

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

OSSE
Student Hearing Office
June 04, 2013

Petitioner,

v.

Hearing Officer: Kimm Massey, Esq.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a year old female, who currently attends a DCPS high school. On May 20th, 2013, Petitioner filed a complaint against respondent DCPS, alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing to adequately evaluate Student in order to develop an appropriate IEP and provide an appropriate placement, including failure to evaluate in all areas of suspected disabilities and failure to perform triennial evaluations. Petitioner also alleges that DCPS failed to develop IEP’s during SY 2010/11, SY 2011/2012 and SY 2012/13. Lastly, Petitioner alleges that DCPS failed to offer an appropriate special education placement during SY 2010/11, SY 2011/12 and SY 2012/13. As relief for these alleged denials of FAPE, Petitioner requested a finding of a denial of FAPE, and requested that DCPS fund an independent comprehensive psychological evaluation, to include cognitive, academic, and clinical assessments and a social history. Petitioner further requested that DCPS convene a meeting to review all evaluations, develop an appropriate IEP and determine placement. Petitioner requested that such a meeting be held within ten business days of receipt of the independent evaluation and be scheduled through counsel.

The Respondent filed its response on March 29, 2013; DCPS denies that it failed to provide the student a free and appropriate public education and DCPS stated in their response that DCPS developed IEPs on 1/28/10, 3/25/11, 3/30/12, and 12/19/12; DCPS argued that both Student and Parent were invited to participate in the meetings, and that they participated by phone on 12/19/12. Moreover DCPS argued in its response that with respect to placement, the 2-year statute of limitations bars claims for SY 2010/11, and that during SY 2011/12 and SY 2012/13, the IEPs required a full-time out of general education setting and student was enrolled in a DCPS senior high school, which can implement the IEP and is appropriate. DCPS states in its response that the student was not suspended excessively from Ballou because of behavior issues but was withdrawn due to chronic truancy issues. DCPS states that the student may reenroll in DCPS, and the agency will review and revise the IEP if necessary.

The parties concluded the Resolution meeting process by participating in a resolution session on April 24th, 2013. No agreement was reached, but the parties agreed not to shorten the 30-day resolution period. Therefore the 45-day timeline began on April 20th, 2013 and will end on June 3rd 2013 which is the HOD date.

On April 29, 2013, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer determined that, absent a motion demonstrating otherwise, Petitioner would only be able to pursue its claims back to 3/20/11, which is two years prior to the filing of the Complaint. The hearing officer issued a Prehearing Order on May 2, 2013.

By their respective letters dated May 6, 2013, Petitioner disclosed seven documents (Petitioner's Exhibits 1-7) and DCPS disclosed sixteen documents (Respondent's Exhibits 1-16).

The hearing officer convened the hearing on May 13, 2013, as scheduled.¹ All documents disclosed by the parties were admitted into the record without objection. The hearing officer received opening statements and Petitioner's testimonial evidence, then Petitioner moved for a directed verdict. The hearing officer took into consideration the arguments of the parties and the relevant evidence prior to denying Petitioner's motion for a directed verdict. Thereafter, DCPS presented its testimonial evidence and the hearing officer received closing statements prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

1. Did DCPS fail to adequately evaluate Student in all areas of suspected disability, including failure to perform triennials, in order to develop an appropriate IEP and provide an appropriate placement?
2. Did DCPS failed to develop IEPs during SY 2010/11 (back to 3/20/11), SY 2011/12, and SY 2012/13?
3. Did DCPS fail to provide an appropriate special education placement during SY 2010/11 (back to 3/20/11), SY 2011/12, and SY 2012/13?

