DCPS considers Student's absences a possible exclusionary factor for providing speech therapy to Student. P 10.

10. Student received an adaptive behavior assessment as part of a Competency Evaluation completed in December 2012 for the Superior Court of the District of Columbia, Family Court. Overall, Student's adaptive level was rated as low average. Student functioned at the average to high average level in all composite skill areas except the leisure and social areas in which his skills were rated as extremely low. P 7.
11. Academically Student functions between the first grade level and the low sixth grade level. He scored below basic on the DC CAS for three years. Student has repeated multiple grades, 4th, 7th, and 8th grade two times. He is likely to be required to repeat grade a second time (which will result in him spending three years in the _____ at the end of the current school year because he currently is receiving failing grades. Student has received failing grades in the vast majority of his classes over the last several years. P 5; P 6; P 28; P 30; P 31; Testimony of _____
12. Student has a history of not attending school and, when in school, not attending his classes. P 31; P 33; P 34; Testimony of Student; Testimony of _____ Testimony of _____ ; Testimony of Petitioner's mother; Testimony of _____ Testimony of _____ Testimony of _____ Testimony of _____ .
13. When Student does attend class he does not receive specialized instruction in World History, Chemistry or Spanish. Testimony of _____
14. Student requires a small school setting and classes with a low student teacher ratio. He requires a structured environment with significant one on one support. To access material Student requires repetition and chunking. P 8; P 19; P 20; Testimony of _____ Testimony of _____

15. Academy is a non-public, special education school for male students in grades 9 through 12. The school is approved by the Office of the State Superintendent of Education in the District of Columbia (“OSSE”). provides academic instruction and concurrent vocational instruction. also provides individual and group therapy to all enrolled students. It has an established protocol for addressing absenteeism. Each classroom at has a teacher and a para-educator. There is a maximum of seven students in a classroom. a 12 month program. Students who attend take the DC CAS and earn high school diplomas. Student has been accepted at He would be the only student on the certificate track were he to attend Testimony of

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. Many of the witnesses who testified in this matter were credible, but some witnesses, as is generally the case, were more persuasive than others. In addition I note there were some credibility issues. For example, I found the testimony provided by DCPS’ witnesses When providing testimony that was essentially the reporting of factual information, such as the number of teachers in a classroom, testimony was clear and supported by the evidence. Conversely, when providing testimony required him to provide explanations or interpretations of documents his testimony became muddy, evasive or even implausible, leading me to conclude that in those instances he was not credible. I, therefore, have not relied on this particular witness for explanations of documents or recitals of communications among the many individuals involved with the education of the instant Student. Ms. testimony was similar to Mr.

in that her factual information was clear and informative, but her testimony regarding interpretation or inference tended to be evasive or muddy. For example, she stated Student did not attend class but she did not know why. Yet Student readily explained his difficulty with the classroom instruction when at hearing. As Student's case manager it would seem likely that Ms.

would have had a relationship with Student that would have allowed her to obtain this information from him. Therefore, it seems likely she either did not ask or was being evasive in her testimony. In either case, her testimony regarding Student is damaged and cannot be given much weight.

I also found _____ regarding the proposed compensatory education plan to lack credibility. Her testimony that the compensatory education plan would remain the same whether it addressed Student's educational history going back to the 4th grade or only the last two years of school was not believable and cannot be relied upon. Additional credibility issues are noted in the discussion that follows.

ISSUES

1) Whether DCPS denied Student a FAPE by failing to provide timely evaluations and re-evaluations in all areas of suspected disability, including a comprehensive psychological assessment, a speech-language assessment and an adaptive functioning assessment¹⁵

Under IDEA, a student must be assessed in all areas related to his/her suspected disability. *34 C.F.R. § 300.304(c)(4)*. In conducting the evaluation, the public agency, here, Respondent DCPS, must assure the evaluation is "sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." *34 C.F.R. § 300.304(c)(6)*. The assessments and other information gathered for the evaluation are used in determining the

¹⁵ Petitioner did not address this issue in opening or closing statements.

content of the child's IEP. *34 C.F.R. § 300.304(b)(ii)*. The assessments thus allow the team to develop an IEP that address all areas of educationally related need. *Id.*

