DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

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

Petitioner,

V.

DCPS,

Respondent.

Date Issued: 8/18/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 8/11/11 Room: 2009

2011 AUG 18 PM 2:57 OSSE STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

A due process complaint was filed by counsel for petitioner on June 22, 2011. He alleges that DCPS denied a FAPE to the student by developing an inappropriate IEP because it did not contain sufficient hours of specialized instruction outside of general education. Counsel for petitioner also claims that the student's placement at School is inappropriate because of his low functioning and emotional issues and his failures in all classes despite interventions the school has implemented. Counsel for respondent filed a response on July 11, 2011 denying the allegations in the due process complaint and asserting that the student failed to take advantage of the FAPE and educational opportunities offered by DCPS because of his truancy. On July 15, 2011 a prehearing conference was held with counsel for petitioner Miguel Hull and counsel for respondent DCPS Cheri Cooley. The prehearing Order was issued on July

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

18, 2011. The prehearing Order indicated that counsel for petitioner stated that he did not have a resolution meeting scheduled for July 5, 2011, but that he agreed with the DCPS case manager by telephone on that date to go forward to a due process hearing. **Counsel for petitioner did not inform this hearing officer of that disposition development until the prehearing conference despite the Prehearing Notice requirement to inform this hearing officer of the disposition as soon as known.** Counsel for petitioner agreed that the resolution period should run out to the end of the thirty day period of July 22, 2011 and that the HOD is due September 5, 2011. The issues to be decided at the due process hearing are: 1. Is the student's current IEP inappropriate for not containing sufficient hours of specialized instruction outside of general education? 2. Is the student's placement at School inappropriate because of his low functioning and emotional issues and his failures in all classes despite interventions the school has implemented? The relief requested is placement at the non-public full-time special education program at

The due process hearing convened at 9:30 a.m. on August 11, 2011 in Room 2009 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Miguel Hull represented the petitioner and Cheri Cooley represented the respondent DCPS. The hearing was closed. At the outset of the hearing, petitioner's documents P-1-P-15 and respondent's documents R-1-R-5 were admitted into evidence without objection. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses: the mother and the educational advocate, Juan Fernandez, who testified in person and from the who testified by telephone. Counsel for respondent DCPS did not call any witnesses.

JURISDICTION

The hearing was convened on August 11, 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

BACKGROUND

Counsel for petitioner alleges that the IEP is inappropriate because it has insufficient hours of specialized instruction and behavioral support services to address his low functioning and disability. Counsel for petitioner also alleges that the placement at School is inappropriate because the school has not been successful with the interventions they have tried in meeting the student's needs. The student has been failing all his classes. Counsel for respondent DCPS counters that the IEP calls for 19.5 hours a week of specialized instruction outside of general education and one hour a week of behavioral support services which is almost the student's entire school day, but that the student truancy is preventing him from taking advantage of the educational opportunities offered by the IEP. The student had extensive unexcused absences last school year.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Is the student's current IEP inappropriate for not containing sufficient hours of specialized instruction outside of general education?

2. Is the student's placement at School inappropriate because of his low functioning and emotional issues and his failures in all classes despite interventions the school has implemented?

The relief requested is placement at the non-public full-time day special education program at

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue one- the inappropriateness of the IEP-are as follows:

1. The student is a year-old male student who has been found eligible for special education services by DCPS as a student with the disability classification of Emotional Disturbance. (P-3)
2. The student attended School for the 2010-2011 School Year. (P-3)
3. The student's IEP of November 9, 2010 calls for 19.5 hours per week of specialized instruction outside of general education and one hour a week of behavioral support services outside of general education. (P-3 at p.3)
4. The student's Report Card dated May 10, 2011 shows the student received Fs in Learning Lab 3 and D.C. History for the fourth advisory. There were no grades listed in his other classes. The teachers' notes indicate excessive absences in Learning Lab 3, Biology and Algebra. (P-7)
5. The student's Report Card dated June 18, 2010 showed the student failed all his courses. (P-7)