FINDINGS OF FACT²

1. Student is a nineteen year old female, who has been diagnosed with bipolar, depression, and emotional disturbance.³

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

² To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

2. Student attended ninth grade at a DCPS senior high school for most of SY 2012/13. However, she was unenrolled by DCPS in the spring of 2013 for nonattendance.⁴
3. The current school year represents Student's fourth year in the ninth grade in DCPS schools. During SY 2011/12, Student attended the same DCPS high school she attended for most of SY 2012/13. For SY 2010/11, Student attended a private school at the beginning of the school year, but she kept getting suspended for fighting; then she attended a different private school that eventually put her out for fighting, then she attended a DCPS school.⁵
4. Student's current IEP is dated December 19, 2012. The IEP signature section indicates that both Student and Parent participated in the IEP meeting by phone. The IEP identifies Student's primary disability as Emotional Disturbance ("ED"). The IEP states that Student is currently in the 9th grade, but her present levels of performance are third grade level in math and the second grade level in reading. Although the IEP states that present levels of performance in math and reading were obtained from "The WJIII Achievement Assessment," the date the assessment was administered is not listed. Moreover, the IEP contains narrative information in the present level of performance sections for written expression, communication/speech and language, and emotional, social and behavioral development, but there is no indication that the information was obtained from a formal or informal assessment. Pursuant to the IEP, Student is to receive 30.5 hours per week of specialized instruction, 2 hours per month of behavioral support services, and 120 minutes per month of speech/language services, with all instruction and related services to be provided outside general education.⁶
5. Student disputes that she participated in a December 19, 2012 IEP meeting by phone, as she does not recall ever participating in an IEP meeting by phone.⁷
6. The administrative record for this case includes a March 25, 2011 IEP and Meeting Notes, which indicate that Student's advocate participated in the meeting and development of the IEP. This IEP states that present levels of performance in math, reading and written expression were obtained from a WJIII Achievement Assessment, but the date the assessment was administered is not listed. The information in the present level of performance sections for the communication/speech and language section of the IEP makes no reference to an assessment or evaluation.⁸
7. The administrative record includes a document that purports to be a March 20, 2012 IEP for Student, but the signature portion of the document indicates that neither Parent nor Student participated in the development of the document. There is also documentation in the record indicating that DCPS sent Parent an IEP Meeting Notice/Letter on March 19, 2012, but there was testimonial evidence demonstrating that the letter was actually sent to and/or received by Parent.⁹

³ See Complaint at 2.

⁴ Testimony of Student; testimony of social worker; see Respondent's Exhibit 2.

⁵ Testimony of Student.

⁶ Respondent's Exhibit 4.

⁷ See testimony of Student.

⁸ Respondent's Exhibits 13 and 14.

⁹ Respondent's Exhibits 12 and 16.

8. Student recalls attending an IEP meeting the first private school she attended during SY 2010/11.¹⁰
9. Informal testing administered to Student on March 21, 2013 reveals that Student is basically unable to tell time when presented with a picture of a clock with the hour and minute hands in various positions, and Student is able to correctly spell only four of the seven days of the week, seven of the twelve months of the year, and eleven of the twenty-one numbers from 1 to 20.¹¹
10. Although Student was able to recognize that documentation included in the administrative record was an IEP, Student was unable to read the words “individualized education program.”¹²
11. The administrative record includes documentation purporting to be one or more functional behavior assessments (“FBA”) and a behavior intervention plan (“BIP”). However, the signature sheets for these documents indicate that neither Parent, Student nor the Student’s advocate participated in the preparation of the documents.¹³
12. The program Student attended at her most recent DCPS school is a smaller, structured program within a larger high school. Most of the students in the program have ED, and there are smaller classrooms, a higher ratio of teachers to students with a maximum of 8 students in each class, behavioral specialists in the classrooms and hallways, a clinical social worker and dean of students assigned to the program, and all classes in the program are held on the same floor.¹⁴
13. At the start of the current school year, Student asked her teachers for help and indicated to her teachers and the assistant principal that she did not understand the work. However, Student was not provided with the necessary help, and the teachers continued to give her the work. Student would get frustrated and leave the classroom, and the assistant principal would tell Student to just go home if she was not going to do the work. Student would go home without any paperwork indicating that she had been suspended. She would go back to school a day or two later, and the process would repeat itself again. This went on for the entire first half of the current school year, even after DCPS convened a November 2012 attendance meeting for Student.¹⁵
14. Student did not begin receiving counseling services until November of SY 2012/13, and even then, she did not receive all of the counseling services required by her IEP because of attendance issues.¹⁶
15. When Student did receive counseling, it was usually due to a crisis that had taken place during the school day, such as verbal aggression with peers and adults. Student would become very escalated and require a lot of support to get back on track. Most of the time

¹⁰ Testimony of Student.

¹¹ Petitioner’s Exhibit 4.

¹² See Testimony of Student.

¹³ Respondent’s Exhibits 5 and 11.

¹⁴ Testimony of social worker.

¹⁵ Testimony of Student.

¹⁶ Testimony of social worker.