In the instant matter, Student's attorney referred the student for a special education eligibility determination on May 18, 2012. He attached the psycho-educational assessment signed by Dr. _____ to the referral. DCPS completed a review of this assessment and held a meeting to discuss eligibility on June 6, 2012. The June 6, 2012 meeting was rescheduled to June 14, 2012 so the psychologist who was to review the assessments during the meeting could attend. The June 6, 2012 meeting also was rescheduled due to the parent's inability to attend the meeting to September 17, 2013. Student was found eligible for special education and related services under IDEA at this September meeting. The team at this meeting, including the parent and Student's attorney agreed he did not have an intellectual disability and was eligible for services as a student with a specific learning disability.

Evaluation under IDEA takes place at a point in time. At the time of the evaluation the student being evaluated is to be assessed in all areas of suspected disability. In the instant matter, Respondent, DCPS, reviewed Student's attendance, an independent psycho-educational assessment provided by Student's attorney and teacher progress reports, and based on these documents found Student eligible for services. Petitioner alleges he was not evaluated in all areas of suspected disability, specifically noting the need for a comprehensive psychological, a speech-language assessment and an adaptive behavior assessment. However, the evidence does not support this claim. Student received a comprehensive psycho-educational assessment in May 2012 which was provided to DCPS and used in determining Student eligible for services. That report, while thoroughly reviewing Student's many needs does not suggest that either a speech-language assessment or an adaptive behavior assessment should be completed. Petitioner did not

request that either of these assessments be provided. The team at the September 17, 2012 meeting found Student eligible. Petitioner's notes (written by his attorney) of this meeting do not indicate Petitioner thought additional assessments were required at this time.

I, therefore, find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to provide a comprehensive psychological, speech-language or adaptive behavior assessment as part of the evaluation process.

IDEA further requires that a reevaluation is conducted if the local education agency, here DCPS, determines that the educational or performance needs of the child warrant a reevaluation or if the child's parent or teacher requests a reevaluation. In the instant matter, Petitioner provided no evidence suggesting there had been a request for an additional comprehensive psychological following his eligibility determination.¹⁶ Petitioner's doctor, however, referred him for a speech-language assessment. This assessment was completed on December 6, 2012. This assessment was provided to DCPS,¹⁷ and reviewed by a DCPS speech language pathologist on February 20 and 21, 2013. The speech language assessment was then reviewed at a multidisciplinary team ("MDT") meeting on February 22, 2013. Thus, Petitioner received a speech language assessment, based on a medical referral to an outside agency, when it was determined such an assessment would be appropriate. The assessment was provided to DCPS and reviewed as part of the IDEA process. There is no evidence indicating Petitioner ever made a request of DCPS for a speech-language assessment before providing this outside assessment to DCPS.

Petitioner provided no evidence suggesting the need for Student to receive an adaptive behavior assessment. However, an adaptive behavior assessment was included in a Competency

¹⁶ The psycho-educational report used in the classification process was less than one year old.

¹⁷ The date this was provided to DCPS is not in evidence.

Evaluation completed in December 2012. Overall, Student's adaptive level was rated as low average. Student functioned at the average to high average level in all composite skill areas except the leisure and social areas in which his skills were rated as extremely low. It appears likely the overall low average score is attributable to the two areas in which he scored extremely low. The competency evaluation with the included adaptive behavior assessment was provided to DCPS.

I, therefore, find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to provide a comprehensive psychological, speech-language or adaptive behavior assessment as part of the re-evaluation process.

2) *Whether DCPS denied Student a FAPE by failing to timely identify Student as having an emotional disability, a specific learning disability and an intellectual disability. This allegation, at least in part, is an assertion that DCPS did not meet its Child Find responsibilities as to Student*

Under the IDEA all children with disabilities who are in need of special education and related services must be identified. 34 C.F.R. § 300.111. The IDEA defines a child with a disability as a child evaluated in accordance with IDEA requirements as having one of thirteen specified disabilities, including among others, specific learning disabilities, emotional disability and intellectual disability. *See*, 34 C.F.R. § 300.8.

