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

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

2010 NOV 23 AM 10:03
OSSE
STUDENT HEARING OFFICE

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

Petitioner,

v

DCPS,

Respondent.

Date Issued: November 23, 2010

Hearing Officer: Seymour DuBow

Case No: :

Hearing Date:11/18/10Room:2009

## HEARING OFFICER DETERMINATION

### BACKGROUND

The student is a female year old enrolled at with the disability category of Emotional Disturbance. Her current IEP calls for 29 hours of specialized instruction out of general education and one hour a week of counseling services. On September 17, 2010, counsel for the petitioner filed this due process complaint alleging that DCPS denied a Free Appropriate Public Education (FAPE) when it failed to develop an IEP that places the student in a residential treatment and/or take the necessary steps to secure a residential placement for the student. On September 28, 2010, DCPS filed a response stating that DCPS had convened an MDT meeting on September 13, 2010 and reviewed the DCPS funded independent psychiatric assessment. The response further stated the team determined that the evaluative data did not support placement in the most restrictive setting and that the student needs to avail

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

herself of the services available at her neighborhood school. DCPS also authorized an independent comprehensive psychological assessment and DCPS agreed to reconvene the MDT team when the independent psychological report is provided.

On October 18, 2010 the first pre-hearing conference was held and a pre-hearing order issued that date where counsel for the parties agreed to file a motion for continuance to allow completion of the independent psychological evaluation and time for the MDT team to review it and discuss placement. A joint Motion for Continuance was filed on October 22, 2010 and an Interim Order on Continuance Motion was granted and signed by the this hearing officer and the chief hearing officer on October 25, 2010 extending the hearing date for 14 calendar days and a final decision must be issued by November 25, 2010. On November 9, 2010 a second pre-hearing conference was held and an Order was issued on November 12, 2010 stating that the issue to be determined at the hearing is, "Did DCPS deny a FAPE to the student by failing to revise the IEP to call for a residential placement for the student?"

The due process hearing convened on November 18, 2010 in Room 2009 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Roberta Gambale represented the petitioner and Laura George represented the respondent DCPS. The hearing was to begin at 9 a.m., but counsel requested a half hour delay to allow the parent to appear which was granted. When the parent did not appear, counsel for petitioner agreed to proceed with the hearing. Both the parent and student did not appear for the hearing. The hearing was closed. At the outset of the hearing, both the petitioner's documents P-1-25 and the respondent's documents R-1-5 were entered into the record without objection. All witnesses were sworn under oath prior to testifying. The witnesses called by telephone for the petitioner were

educational advocate, Dr. Natasha Nelson, clinical school psychologist, Dr.

Rama Prayaga, psychiatrist, and residential administrator at The respondent DCPS called case manager for transition to non-public schools who testified in person.

The hearing was convened on November 18, 2010 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300 and Title V-E of the District of Columbia Municipal Regulations.*

## ISSUE

The issue to be determined is as follows:

1. Did DCPS deny a Free Appropriate Public Education (FAPE) to the student by failing to revise the IEP to call for a residential placement?

## FINDINGS OF FACT

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

1. The student is a female seventeen-year old who has been found eligible for special education services as a student with the disability category of Emotional Disturbance. The student's IEP calls for 29 hours a week of specialized instruction outside of general education and one hour a week of behavioral support services. (P-12, R-2) The parties have agreed to meet November 30, 2010 to review the independent psychological evaluation and review and revise the student's IEP and discuss placement. (Testimony of

2. The student attended from to grade. She than attended for grade where her attendance and grades went down and she was expelled early in the school year. The student than attended where she completed grades and and then went to campus for and grade where her attendance was sporadic. is a non-public day special education school. (P-2 p.2, R-5 at p.5) The student stopped attending and was expelled for non-attendance. (Testimony of Pursuant to a May 13, 2010 Settlement Agreement, the parent and DCPS agreed the student would be placed on an interim basis at her neighborhood school. (P-8, R-1, Testimony of The student did not attend at the end of last school year and a truancy referral was made. The student also did not attend this school year until meeting with the case manager at the end of September and then attended sporadically. (Testimony of
3. In November,2007, a court ordered psychoeducational evaluation was conducted by the Child Guidance Clinic following charges of Simple Assault and Destruction of Property that amended an earlier 2007 diagnosis of Depressive Disorder to Bipolar Disorder II based on the student's irritability, report of sleep difficulties, and feeling of guilt. (P-1 p.1, P-2 p.3) The psychiatric evaluation by Dr. Prayaga conducted on July 18, 2010 and the comprehensive psychological evaluation of November 4, 2010 supervised by Dr. Nelson agreed with the earlier diagnosis of Bipolar Disorder, Moderate. (P-1 at p.3 and P-2 at p.12) The comprehensive psychological evaluation found that the student should be classified with Emotional Disturbance because she

meets the criteria for Bipolar Disorder II and also diagnosed a Learning Disorder based on the student's difficulties in math, reading and written language that impact her ability to perform adequately in the school setting. The psychological evaluation also gave a diagnosis of Cannabis Abuse (By History) (P-2 at p.12)