6. A psycho educational evaluation was conducted on the student on February 1, 2010 by the Child Guidance Clinic of the Superior Court of the District of Columbia Family Court-Court Social Services Division. (P-8) On the WISC-IV test the student had a full-scale IQ score between 54-64 placing his overall cognitive ability in the Extremely Low Range and puts him at the 0.3 percentile when compared to adolescents his age. He has major difficulties with verbal knowledge and reasoning abilities. On the Woodcock-Johnson Tests of Achievement (WJ-III) The student had a standard score of 51 on Broad Reading which is 2.3 grade equivalent, a 64 on Broad Math which is 3.7 grade equivalent, a 39 on Broad Written Language which is 1.8 grade equivalent, a 48 on Basic Reading which is 2.2 grade equivalent, a 60 on Reading Comprehension which is 2.7 grade equivalent, a 69 on Math Calculation Skills which is a 4.4 grade equivalent and a 65 on Math Reasoning which is 3.5 grade equivalent. (P-8 at pages 9-10) He was also administered the Vineland Adaptive Behavior Scale and his overall composite score was 91 which placed his functioning in the Adequate range. The evaluator found: "[student's] cognitive, achievement, and adaptive functioning skills suggest that he suffers from an Intellectual Disability (Mild Mental Retardation)." (P-8 at p.10) The evaluator concluded: "Results from his evaluation indicate that [student] suffers from Disruptive Behavior Disorder, Cannabis Dependence Disorder, and a rule out of Posttraumative Stress Disorder. [Student's] emotional and behavioral difficulties are likely associated with

his cognitive challenges and trauma related to being shot and finding out about his biological father. Without community and therapeutic intervention [student's] externalizing behaviors and substance abuse will become more severe." (P-8 at p.14) The evaluator recommended updating his IEP to change his disability classification to Intellectual Disability and provide small classroom instruction and one-on-one tutoring. (P-8 at p.15)

7. The student's attendance summary from August 16, 2010 to July 7, 2011 showed he had 484 unexcused absences from individual classes and 59 lates. (R-4) The student has attendance problems because he is ashamed of his low functioning and does not want other students to know of his low level of reading. (Testimony of Mother, R-5 at p.2, P-5 at p.2) There was no evidence presented by counsel for petitioner that the student's truancy was related to his disability of emotional disturbance.

8. The student refuses to see the school social worker for his one hour a week of behavioral support services. (Testimony of Mother, R-5 at p.2, P-5 at p.2)

9. The special education teacher has offered to provide the student with individual instruction after class in mathematics. The student has not taken advantage of this offer of instruction. (Testimony of Mother)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue two- the inappropriateness of student's placement at School-are as follows:

II.

1. The student has been attending School for the 2010-2011 School Year. (Testimony of Mother, P-3)
2. The student has had 484 unexcused absences from individual classes and 59 lates during the last school year. (R-4)
3. The student's special education teacher has offered to provide additional individual assistance to the student after class, but the student has not availed himself of that opportunity. (Testimony of Mother)
4. The student has refused to see the school social worker to receive the one hour a week of behavioral support services provided for in his IEP. (Testimony of Mother, R-5 at p.2)
5. The student's special education classes have a small student to teacher ratio. In the citizenship class there were two students to one special education teacher and the Learning Lab was a small setting. (Testimony of
6. School is able to implement the student's IEP calling for 19.5 hours a week of specialized instruction outside of general education and one hour a week of behavioral support services.

CREDIBILITY FINDING

A hearing officer is responsible for assessing the credibility of witnesses. *See Shore Regional High School Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3rd Cir. 2003) The educational advocate's testimony about his discussion with the student's special education teachers about the services offered and the student teacher ratio is credible based on my observation of his straightforward answers to counsels' questions.

DISCUSSION/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 on issue one- the inappropriateness of the IEP-are as follows:

In determining if an IEP meets the substantive requirements of the IDEA, The United States Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) held that courts must determine "is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07.

Counsel for petitioner argues that the IEP has insufficient hours of specialized instruction and behavioral support services to address his low functioning and disability. Counsel for respondent DCPS counters that the IEP calls for 19.5 hours a week of specialized instruction outside of general education and one hour a week of behavioral support services which is almost the student's entire school day, but that the student truancy is preventing him from taking advantage of the educational opportunities offered by the IEP.

In *Hinson v. Merritt Educational Center*, 579 F. Supp. 2d 89 (D.D.C. 2008), the Court held:

> Here, there is evidence that the student has been absent from school for substantial periods of time. Although the Parties disagree on whether all the student's absences were voluntary, the Hearing Officer found that both Plaintiff and Defendant agree that 'the student did not attend classes.' at 5. In light of extensive absences throughout the school year and giving proper deference to the Hearing Officer's Determination, Plaintiff has not shown that the student's poor academic performance resulted from a lack of appropriate services rather than the student's own extended absences. The Hearing Officer's conclusion that was not 'availing himself of educational benefit' under these circumstances was a reasonable determination. Indeed, it is difficult to say how the Hearing Officer could have determined that the services in the IEP were not working when the student had not taken advantage of those services.

In this case, the student has had excessive unexcused absences totaling 484 unexcused absences from individual classes and 59 lates during the last school year. The student has refused to see the school social worker to receive the one hour a week of behavioral support services offered in his IEP. The student has not availed himself of the extra instructional assistance offered by his special education teacher. The testimony of the mother is that the student does not go to class because he is ashamed of his low reading level and does not want to be embarrassed in front of his peers. That reason does not indicate that it is the student's disability of emotional disturbance that is keeping him from attending class. Counsel for petitioner has offered no evidence, especially expert testimony, that the student's disability is preventing him from attending class. The student's IEP calls for 19. 5 hours a week of specialized instruction and one hour a week of behavioral support services. This is an extensive amount of specialized instruction and related services, but it is difficult to determine if the IEP is working when the student does not attend classes and refuses to see his social worker for related services or avail himself of additional individual instructional assistance offered by his special education teacher. *See also Garcia v. Board of Education of Albuquerque Public School*, 520 F. 3d 1116 (10th Cir. 2008) where the Tenth Circuit Court of Appeals affirmed a district court's denial of compensatory education because the student demonstrated an unwillingness to return to

school and the student would not choose to benefit from the compensatory education services that she might receive from the court. Counsel for petitioner has failed to meet his burden of proof that the student's IEP is not reasonably calculated to provide educational benefit.

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 on issue two- the inappropriateness of the placement-are as follows:

The second issue to address is whether the placement at School is appropriate. The Supreme Court held in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 201 (1982) that IDEA was intended to provide a "basic floor of opportunity" and an individualized plan "designed to provide educational benefit to the handicapped child." *See Schoenbach v.District of Columbia*, 309 F. Supp. 2d 71, at 80 (D.D.C. 2004) This Circuit has held that a school has met its obligation to provide a FAPE if the school's program "confers some educational benefit." *Kerkam v. Superintendent, District of Columbia Public Schools*, 931 F 2d 84 (D.C. Cir. 1991) The analysis of the appropriateness of a public school placement "is not comparative." *Jenkins. v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir. 1991) Although IDEA guarantees a FAPE, it "does not necessarily guarantee the child [with the 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 127,139 (D.D.C. 2002). An IEP must be 'reasonably calculated' to confer educational benefits on the child, ...but it need not "maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Rowley* at 200, 207. , quoted in *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009)

In this case, this hearing officer finds that School is able to implement the student's current IEP. (See Findings of Fact II.-#6) School is offering a small student to teacher ratio and small setting for the student's special education classes. (See Findings of Fact II. #5) School's special education teachers are offering additional instruction to the student, but he is not availing himself of this instruction. (See Findings of Fact II. #3) The student is also refusing to participate in the behavioral support sessions one hour a week provided by the school social worker pursuant to the student's IEP. (See Findings of Fact II. #4) The placement School is offering educational benefits to the student, but the student has not taken advantage of these educational opportunities. This Circuit has held in *Jenkins*, 935 F. 3d at 305 "[I]f there is an 'appropriate' public school program available…the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." The Supreme Court in *Burlington School Committee v. Department of Education,* 471 U.S. 359 (1985) and *Florence County School Dist. Four v. Carter*, 510 U.S. 7 at 15 (1993) has held that parents "are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." Since this hearing officer has answered the threshold question that there is no denial of a FAPE with the present placement at School, it is not necessary to do further analysis on the second prong of the Supreme Court test for reimbursement.

ORDER

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

Counsel for petitioner's request for relief is DENIED and the case is DISMISSED with prejudice.

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: 8/18/11 Seymour DuBow /s/

Hearing Officer