In the instant matter, Student was found eligible for services under IDEA as a student with specific learning disabilities. There is no disagreement regarding Student's learning disabilities. Yet Petitioner argues DCPS did not provide Student a FAPE because Student was not identified as having an emotional disability, a specific learning disability and an intellectual disability which presumably would result in Student being found to have multiple disabilities. *See*, 34 C.F.R. § 300.8(c)(7). Petitioner argues both a child find violation and a FAPE violation as the bases for this claim.

The child find argument under 34 C.F.R. § 300.111 addresses the identification of potentially eligible, special education students and the evaluation of these students to assure they are included in IDEA services if appropriate. Under IDEA, Child Find is an affirmative obligation. A district must identify and evaluate all students potentially eligible for services under IDEA. There is no doubt Student was identified and has been receiving IDEA services under an initial IEP developed in October 2012. However, it is difficult to imagine how DCPS could not have recognized Student was having academic issues that might possibly result in his being found eligible for special education under IDEA prior to the start of his second year in ninth grade. He had repeated a grade four additional times prior to the instant year for a total of five years. He was not receiving passing grades and had not for some time. He scored below the basic level on the DC CAS exam for three years prior to entering

DCPS suggests that Student's poor school performance is attributable to his poor attendance. I cannot disagree with the proposition that poor attendance affects academic performance. However, in the instant matter, it stretches credulity to suggest this was the only cause of Student's poor school performance, and the MDT ultimately agreed. The MDT found Student eligible for services under the IDEA while simultaneously pointing at his poor attendance. However the MDT did not make an effort to understand the basis for Student's poor attendance. At hearing, DCPS went so far as to blame the Student for having a disability that impacts his school performance and contributes to his chronic absenteeism by denying the extent of Student's educational need. When presented with an explanation for his poor attendance, rather than examining the evidence presented in a psycho-educational evaluation developed for the District of Columbia District Court, a psychiatrist's assessment and a competency evaluation, DCPS denied the psychological underpinnings of Student's absenteeism. Multiple witnesses, a

psychologist, a psychiatrist and a social worker testified regarding Student's anxiety and school avoidance and distinguishing truancy which is an intentional, perhaps oppositional act, from absenteeism caused by underlying psychological and emotional issues as with Student. DCPS ignored these underlying issues and continued, both prior to finding Student eligible for programs and services under IDEA and after finding him eligible, to deny Student's disabilities as they related to his absenteeism and the resultant need for intervention. This denial of or refusal to recognize Student's needs related to emotional factors continued during hearing. DCPS' denial or refusal appears to be based, at least in part, on a lack of understanding of emotional disability. For example, during his testimony, the SEC from _____ repeatedly stated Student was not a behavior problem, adding Student's only problem was that he did not go to class. This appeared to be his explanation for not recognizing Student's emotional disability. Yet the definition of an emotional disability under IDEA includes a, "tendency to develop physical symptoms or **fears** associated with . . . school problems." 34 C.F.R. § 300.8(c)(4)(i)(E) (emphasis added). Fear, manifest as anxiety, is what the witnesses described in relation to Student's school avoidance and truancy. Fear, manifest as anxiety, is what the evaluations describe. Fear, resulting in anxiety and avoidance, is what DCPS ignored and continues to ignore.

I, therefore, conclude DCPS failed to meet its Child Find obligation by failing to identify Student as a child with an emotional disability and/or a specific learning disability for the two years preceding the filing of this complaint. I further find DCPS did not fail to meet its Child Find obligation by failing to identify Student as a child with an intellectual disability as Petitioner did not meet his burden of proof as to this claim.¹⁸

¹⁸ Petitioner provided no evidence on the possible classification of Student as having an intellectual disability other than his poor academic performance which can have many causes.