Student could be de-escalated, but if the staff could not get Student to de-escalate she was sent home or she would leave on her own.¹⁷

16. On November 8, 2012, DCPS prepared a Student Attendance Support Plan at a meeting that was attended by both Parent and Student. The Plan notes that Student was pregnant at the time and felt tired and sick and indicated that home-school might be an option. The Plan required Student to continue participating in individual therapy, change her doctor appointments to after-school hours, and bring in doctor appointment notes for excused absences. The Plan notes that information regarding home-school was provided to Parent.¹⁸
17. By January, Student found out that she was a high risk mother. She stayed home a week or two, and then she went back to school. She was given a packet of work to do in school, but she did not understand the reading and math. Eventually, she got frustrated and stopped going to school for a while at the end of January.¹⁹
18. Staff members at Student's current DCPS high school called and/or attempted to call Student and/or Parent regarding Student's excessive absences on September 6 and 24; October 2, 4, and 9; November 1 and 13; and February 12 and 25. By February of 2013, Student was having complications with her pregnancy and was also having difficulty getting in touch with the Dean of Students to submit paperwork for Home Instruction services.²⁰
19. On February 10, 2013, DCPS sent Parent a letter stating that Student had been "continuously absent from school since 2/11/13 . . . [and] "effective 3/13/13 your child will be removed from membership at" her DCPS high school.²¹
20. As of March 14, 2013, Student had been present for only 16 of the 113 days of school to that date.²²
21. Student had similar attendance problems during SY 2011/12, which also resulted from behavior issues. However, that year, Student would get into fights, she would get suspended for fighting, and the staff at that school told her that since she had already turned 18 she could leave school and did not have to return.²³
22. Student did not receive any evaluations from DCPS during the current school year, or during SY 2011/12.²⁴
23. At the May 13, 2013 due process hearing for this case, DCPS stipulated that it is willing to provide the requested comprehensive psychological evaluation for Student, including clinical, academic, cognitive and educational components, as well as a social history. DCPS is also willing to convene a meeting for Student within 20 days of receipt of the evaluation, but only if she enrolls in DCPS. Petitioner disagreed with the suggestion that

¹⁷ Testimony of social worker.

¹⁸ Respondent's Exhibit 6.

¹⁹ Testimony of Student.

²⁰ Respondent's Exhibit 7.

²¹ Respondent's Exhibit 2.

²² Respondent's Exhibit 9.

²³ Testimony of Student.

²⁴ Testimony of Student.

Student must enroll in DCPS to be offered a FAPE; nevertheless, Student is not opposed to enrolling back in her DCPS high school prior the IEP meeting. Despite these stipulations and agreements, the parties were unable to amicably resolve this matter and chose to go to hearing.

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:

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner's claims.

Evaluations

Under IDEA, a public agency must ensure that a reevaluation of each disabled child is conducted if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation or if the child's parent or teacher requests a reevaluation. 34 C.F.R. § 300.303(a). Such a reevaluation may occur not more than once a year, unless the parent and public agency agree otherwise; and must occur at least once every 3 years, unless the parent and public agency agree otherwise. 34 C.F.R. § 300.303(b).

The purposes of a reevaluation include providing the disabled child's IEP team with evaluation data sufficient to determine, *inter alia*, whether any additions or modifications to the child's special education and related services are needed to enable the child to meet the measurable annual goals set out in the child's IEP and to participate, as appropriate, in the general education curriculum. 34 C.F.R. § 300.305(a)(2)(iv). Hence, IDEA requires that each disabled child's IEP be revised at least annually to address, *inter alia*, the results of any reevaluation conducted pursuant to 34 C.F.R. § 300.303. 34 C.F.R. § 300.324(b)(1)(ii)(B).

Moreover, IDEA requires that in determining the educational placement of a disabled child, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1).

In the instant case, Petitioner argues that DCPS has denied Student a FAPE by failing to adequately evaluate Student in all areas of suspected disability, including by failing to perform triennials, in order to develop an appropriate IEP and provide an appropriate placement. Petitioner points to the lack of evaluations in the record in support of its argument. DCPS disagrees, arguing that Petitioner failed to present any evidence regarding when evaluations should have been performed for Student, and arguing that the lack of evaluations in the record does not mean that evaluations do not exist.

