District of Columbia

Office of the State Superintendent of Education

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STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools "DCPS" Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Date: July 19, 2010 Representatives: Counsel for Petitioners: Domiento C.R. Hill 1220 L Street NW Suite 700 Washington, DC 20005 Counsel for DCPS: Tanya Chor, Esq. Assistant Attorney General District of Columbia DC Public Schools 1200 First Street, NE Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

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

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

BACKGROUND:

A Due Process Hearing was convened July 19, 2010, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003, in Hearing Rooms 6A and then 7A. The hearing was held pursuant to a due process complaint submitted by counsel for the parent and student filed May 25, 2010, alleging the issue(s) outlined below. A pre-hearing conference in this matter was conducted July 13, 2010, and a pre-hearing order was issued on July 16, 2010.

ISSUE(S): [2]

The issue to be adjudicated is: Whether DCPS denied the student a Free Appropriate Public Education ("FAPE") by failing to provide the student an appropriate placement and whether the student is in need of a residential placement?

Petitioner asserts the student is in need of a more restrictive setting than DCPS has proposed. Petitioner asserts the student is in need of a residential placement and seeks DCPS funding and immediate placement for the student at a residential treatment facility.

DCPS is of the position its proposed placement at School B a special education day program is appropriate and the student is not in need of residential placement.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which have resulted in stipulations of fact as noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 & 46 and DCPS Exhibits1-16) which were admitted into the record.[3]

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[2] The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

[3] The disclosed and admitted documents are listed in Appendix A.

FINDINGS OF FACT [4]:

1. Student or "the student" is years old and resides in the District of Columbia with his parent(s), (hereinafter "Petitioner" or "Parent"). The student is currently eligible to receive special education and its related services as a result of his disability classification of Emotional Disturbance ("ED"). (Petitioner's Exhibit 12).

2. The student attended School A during the 2009-2010 School Year ("SY"). School A is a private full time special education therapeutic day program and the student's attendance at School A was funded by the District of Columbia Public Schools ("DCPS"). (Petitioner's Exhibit 12)

3. The student's individualized educational program ("IEP") developed November 18, 2009, prescribes the student receive 27.5 hour of specialized instruction per week outside the general education setting and 1.5 hours of behavioral support services per week. The IEP includes a Behavior Intervention Plan ("BIP"). (Petitioner's Exhibit 24)

4. The student's most recent psychological and educational assessments, conducted in March 2010, reveal that the student's cognitive abilities are in the extremely low range and his educational functioning is at the third to fourth grade level. (Petitioner's Exhibit 5)

5. The student's current individualized educational program ("IEP") and behavior intervention plan ("BIP") are appropriate and the student is provided the services of a dedicated one-on-one aide. (Stipulation)

6. In November 2009 School A requested that a one-to-one aide be assigned to the student as a result a long-standing history of behavioral difficulties. The justification noted the student had accrued 10 days of out of school suspension and 4 days of in school suspension due to disruptive, aggressive, and destructive behaviors. "He has placed himself in unsafe situations by leaving campus and engaging in aggressive, reactive ways. Given his current instability, he appears unable to function appropriately in the classroom." (Petitioner's Exhibit 18)

7. On March 4, 2010, a psychiatric evaluation was conducted of the student and the report was generated on March 5, 2010. The evaluator reviewed the student's previous evaluations, and conducted and clinical interview of the student and one of his therapists. The evaluator diagnosed the student with Cannabis Dependence, Bipolar Disorder (N.O.S.) Oppositional Defiant Disorder, Antisocial Behavior, and Borderline Intellectual Functioning. The student has also been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). The evaluator recommended the student receive mood-stabilizing medication for aggressive behavior and continued individual therapy and education in a

[4] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer may cite only one party's exhibit.

small class setting. The evaluator also recommended that the student receive drug education classes and drug testing by court order. The psychiatric evaluation was provided to DCPS by Petitioner's counsel on March 17, 2010. (Petitioner's Exhibit 4 & 5)

8. The student's therapist at School A attended the student's manifestation review meetings during SY 2009-10. The therapist shared at these meetings that the student's aggressive behavior was continuing unabated despite being assigned a dedicated aide. She shared that the student's physical agitation increased and he on occasion left school property. The student was repeatedly suspended from school because of his behavior. As the year progressed the student was provided increasingly more crisis intervention at School A by his therapist above and beyond his IEP prescribed therapy sessions. (Dr. Naik's testimony)

9. On April 10, 2010, School A prepared a justification for the student to be placed in residential placement. The student's therapist cited the student's "current demonstration of unsafe and out-of-control behavior and inability to be available for learning in a full time day treatment and therapeutic structured setting he is at risk for engaging in more negative and self-destructive behaviors." The student's therapist is of the opinion that a lateral move for the student to another day therapeutic program, where he would not received around the clock supervision, would result in the regressing both emotionally, behaviorally and academically. In her opinion the student requires placement with 24-hour behavioral support and psychiatric services. (Dr. Naik's testimony, Petitioner's Exhibit 27)

10. At the April 15, 2010, MDT/IEP meeting the therapist recommended to the team that the student be in residential placement. A DCPS representative participated in the meeting. All members of the team agreed that the student was in need of a residential placement. The DCPS representative that he would review the student's evaluations and forward a packet to the DCPS "residential review board." (Dr. Naik's testimony)

11. Manifestation review meetings were held for at the student at School A on November 18, 2009, and April 15, 2010. (Stipulation)

12. School A is no longer an appropriate educational program for the student. School A was determined to be inappropriate as of April 15, 2010. (Stipulation)

13. On May 7, 2010 an independent functional behavior assessment ("FBA") was conducted of the student. The FBA included student and teacher interviews and questionnaires. The assessor determined the student was at times during observation "focused on tasks and managed to complete a significant amount of his class assignment." "Further observation revealed [the student] appeared to express himself with an aggressive and hostile tone in his voice. On several occasions, [the student] was also observed using profanity in the classroom...[the student] was observed being defiant and unwilling to follow directions..." The assessor recommended a BIP to address the following: failure

to follow directions, use of profanity and tapping/banging on furniture. (Petitioner's Exhibit 10)

14. On or about May 17, 2010, the student was suspended following an incident in which he assaulted one teacher and threatened to his one-on-one teacher and assaulted her. The teacher has filed criminal charges against the student. As a result of this incident the student was expelled from School A. The student has received no educational or related services since that date. (Dr. Naik's testimony)

15. On May 17, 2010, the director of School A sent correspondence to DCPS requesting a manifestation hearing for the student based on the student threatening to kill his one-on-one teacher and assaulting a staff member. (Petitioner's Exhibit 37)

16. Multidisciplinary team ("MDT")/IEP meetings were held for the student on May 25, 2010, and July 7, 2010. (Stipulation)

17. At the May 25, 2010, MDT/IEP meeting the team discussed the student's expulsion. The members of the team except for the DCPS representative attempted to discuss the student's placement. The DCPS representative was unwilling to discuss residential placement and suggested that the student attend School B on an interim basis until a placement was determined. The School A staff strongly disagreed with the student's placement at another placement at the same level of restriction was inappropriate for the student had would result in his regression. No one from DCPS ever contacted the student's therapist to discuss the student's behavior and educational needs prior to this meeting. (Mr. Naik's testimony)

18. DCPS on May 25, 2010, issued a Prior Notice of Placement ("PNOP") for the student to attend School B. The parent opposed the placement at School B and filed a "Stay Put" and the current due process complaint challenging the proposed placement and seeking a residential placement. (Stipulation)

19. The parent stated her disagreement with the student's placement at School B based on her visit and tour of School B. testimony, Petitioner's Exhibits 30 & 31)

20. DCPS received the independent FBA from Petitioner on June 4, 2010. (Stipulation)

21. At the July 7, 2010, MDT/IEP meeting the MDT reviewed the student's current evaluations. The MDT members included the School A staff, the parent and her educational advocate and a representative of DCPS. The MDT discussed the student's educational placement as the student had not been allowed to return to School A since May 25, 2010, because of the incident that involved him threatening and striking school staff members. testimony, Petitioner's Exhibits 30 & 31)

22. At the July 7, 2010, meeting the student's therapist stated the student is a danger to himself in any setting that is not secure and has access to psychiatric services and medication. The School A staff and the parent and her advocate proposed the student be placed in a more restrictive placement specifically in a residential treatment facility.

However, team was restricted by the DCPS representative from discussing placement and only reviewed the student's recent evaluations. (Dr. Naik's testimony)

23. The student has been referred to and accepted by a residential educational and treatment center ("RTC") located outside the Washington Metropolitan area. The student was interviewed by the staff and his educational records and evaluations were reviewed. The school is licensed for 55 students and provides educational and psychiatric care for students typically from 6 to 18 months. The program serves students ages 12 to 17 with a variety of disabilities particularly students with psychiatric disorders. The program can provide the student the instructional and related services prescribed in his IEP and it has certified special education teachers and related service providers. testimony)

24. The can provide psychiatric services and medication management to the student. The school offers a behavior modification program and can implement the student's BIP. Each classroom has a teacher and aide. The school can provide the student the one-on-one aide if necessary. The cost of the program is per day for education services and per day for the RTC and reimbursement for medication management and other medical services. testimony)

25. The parent had the impression that the student was doing well at School A in the first half of SY 2009-10. The student had increasing difficulty regulating his behavior in the second half of the school year which ultimately resulted in him being charged criminally. The student had some difficulties with the dedicated aide who was assigned to him. (Parent's testimony)

26. The parent visited School B and was dissatisfied with the school. She noticed staff members there from a previous school the student attended where he had difficulties. Based on her observations of the school the parent was of the opinion the School would be a worse setting for the student than School A. The parent believes the student is in need of residential placement to assist with his behavior difficulties and maintain the student on needed medication to address his emotionality and ability to focus in school. The parent is also concerned the student would be in continued danger in the community including the community in which School B is located. (Parent's testimony)

27. DCPS staff reviewed the student's evaluations and educational records and conducted an observation of the student at School A at the school's request to help determine if the student needed a more restrictive setting. The observation was conducted on March 25, 2010. During the observation the student was disruptive in one class and ultimately walked out of the classroom. The teacher appeared to be inexperienced and unable to maintain the students' decorum. In another class the student was, however, controlled and focused. The student's dedicated aide shared with the observer that the student is allowed to misbehave in the class in which he was disruptive. The dedicated aide in the observer's opinion was not sitting with the student and assisting him or taking any action that was a part of the student's BIP to address his behaviors.
testimony, DCPS Exhibit 7)

28. The DCPS residential placement manager reviewed the student's educational records and evaluations and participated briefly in the student's April 15, 2010, MDT/IEP meeting by stating to the team what documents were needed to consider the student for residential placement which included a psychiatric evaluation. At the time DCPS residential placement staff had not received the student's psychiatric evaluation although it had been provided to DCPS on March 17, 2010. The DCPS residential placement manager had not reviewed the student's psychiatric evaluation prior to the due process hearing. However, upon review it was determined by the manager that the psychiatric evaluation did not recommend residential programming. The DCPS residential placement manager made some inquiry with School A staff regarding the implementation of the student's BIP. In his opinion based on this conversation many elements of the student's BIP were not being implemented. testimony)

29. The placement proposed by DCPS for the student, School B, is full time special education therapeutic day program that can provide the student the services currently prescribed by his IEP and can provide the student with medication management. testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 34 C.F.R. 300.17 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. Sec. 300.320 through 300.324. (Authority: 20 U.S.C. 1401(9))

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 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

[5] 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 that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

placement is inadequate or adequate to provide the student with FAPE.

Issue: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate placement. (Whether the student is in need of a residential placement?) Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

DCPS, as the local and state education agency, is to make certain that the educational placement, for each child with a disability within its jurisdiction, is able to implement the student's Individualized Educational Program. Pursuant to 34 C.F.R. § 300.17,

> Free appropriate public education or FAPE means special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..."

DCPS shall implement an IEP for each student with a disability. Pursuant to D.C. MUN. REGS. tit. 5, § 3010.2 (2003), DCPS "shall implement an IEP as soon as possible after the meeting where the IEP is developed..."

In this case DCPS failed to provide the student a placement that can meet his education needs. The student was without any placement from April 15, 2010, until the prior notice of placement was issued on May 25, 2010. The evidence demonstrates the student has received no services during that period.

Pursuant to 34 C.F.R. 300.39 special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.

Pursuant to 34 C.F.R. § 300.115(a), DCPS "must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."

On April 15, 2010, the MDT/IEP team for the student recommended that the student's placement at residential placement and School A was no longer appropriate, as he was too violent for the program.

The DCPS witness who observed the student conducted one observation of the student, which was prior to the incidents that resulted in the student's expulsion and arrest. The student has reportedly threatened the life of a School A staff member and on more than one occasion physically harmed staff. The student has been diagnosed with, among other things, Bipolar Disorder (N.O.S.) Oppositional Defiant Disorder, Antisocial Behavior, and Borderline Intellectual Functioning, and he has apparently engaged in ongoing illegal drug use. The student's emotionality, increasingly disruptive and aggressive behavior and physical harm to others make the student a clear risk to himself, to his peers and school staff.

DCPS staff were alerted as early as March 2010 that the student was in School A's opinion in need of restrictive placement. DCPS staff indicated at the student's April 15, 2010, MDT/IEP meeting that the student's case would be referred to the "residential review board." There was not clear reasons ever proffered at any subsequent MDT/IEP meeting as to why the student was no longer being considered by DCPS for the level of placement clearly recommended by the team members who worked with and were familiar with the student and had made the recommendation repeatedly in the student's MDT/IEP meetings from April through July 2010. Although DCPS had been provided months earlier the student's psychiatric evaluation, which diagnosed his emotional difficulties and made recommendations for medication and drug treatment, the evaluation was not reviewed by DCPS until the day the hearing.

Although clearly articulated that School B has staff he is familiar with and has worked with in the past and stated that the staff can provide the student medication management at School B the weight of the testimony from the student's therapists and individuals, including the parent and advocate who have personal and ongoing knowledge of the student far outweighed any evidence the student could be sustained and not regress behaviorally and academically at the same level of restriction as School A.

While the student may be able to be sustained at a placement the same level of restriction as School A if things are "done differently," however, there was scant testimony from anyone who is regularly engaged with the student who could refute the testimony of the individuals familiar with him and who credibly testified the student has been unsuccessful in a full time day therapeutic program despite increasing crisis intervention and a one-on-one dedicated aide.

Based on the evidence presented the Hearing Officer concludes Petitioner has met the burden of proof by a preponderance of the evidence that the student is in need of a more restrictive setting and specifically in need of residential placement for at least the short term. There is sufficient evidence that the student's educational and related services and the recommended 24-hour behavioral and psychiatric support can be provided at and that the placement is appropriate for this student.

ORDER:

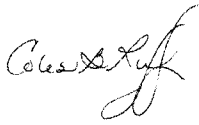
1. DCPS shall immediately place and fund student at (Behavioral Health Eastern Shore) and provide transportation services.

2. DCPS shall review the student's continued placement within at least 90 days of his arrival in order to determine if the student is ready for step-down and reentry to a less restrictive environment.

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. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: July 22, 2010