The allegation regarding Student's current classification category, specific learning disability alone rather than identifying additional classification categories of emotional disability and intellectual disability thereby alleging student should have been classified as having multiple disabilities, is not a basis for finding a denial of FAPE. As noted above, it is likely that Student has an emotional disability although he has not been so classified. While every special education student must be included in one of the thirteen classification categories, the categories themselves do not control the services provided to the student, and it is the programs and services in the IEP that define the student's FAPE. The classification categories are statistical warehouses used for various statistical and research purposes. A FAPE, in contrast, is an individualized determination based on the needs of the particular student identified in his/her IEP. Students with identical classifications may receive entirely different services, and students with different classifications may receive identical services based on their identified needs. It is the needs of the child that determine FAPE, not the label under which the student receives services. The IDEA regulations, moreover, state that nothing requires a child be classified by his/her disability as long as the child with an eligible disability who needs special education and related services is regarded as a child with a disability under IDEA. *See*, 34 C.F.R. § 300.111(d). Student has been found eligible and has an IEP so he is of course regarded as a child with a disability under IDEA.

For these reasons I find, by a preponderance of the evidence, that Student was not denied a FAPE by DCPS' failure to identify Student as a student with a specific learning disability, an emotional disability and an intellectual disability.

3) *Whether DCPS denied Student a FAPE by failing to provide him an appropriate IEP. His IEP did not provide sufficient hours of service; Student requires a full time IEP. The IEP did not include, among other items, speech goals, goals addressing the student's emotional needs or*

needed interventions for student's learning disabilities. Petitioner has raised concerns about all components of the IEP

Under the IDEA each local education agency is required to provide a FAPE to each student found eligible for special education and related services. A FAPE is:

Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . . [a]re provided in conformity with an . . . IEP that meets the requirements of [the IDEA regulations].

34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id.* An IEP that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-

204 (1982). All students found eligible for services under IDEA are determined to fit in one of 13 eligibility categories. 34 C.F.R. § 300.306. *See also*, D.C. Code § 30.3001.

In the instant matter, Petitioner's experts as well as the professionals who work with him or evaluated him outside DCPS agreed Student requires a full time program in a small school setting with a structured small classroom providing a low ratio of students to teachers. Student also needs to have the availability of intensive one on one instruction. The program, they agreed should have a strong therapeutic orientation. They further indicated Student's program and services should focus on instruction in vocational skills and practical life skills. He needs behavior intervention to address his truancy and class cutting as well as support to address his anxiety and related school avoidance. Student's needs and skills are such that he requires instruction using chunking, simple sentences and repetition. He is a visual learner so pictures should be incorporated in his instruction. Student also requires assistance in developing age appropriate social skills and in developing social pragmatic language skills. He requires speech language therapy, and he requires counseling to address his anxiety, school avoidance, immaturity, and limited social skills.

Despite the overlapping agreement of those who know and/or evaluated Student, DCPS contends he does well in the large, high school setting to which he is currently assigned. While noting Student does not attend class, DCPS ascribes Student's absenteeism to volitional behavior rather than connecting it to Student's poor academic achievement and related class avoidant behavior resulting from his school based anxiety. Student himself states he does not understand what is occurring in his classes. He does not get the help he needs in class, and he does not attend class because he does not understand the instruction. The DCPS witnesses appeared to have little understanding of Student. They did not know why he did not attend class. They did not

understand his disabilities. Their testimony appeared to focus on justifying their position that Student would be receiving a FAPE if only he were not oppositional and chose to attend class. The evidence does not support this view of Student.

Student's case manager attended the January 13, 2013 MDT meeting and took notes. When asked during her testimony about the statement in these notes indicating the team agreement that Student would benefit from a smaller setting, Student's case manager attempted to explain away the statement by stating all students would benefit from a smaller setting, and further Student does well in general education. This testimony is not credible. While it is a truism that all students would benefit from a smaller setting, the notes in which this statement is included reflect team consensus regarding the instant student. They memorialize a team decision. All students are not discussed in the notes. Only the instant Student, and the team's agreement as to Student's potential benefit from a smaller setting are discussed in the notes.