A review of the evidence in this case reveals that Student was not evaluated during SY 2012/13 or SY 2011/12. There is no evidence in the record tending to indicate that she was evaluated in SY 2010/11 either. Indeed, although some of the present levels of performance in Student's

December 19, 2012 and March 25, 2011 IEPs purport to be based on a WJIII educational assessment, the IEPs offer no indication of when that assessment was conducted, and the remaining sections setting forth present levels of performance make no reference at all to any assessments or evaluations. Moreover, under Student's December 19, 2012 and March 25, 2011 IEPs based on the WJIII that was conducted on some unknown date, Student was retained in the ninth grade for the third time at the end of SY 2011/12, she was unenrolled from school altogether by DCPS prior to the end of SY 2012/13, and during both school years she experienced continuous behavior problems that ultimately resulted in severe truancy problems.

This evidence, taken together, demonstrates that DCPS failed to adequately evaluate Student in all areas of suspected disability so as to be able to develop appropriate IEPs for Student and provide her with an appropriate educational placement. *See Letter to Borucki*, 16 IDELR 884 (OSEP April 11, 1990) (a disabled child's failure to cooperate with the educational program does not relieve the school district of its obligations to provide FAPE; in fact, a student's lack of cooperation may indicate a need for reevaluation, a revised IEP or change in placement); *Independent School Dist. No. 284, Wayzata Area Schools, Wayzata, Minnesota, v. A.C.*, Civil Action No. 00-2346MN (8th Cir. August 3, 2001) (sometimes what looks like simple misbehavior is actually a more complicated problem whose remedy should be integrated into the child's overall program of special education; if the problem prevents the disabled child from receiving educational benefit, then it should not matter that the problem is not cognitive in nature); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) (the FAPE required under IDEA requires the provision of personalized instruction with sufficient support services to permit the disabled child to receive educational benefit; the personalized instruction should be formulated in accordance with the Act and enable the child to achieve passing marks and advance from grade to grade). Hence, the hearing officer concludes that Petitioner has met its burden of proof on this claim, and the hearing officer will order DCPS to provide the independent evaluation it stipulated that it would provide Student and to convene a meeting to review same.

IEPs

Under IDEA, at the beginning of each school year, each public agency must have an IEP in effect for each child with a disability within its jurisdiction. 34 C.F.R. § 300.323(a). IDEA assigns responsibility for the development, review and revision of a disabled child's IEP to the IEP team. *See* 34 C.F.R. § 300.324. In this regard, the IEP team **must** include, *inter alia*, the child's parents, and whenever appropriate, the disabled child. 34 C.F.R. § 300.321(a) (emphasis supplied).

Under IDEA, each public agency must take steps to ensure that one or both parents of a disabled child are present at each IEP team meeting or are afforded the opportunity to participate, including notifying parents of the meeting early enough to ensure that they will have an opportunity to attend, and scheduling the meeting at a mutually agreed on time and place. 34 C.F.R. § 300.322(a). Although IDEA provides that an IEP meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend, in such a case the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as detailed records of telephone calls, copies of correspondence sent to the parents, and detailed records of visits made to the parent's home or place of employment. 34 C.F.R. § 300.322(d).

In the instant case, Petitioner charged DCPS with failing to provide Student with any IEPs at all for school years 2010/11 (dating back to March 20, 2011), 2011/12, and 2012/13. DCPS

disagrees, pointing to the documents in the administrative record purporting to be IEPs for Student. However, Petitioner contends that these documents are not truly IEPs within the meaning of IDEA because Student and/or Parent did not participate in their development, as required by IDEA.

A review of the evidence in this case reveals that the administrative record includes a March 25, 2011 IEP, which indicates that Student's advocate participated in the development of the IEP; a March 20, 2012 IEP, which indicates that neither Parent nor Student participated in the development of the document; and a December 19, 2012, which indicates both Student and Parent participated in the development of the IEP by phone, although Student does not recall participating in the meeting by phone. Student also testified that she participated in an IEP meeting during SY 2010/11. Although there is documentation in the record indicating that DCPS sent Parent an IEP Meeting Notice/Letter on March 19, 2012, there was testimonial evidence demonstrating that the letter was actually sent to and/or received by Parent.