4. Both Dr. Prayaga's psychiatric evaluation and Dr. Nelson's psychological evaluation recommended a medication management plan to address the student's Bipolar Disorder. (P-1 at p.3 and P-2 at p.13) Dr. Nelson's report stated at recommendation number three: "Though [student] does not believe that she needs medication, psychopharmacology is a useful approach to remediating symptoms associated with Bipolar Disorder." (P-2 at p.13) Dr. Prayaga testified that medication would make a big difference in treating Bipolar Disorder and in his experience he has seen very successful treatment of Bipolar Disorder with medication with fewer relapses, lesser crisis and improvement in impulsivity as well as good outcomes. The student has not been on a medication plan for her Bipolar Disorder. Other students with Bipolar Disorder attend school. (Testimony of Dr. Prayaga)
5. Dr. Prayaga recommended a residential treatment center for the student in his report and testimony based on her not making progress in regular school and a non-public day program. Dr. Prayaga only met the student once in August 2010 for 30-40 minutes. He did not interview the parent. (P-1 at p.3 and Testimony of Dr. Prayaga)
6. Dr. Nelson in her report and testimony also recommended a residential placement because the less restrictive environment of a full-time private school placement was unsuccessful. Dr. Nelson also testified that the student's Bipolar Disorder may have made it difficult for her to decide to go to school. Dr. Nelson did not personally

evaluate the student and did not meet or interview the student. (P-2 at p.12 and Testimony of Dr. Nelson)

7. The student has been accepted at Center in Berryville, Virginia and program. provides academic and medical and psychiatric services including individual psychotherapy and group therapy. is an accredited school and licensed by the Virginia Interdepartmental Regulations of Children's Residential Facilities.
   is a behavioral healthcare provider offering integrated rehabilitative and psychiatric care for students with moderate to severe emotional and behavioral disorders. (Testimony of and P-20 and P-21)
8. First Home Care Services under contract with DCPS provides diagnostic assistance and can provide medical management and counseling inside the home if necessary for a student. Each student is assigned a community support worker. First Home Care Services has agreed to provide services to the student again. The student had a prior referral to First Home Care, but when the student did not go to her appointments she was no longer served. (Testimony of
9. Both the student and parent failed to participate in the due process hearing. The student told the case manager for transition from First Home Care when interviewed at the student's home in late September 2010 that the reason she does not go to school is that it takes too long to graduate, the school day is too long and she does not want to go. On days she wants to go to school, she goes according to her interview with the case manager. The mother told the case manager that the student will do what she wants to do. (Testimony of This hearing officer finds the testimony of

the only witness to testify in person, very credible based on her detailed account of her interview with the student and this hearing officer's observation of her demeanor when testifying. A licensed social worker interviewed the parent on September 26, 2010 for her social work assessment report and the parent told her: "[Student] does not accept her authority, stays out for days at a time and does not follow through on things that were asked of her. This also proved to be evident with her compliance with medication and probation." (R-5 at p.4)

## CONCLUSIONS OF LAW

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

Counsel for petitioner argues that DCPS denied a FAPE to the student in not providing a residential placement. Counsel for the petitioner is requesting as relief that DCPS fund and place the student at a residential placement at either residential facility in Berryville, Virginia or both have accepted the student. Counsel for DCPS responds that DCPS did not deny a FAPE because the student did not take advantage of the educational opportunities offered by DCPS through her failure to attend school.

The Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) held that IDEA does not require school districts to "maximize each child's potential." *Rowley*, 458 U.S. at 198. Instead "Congress sought only to require a basic floor of opportunity that provides some educational benefit." *Rowley*, 458 U.S. at 200. While IDEA guarantees a FAPE, it "does not necessarily guarantee the child [with a disability] the best available education." *Holland v. District of Columbia*, 71 F. 3d 417, 419 (D.C. Cir. 1995) Nor does IDEA ensure that a FAPE

will consist of the precise plan that the parent desires. *See Shaw v. District of Columbia*, 238 F. Supp. 2d 127 at 139 (D.D.C. 2002) In a case with similar facts to this case, the Court in *J.P. and R.P. v. Enid Public Schools*, 2009 U.S. Dist. LEXIS 87813 (2009) held the local school district did not deny a FAPE when it did not place a student with behavioral problems-drug abuse, truancy and the lack of impulse control-in a residential facility as requested by the parents. The Court citing the above holding in *Rowley* found that if the student had less drug use and better school attendance, he would have benefitted from his IEPs. While conceding that the residential facility might better solve these problems, the Court held relying on *Rowley* that IDEA does not require maximizing a child's potential.

In this case, the student has a long history of not attending school whether it be DCPS public schools including the current interim placement at or when DCPS funded placement at a non-public special education day program. DCPS has developed an IEP that calls for 29 hours a week of specialized instruction outside of general education and one hour a week of behavioral support to meet the student's unique needs. The student, however, has failed to attend school to take advantage of these extensive special education opportunities. Both the student and parent failed to participate in the due process hearing. The case manager however, did interview the student at her home in late September 2010 and the student told her that the reason she does not go to school is that it takes too long to graduate, the school day is too long and she does not want to go. On days she wants to go to school, she goes. The mother told the case manager that the student will do what she wants to do. This hearing officer finds the testimony of the only witness to testify in person, very credible based on her detailed testimony and observed demeanor in testifying. *See Shore Reg'l High Sch. Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F. 3d 194, 199 (3d Cir. 2004) The

social worker's assessment report including an interview with the parent also supports testimony that the student does not follow authority and does what she wants to do. (See Findings of Fact #9)

The facts in this case are similar to the case of *Garcia v. Board of Education of Albuquerque Public School*, 520 F. 3d 1116 (10th Cir. 2008). In that case, an adolescent female student dropped out of school and demonstrated an unwillingness to return to school. The Tenth Circuit Court of Appeals affirmed a district court's denial of compensatory education because the student would not choose to benefit from the compensatory services that she might receive from the court. The Court noted the general maxim that "equity will not help those who do not help themselves". This hearing officer concludes that DCPS has offered a FAPE to the student. The student has failed to take advantage of the educational opportunities offered by DCPS through her non-attendance which is due to her own actions.

Petitioner's counsel relies on the testimony and evaluations of Dr. Nelson and Dr. Prayaga to support her position that the student needs a residential placement to access education. This hearing officer finds their testimony and evaluations recommending a residential placement unpersuasive. Dr. Nelson never met or interviewed the student or parent and based her recommendation in part on the student not succeeding in her non-public day placement and her DCPS public school placement. The reason, however, that she did not succeed was mainly due to her not attending school. Dr. Nelson also pointed out that her Bipolar Disorder makes it difficult for her to make decisions to go to school. Both Dr. Nelson's evaluation and testimony recommended that "psychopharmacology is a useful approach to remediating symptoms associated with Bipolar Disorder." (P-2 at p.13) Dr. Nelson also stated the student does not believe that she needs medication and is not on a medication plan. Dr. Prayaga only interviewed

the student once for thirty to forty minutes. Dr. Prayaga also did not interview the parent which could have provided important information on family history, the student's behaviors and her motivations. Dr. Prayaga also based his recommendation on a residential placement based on the student not succeeding in less restrictive settings, but again did not take into account the student's non-attendance and did not indicate he was aware of the specifics of the educational program offered by DCPS. Dr. Prayaga testified that medication would make a big difference in treating Bipolar Disorder and in his experience he has seen very successful treatment of Bipolar Disorder with medication with fewer relapses, lesser crisis and improvement in impulsivity as well as good outcomes. The student has not been on a medication plan for her Bipolar Disorder. (Testimony of Dr. Prayaga) This hearing officer questioned Dr. Prayaga why he did not prescribe a medication plan for this student if medication has been so successful in treating the symptoms of Bipolar Disorder. His answer that she was not his patient was not convincing.

The student has not been on a medication plan for her Bipolar Disorder. The testimony of petitioner's own witnesses Dr. Nelson and Dr. Prayaga is that a medication plan has proven to be very successful in treating the symptoms of Bipolar Disorder. First Home Care Services under contract with DCPS provides diagnostic assistance and can provide medical management and counseling inside the home if necessary for a student. This provides an option to address the student's needs in a less restrictive setting. "The IDEA requires school districts to place disabled children in the least restrictive environment possible." *Roark ex re. Roark v. District of Columbia*, 460 F. Supp. 2d 32, 43 (D.D.C. 2006) (citing *20 U.S.C. Section 1412 (a) (5); 34 C.F.R. 300.550; D.C. Mun. Regs. Tit.5-E Section 3011 (2006)*). In considering the student's above history and the testimony of Ms. Hayes and the social work assessment, this hearing officer is not convinced that the student's Bipolar Disorder is the main reason the student does

not go to school. Other students with Bipolar Disorder attend school. (See Findings of Fact #4) This student who is now years old has chosen to go to school when she wants to and not go when she doesn't want to go. (See Findings of Fact#9)

## ORDER

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

**Petitioner's request for relief is DENIED and the case is DISMISSED**

## NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: 11/23/10 Seymour DuBow/s/

Hearing Officer