The case manager also attempted to underplay the notes by stating Student does well in general education classes, but this testimony also is not supported by the evidence. Student does not attend his general education classes (except on a rare occasion). His grades are poor, and he repeatedly scored below basic on a standardized measurement of academic achievement, the DC CAS. He has repeated academic school years at least four times, and will likely be required to repeat ninth grade again at the end of the current school year. Respondent argues that Student's achievement is low because he does not attend class. This may be true, in part, but his case manager stated she did not know why he does not attend class. Student was very clear in his testimony. He does not attend because he does not understand. Petitioner's witnesses were very clear. He does not attend because of his anxiety related to this lack of understanding. Student cannot possibly do well in general education classes because he is not in these classes, and his

academic achievement is low. He is an eighteen year old man assigned to entry level high school classes for the second time. He is old enough to vote and join the army. Yet his reading and math skills are those of an elementary school student. His case manager's testimony suggests that Student should be blamed for his disability. She indicated he would benefit from his education if only he would attend classes, and he does not do so. She does not recognize his emotional disability. She does not recognize his language disability, and she views his learning disability as manageable in general education academic classes with additional pull out services. The rest of the MDT, other than Student's mother and her advisors, apparently held similar views and ignored significant evidence to the contrary. The special education coordinator's testimony also indicated that Student's class avoidance was volitional and distinguished this behavior from that which would be a basis of finding an emotional disability thereby showing he did not understand ED classification, as noted above.

Student's IEP lacks the components needed to address his anxiety, absenteeism, language disability and poor academics except on a rather superficial basis in some of these areas. Reading the IEP and the accompanying behavior intervention plan it is difficult if not impossible to understand how Student's complex needs are to be addressed. Student's current academic skills are between the first and sixth grade level. He scored in the first to third percentile in all areas of reading and math on a Woodcock Johnson Tests of Achievement III used to assess his academic abilities in May 2012. The only exception were his word attack skills which were at the twelfth percentile. His October 11, 2012 IEP provides for 15 hours of special instruction per week. Five hours are to be in general education and 10 hours are to be outside general education. This IEP includes two goals in mathematics, three goals in reading and one goal in the social emotional/behavioral area. The math and reading goals address 9th grade

curriculum. They do not address Student's individualized needs. DCPS contends grade level curriculum based goals must be on the IEP. However, there is nothing on the IEP other than the mention of needs that suggests Student will receive instruction designed to meet his individual needs, nor is there an explanation as to how this is to occur. There is no suggestion of instruction geared at helping Student learn the skills that he is currently missing.

Student also is to receive 120 minutes per month of behavior support services, but the goals in this area are broad and lack information as to how they are to be implemented.¹⁹ This goal in the social/emotional behavioral area does not address Student's needs as documented in multiple psychological and psychiatric reports and letters. Moreover, following receipt of the 12/6/12 speech-language evaluation and addendum of 4/24/13 which identified Student's extremely low expressive and receptive language skills the MDT did not to add speech therapy to Student's IEP.²⁰ His IEP also is not focused on his needs for vocational education. This IEP is not designed to address in any comprehensive manner Student's complex academic, social-emotional, and speech needs. The IEP does not provide Student a basis for receiving even some educational benefit.

¹⁹ The IEP actually has one goal which includes three separate behaviors labeled objectives. For example, one objective states Student will refrain from using attention seeking/immature behaviors to avoid classwork and other academic assignments in 4/5 trials. It does not identify these behaviors. It does not indicate what interventions are to occur. It merely states this is to occur and be evaluated through weekly observation. It is unlikely that anyone attempting to implement this objective would be able to do so as it is vague and undefined.

The related behavior intervention plan is a bit more detailed but it too lacks the information needed to make it effective. The BIP includes 6 behaviors to be addressed. Among these is the following: Student will verbalize his need for assistance both socially and emotionally in 4/5 trials. It also identifies rewards and punishments for all the behaviors included on the BIP. It is not clear how these are related or are to be implemented as to each of the identified behaviors.

²⁰ A DCPS speech language pathologist reviewed this independent assessment and noted there had been no observation of Student in the classroom setting nor interviews with teachers nor a description of Student's performance in school. The review also noted Student's absences as a possible exclusionary factor for providing speech therapy. I note IDEA does not include absenteeism as a basis for excluding a needed related service from a student's IEP. The speech language pathologist who conducted the assessment testified that the lack of an observation did not change Student's assessed needs, and the DCPS reviewer did confirm that Student is functioning below grade level expectations.

I therefore conclude by a preponderance of the evidence that DCPS denied Student a FAPE by failing to provide him an appropriate IEP.

4) *Whether Student is entitled to compensatory education*

Under *Reid*, a hearing officer may award compensatory education services that compensate for a past deficient program. *Reid v. District of Columbia*, 401 F. 3d 516, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003). IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* “. . .the inquiry must be fact-specific and . . . 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* at 524.

In the instant matter, I have found DCPS denied Student a FAPE by failing to identify Student as a child with an emotional disability and/or a specific learning disability for the two years preceding the filing of this complaint and by failing to provide him an appropriate IEP in the 2012-2013 school year. DCPS had ample evidence to suggest Student was a student with an emotional disability and/or a learning disability in March 2011. Student was testing below basic in the DC CAS. He had repeated several grades in school. His academic skills were low. He was receiving failing grades and was not attending classes. While none of these factors mean the student was automatically a student with a disability who was eligible for services under the IDEA, the combination of these factors were sufficient to raise the possibility of his eligibility and the need for an IDEA evaluation. DCPS did not take this action and, therefore did not meet its affirmative child find obligation. Moreover, once found eligible in 2012, DCPS created an IEP that was not designed to address Student’s individual needs, and, further, as more and more

evidence was obtained DCPS continued to meet and blame Student for his failure to achieve rather than provided him the services needed, as identified in multiple assessments, to assist his in receiving educational benefit from his program and services. *See Rowley, Supra.*

I therefore conclude Student is eligible for compensatory education. However, the compensatory education plan proposed by Petitioner does not appear to provide the rationale or programs and services required by *Reid*. Rather than proposing a plan to provide the educational benefit that likely would have accrued had DCPS provided Student an evaluation in 2011 and an appropriate program and services under the 2012 IEP, this plan appears to address prospective need. It proposes that Student compensatory services be provided 6 months prior to aging out of special education, or approximately two and one half years from now rather than providing compensatory services now. The plan states this will help Student with transition to post-secondary education, vocational training or the workforce, but this is not the purpose of compensatory education. Compensatory education is intended to be provided NOW in an effort to compensate for what has been lost in the past.

Student's compensatory education, therefore, must start as soon as possible in an effort to help Student recoup some of the education he has lost due to DCPS failure to act. As it is clear Student has received little if any educational benefit since March 2011. Compensatory education must be designed to address this lack of benefit. Student continues to struggle with low academic skills in reading and math. These are the foundation of all other academics. Therefore, the compensatory education to be provided, as described in the Order section below, must and will address Student's remedial needs in these areas.

Academy

Petitioner's proposed remedy includes placement at is a non-public, full-time special education school for male students in grades 9 through 12.

provides academic instruction and concurrent vocational instruction.

also provides individual and group therapy to all enrolled students. It has an established protocol for addressing absenteeism. Student has gone through the application process and been accepted by the school.

While a private school's acceptance of a student and the school's concomitant assurance that it can provide the student the program and services needed are necessary for finding the school is an appropriate placement for a student, these two factors are not sufficient, in themselves, for such a finding. An award of a private school placement is prospective relief intended to insure that the student receives a FAPE in the future as required by the IDEA. *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C.Cir. 2005). The courts have identified the factors relevant to determining whether a particular placement is appropriate for a particular student. They include

- the nature and severity of the student's disability;
- the student's specialized educational needs;
- the link between these needs and the services offered by the private school;
- the placement cost;²¹ and
- the extent to which the placement is the least restrictive environment.

Id. at 12.

²¹ The OSSE approves private schools and sets the allowable costs for attendance for DCPS students. I, therefore, do not discuss this factor in the instant analysis of the proposed placement.

Here it is important to recognize that all students attending _____ are on the diploma track, and Petitioner is not. He is on the certificate track. Therefore, Student would be the only certificate track student in attendance were he to go to _____. The educational director of _____ testified the school would be able to provide the appropriate program and services for Student in this situation. However, I find this assertion, although made with good intentions, does not establish _____ is an appropriate placement for Student. While it is possible for _____ to create instruction and services that are certificate oriented, this is not the program and services other students in the school would be taking. As in his current program, Student would be in classes with students working at significantly higher academic levels. Even if _____ individualized the instructional level, Student would again be in a situation where he cannot help but notice that all those around him are working at a higher level. He has learned to avoid such situations as they are anxiety producing. There is no reason to believe a similar situation at _____ would be any less anxiety producing than his public school classes. Moreover, the evidence is clear that Student requires intensive, individualized services focused on vocational training, socialization skills and pragmatic speech/language skills. A school graduating its students with a high school diploma must, of necessity, have a different focus. Student would become a class of one within an already restrictive, albeit smaller, environment. _____ does not meet the *Branham* factors.

I, therefore, conclude by a preponderance of the evidence, _____ is not an appropriate placement for Student.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. DCPS did not deny Student a FAPE by failing to provide a comprehensive psychological, speech-language or adaptive behavior assessment as part of the evaluation process.
2. DCPS did not deny Student a FAPE by failing to provide a comprehensive psychological, speech-language or adaptive behavior assessment as part of the re-evaluation process.
3. DCPS failed to meet its Child Find obligation by failing to identify Student as a child with an emotional disability and/or a specific learning disability for the two years preceding the filing of this complaint.
4. DCPS did not fail to meet its Child Find obligation by failing to identify Student as a child with an intellectual disability for the two years preceding the filing of this complaint.
5. Student was not denied a FAPE by DCPS' failure to identify Student as a student with a specific learning disability, an emotional disability and an intellectual disability.
6. DCPS denied Student a FAPE by failing to provide him an appropriate IEP.
7. Student is entitled to compensatory relief.
8. Academy is not an appropriate placement for Student.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

1. The multidisciplinary team at Senior High School, including Petitioner, his mother, and their advisors, is to meet within 10 business days of receipt of this Hearing Officer Determination to develop a compensatory education plan for Student. This plan must include two components:

- Student is to be provided 15 hours of tutoring each week during the summer of 2013. The tutoring is to focus on Student's remedial needs in reading and mathematics. It is to be provided by an independent contractor, paid for by DCPS, of Petitioner's choosing. The MDT is to provide Petitioner three possible contractors from which to choose, or he may identify a contractor he prefers, who meets DCPS standards. This tutoring is to begin no later than July 1, 2013 and it is to continue until Student is enrolled in a school, meeting the requirements described in Paragraph 2., below, for the 2013-2014 school year. The tutoring is intended to compensate Student for the failure to identify Student as a potentially having an emotional disability and or a specific learning disability in March 2011.

- Student is to receive 5 hours of tutoring per week during the 2013 – 2014 school year. The tutoring is to focus on the courses Student is taking during the school year and the skills he needs to obtain educational benefit from these courses and achieve passing grades. It is to be provided by an independent contractor, paid for by DCPS, of Petitioner's choosing. The MDT is to provide Petitioner three possible contractors from which to choose, or he may identify a contractor, he prefers, who meets DCPS requirements. This tutoring may be provided by the same provider identified for the summer of 2013. This tutoring is intended to compensate Student for the lack of appropriate instruction he received in the 2012- 2013 school years due to his absenteeism resulting from his disability.

2. The multidisciplinary team at High School is also to discuss and plan an appropriate placement for Student at the meeting held within 10 business days of receipt of this Hearing Officer Determination. The proposed placement for Student must have a

vocational orientation, provide him individualized instruction designed to address his learning needs, offer the opportunity for one on one work, provide Student social skills training and speech language therapy as well as counseling. Instruction is to take place in a small environment with support and structure. DCPS is to discuss possible options with Student, his mother and his advisors. DCPS is to then identify three possible school placements that can address Student's needs. These possibilities are to be provided to Student, his mother and advisors at a meeting held within 10 business days of the first meeting. At least one of these placements must be a non-public school placement. Student, his mother and advisors are to have opportunities to visit the proposed schools. Student, his mother and advisors are to select one of the three possible schools. DCPS is to assure Student has a placement at the selected school available to him on the first day of the 2013-2014 school year. Within 30 days of the start of the school year a meeting is to be held to develop an appropriate IEP for Student, including full time placement at the selected school and all of the criteria set forth above. DCPS is to pay tuition and all related costs for the selected school program if Student selects a non public..

IT IS SO ORDERED:

6/4/13

Date



Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).