Based on the evidence outlined above, the hearing officer concludes that the evidence in this case proves that DCPS had a valid IEP in place for Student as of March 25, 2011, and that there was a valid meeting to develop an IEP for the additional five-day period of SY 2010/11 at issue here (from May 20 – 25, 2011), which tends to prove that there was a valid IEP in place during that time period. The March 25, 2011 IEP remained valid for at least one year through March 25, 2012. However, from March 25, 2012 through the end of SY 2011/12, and from the start of SY 2012/13 through December 19, 2012, DCPS did not have a valid IEP in place for Student, because the IEP team that developed the document purporting to be a March 2012 IEP for Student did not include Parent and/or Student, and DCPS's possible provision of a meeting notice to Parent one day prior to the IEP meeting did not constitute valid notice or valid justification for proceeding without Parent. Thereafter, from December 19, 2012 through all remaining periods at issue in this case, DCPS had a valid IEP in place for Student.

For these reasons, the hearing officer concludes that Petitioner met its burden of proving that DCPS failed to provide Student with an IEP during the approximately three-month period from March 2012 through the end of SY 2011/12, and for the approximately four-month period from the start of SY 2012/13 through December 19, 2012, for a total of approximately seven school months, but Petitioner otherwise failed to meet its burden of proof on this claim. Although the evidence as detailed in the preceding subsection further proves that Student did not receive educational benefit during the seven school months at issue, Petitioner failed to present even a scintilla of evidence regarding the form and amount of compensatory education required to place Student in the position he would have occupied but for DCPS's denial of a FAPE. Therefore, the hearing officer declines to, and indeed, is unable on this record to award compensatory education to compensate Student for the denial of FAPE. *See Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. 2005) (in every case, the inquiry must be fact-specific and the ultimate award of compensatory education 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).

Placement

Under IDEA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17.

In the instant case, Petitioner argues that DCPS failed to provide Student with an appropriate special education placement during school years 2010/11 (dating back to 3/20/11), 2011/12, and SY 2012/13. In support of this argument, Petitioner points to Student's repeated suspensions (both formally and informally) at the current school during SY 2011/12 and SY 2012/13, which have resulted in Student's chronic truancy problems and repeated retentions in the ninth grade. DCPS disagrees, arguing that Petitioner failed to meet its burden of proof and that the agency provided Student with an educational placement that allowed her access to education and the opportunity to receive passing marks and advance from grade to grade.

A review of the evidence in this case reveals that there is no evidence at all, either testimonial or documentary, going to the appropriateness of Student's educational placement in SY 2010/11 from March 20, 2011 through the end of the school year. Therefore, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this portion of its claim of an inappropriate placement.

With respect to school years 2011/12 and 2012/13, the evidence reveals that Student attended the same DCPS high school during both years, and as noted above in the subsection regarding Evaluations, Student was retained in the ninth grade for the third time at the end of SY 2011/12, she was unenrolled from school altogether by DCPS prior to the end of SY 2012/13, and during both school years she experienced continuous behavior problems that ultimately resulted in severe truancy problems. The DCPS program Student attended during the previous and current school years is a smaller, structured program within a larger high school and most of the students share Student's disability of ED. Hence, theoretically, the program would appear to be ideal for a student such as Student. In reality, however, Student clearly was unsuccessful in the program and DCPS failed to take steps to either put supports in place to ensure that Student received educational benefit or provide an alternative location of services that could meet Student's needs. Under these circumstances, the hearing officer concludes that Petitioner met its burden of proving that DCPS failed to provide Student with an appropriate educational placement/location of services during SY 2011/12 and SY 2012/13. *See e.g., Board of Education v. Rowley, supra*, (provision of FAPE consists of provision of personalized instruction with sufficient support services to permit disabled child to receive educational benefit, achieve passing marks and advance from grade to grade).

As noted above in the preceding subsection, however, Petitioner failed to provide any evidence at all that would enable the hearing officer to issue an award of compensatory education to Student. Nevertheless, the hearing officer will order DCPS to convene a meeting upon completion of the independent evaluation that will be ordered herein to determine an appropriate educational placement/location of services for Student.

ORDER

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

1. DCPS shall provide Petitioner with funding for an independent comprehensive psychological evaluation for Student, including clinical, academic, cognitive and educational components, as well as a social history.
2. Within 20 calendar days of Petitioner's provision to DCPS of the independent evaluation report, DCPS shall convene an IEP meeting for Student to review the independent

evaluation data, review and revise Student's IEP as appropriate, and discuss and determine an appropriate educational placement/location of services for Student.

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 U.S.C. § 1415(i).

Date: 6/3/2013

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer