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

School

and DCPS ,

Respondents.

Date Issued: 1/3/12

Hearing Officer: Seymour DuBow

OSSE
STUDENT HEARING OFFICE
2012 JAN 13 AM 9:14

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

A due process complaint was filed by counsel for petitioner on October 28, 2011. (P-1) Counsel for respondent School filed her response on November 14, 2011 and counsel for respondent DCPS filed her response on November 8, 2011. A resolution meeting was held on December 1, 2011 with and the parties failed to reach an agreement. A resolution meeting was held on November 18, 2011with DCPS and the parties failed to reach an agreement. A prehearing conference was held on November 27, 2011 and a Corrected Prehearing Order was issued on November 30, 2011. Counsel for petitioner agreed to letting the full thirty day resolution period run.

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

A due process hearing convened at 9 a.m. on December 19, 2011 in of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Petitioner was represented by Charles Canty, respondent was represented by Lauren Baum and respondent DCPS was represented by Cherie Cooley. The hearing was closed. At the beginning of the hearing, counsel for respondent DCPS's documents DCPS-1-DCPS-8 and counsel for petitioner's documents P-1-P-8 were admitted into evidence without objection. Counsel for petitioner objected to -7 on the grounds he did not receive it, but counsel for respondent provided e-mail verification to this hearing officer that the document was properly disclosed to counsel for petitioner on December 12, 2011. This hearing officer overruled counsel for petitioner's objection and -7 was admitted into evidence along with all of counsel for documents -1- -8. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses: the petitioner and educational advocate, Tiresias McCall, who both testified in person. Counsel for respondent and counsel for respondent DCPS did not call any witnesses and rested on their disclosed documents.

JURISDICTION

The hearing was convened on December 19, 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

The student is a year old female who has been found eligible for special education services as a student with the disability classification of Multiple Disabilities.

-4) Counsel for petitioner filed this due process complaint alleging that did not provide counseling services and failed to provide life skills/independence skills when the student was at and further alleging that DCPS failed to provide an appropriate placement at School for the current school year. Counsel for and counsel for DCPS deny the above allegations.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Did allegedly discontinue thirty minutes of counseling services on the student's February 2, 2011 IEP without any reevaluation?

2. Did allegedly fail to implement the student's February 2, 2011 IEP by not providing life skills/independence skills in a transition services plan?

3. Did DCPS fail to provide an appropriate placement at School for the 2011-2012 School Year because the student is allegedly failing to make educational progress with her academic skills remaining at the first grade level in this setting that is providing 15 hours of specialized instruction in a regular education class without a dedicated aide?

The relief requested is reconvening of an MDT/IEP meeting to review and revise the student's IEP and discuss and determine placement and to place the student at an alternative special education program placement including a residential placement. Counsel for petitioner is also

requesting compensatory education for missed counseling services and missed life and independence skill training.

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 failure of to provide counseling services- are as follows:

I.

1. The February 23, 2010 IEP developed by Charter School and signed in agreement by the parent called for 30 minutes a week of counseling services. The IEP stated in the goal section that social emotional support is no longer required. -1)
2. An MDT meeting was held on September 9, 2010 with the parent participating by telephone. The MDT Notes state: "The team asked mom about the counseling goals that had been discontinued in the body of the IEP but were still on as services. The parent shared that counseling was discontinued because of their living situation, but that mom still wanted counseling. She stated that she was just not able to have it over the summer because she would not be able to come to school. -2)
3. The student's IEP developed by on February 2, 2011 and signed by the parent that she agreed with the contents of the IEP provided for 30 minutes a week of counseling services. The February 2, 2011 IEP as in the previous IEP stated in the goal section that social emotional support was no longer required. -4, P-3)

4. The social worker's counseling logs indicate the student received 30 minutes a week of counseling services for the 2010-2011 School Year. 7)

5. The IEP Progress Report for the 2010-2011 School Year states that the social worker found in her June 13, 2011 entry that the student is mastering the area of social emotional development. -6)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue two- the failure of to provide life skills/ independence skills- are as follows:

II.

1. The student was years of age when the February 2, 2011 IEP was developed. -1 & 4)

2. The February 2, 2011 IEP does not provide for life skills/independence skills and does not include a transition plan. 1 &4) The parent signed her agreement with the contents of both the February 2010 and February 2011 IEPS. -1 & 4)

After considering all the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact on issue three- the failure of DCPS to provide an appropriate placement at School- are as follows:

III.

1. The student began to attend DCPS's School at the beginning of the 2011-2012 School Year. (Testimony of Parent, DCPS-6)
2. The student's report card for the first advisory at was a C in Character Development, a C- in Social Studies, a C in English Language. These were classes taught by the special education teacher outside of general education. The student also received a C+ in Music. (DCPS-6)
3. DCPS adopted the February 2, 2011 IEP of The IEP Progress Report completed by the special education teacher at dated October 28, 2011 stated the student was progressing on meeting her IEP goals in mathematics and written expression. (DCPS-2) DCPS is implementing the student's IEP calling for 15 hours of specialized instruction per week outside of general education as indicated by her report card and the IEP Progress Report. (DCPS-2 & 6)
4. The February 2, 2011 IEP does not call for a dedicated aide and the parent signed her agreement with that IEP. -4)

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) This hearing officer after listening to the answers to counsels' questions found the testimony of the educational advocate not credible. The educational advocate did not observe the student in classes at or School, did not talk to his teachers or staff at or School and did not participate in any meeting at (Testimony of Tiresias McCall, educational advocate)

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 and two against respondent are as follows:

Counsel for petitioner argues that failed to provide 30 minutes a week of counseling services as required by her February 2, 2011 IEP. The above Findings of Fact I. #1-#4 show that did provide these counseling services. The counseling logs show that provided counseling services throughout the 2010-2011 School Year as required by her IEP. Counsel argues that should not have discontinued the student's social emotional goals. The MDT team removed social emotional goals from the student's IEPs because the student had mastered those goals. (See Findings of Fact I. #5) Despite her mastering social emotional goals, continued to provide counseling services throughout the 2010-2011

School Year. (See Findings of Fact I. #4) Even assuming that there was a procedural violation in discontinuing social emotional goals in her IEP, which this hearing officer does not find, counsel for petitioner has failed to show that the student suffered any educational harm by discontinuing those goals when continued to provide counseling services. "Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits." *Roland M. v. Concord Sch. Comm.* 910 F.2d 983, 994 (1st Cir. 1990) (en banc). "an IDEA claim is viable only if...procedural violations affected the student's substantive rights." *Lesesne ex. Rel. B.F. v. District of Columbia*, 447 F. 3d 828, 834 (D.C. Cir. 2006)

Counsel for petitioner also argues that failed to implement the student's February 2, 2011 IEP by not providing life skills/independence skills. The February 2, 2011 IEP does not provide for life skills/independence skills. There is no transition plan in the February 2, 2011 IEP. The parent signed her agreement with the contents of the February 2, 2011 IEP. (See Findings of Fact II. #2) *IDEA at 34. C.F.R. 300.43* defines transition services as a coordinated set of activities designed to improve the student's academic and functional achievement to facilitate the child's movement from school to post-school activities and can include acquisition of daily living skills. The student was only years old when the above IEP was developed. *IDEA at Section 300.320 (b)* does not require a transition plan to be in effect until a child turns 16 years of age.

5 D.C.M.R. 3030.3 states:

"The burden of proof shall be the responsibility of the party seeking relief. Based solely upon 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 a FAPE."

Because counsel for petitioner has failed to meet his burden of proof that there was an implementation failure, it is not necessary to do a legal analysis as to whether the aspects of the IEP not followed were "substantial or significant" or whether the deviations from the IEP's stated requirements were "material" so as to deny a FAPE. *Wilson v. D.C.* (Civil Action 09-02424, March 18, 2011) *Houston Independent School District v. Bobby R.* , 200 F. 3d 341 at 349 (5th Cir. 2007), *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5 J, 502 F. 3d 811 (9th Cir. 2007); *Catalan v. D.C.*, 478 F. Supp. 2d 73 (D.D.C. 2007)

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 three- that DCPS failed to provide an appropriate placement at School- are as follows:

The legal standard for educational placements was stated in the U.S. Department of Education interpretative guidelines that "educational placements under Part B must be individually determined in light of each child's unique abilities and needs, to reasonably promote the child's educational success." *Appendix A to 34 C.F.R. Part 300 Question 1.* Following the development of an IEP, the public school system is required to provide an appropriate educational placement that meets the needs set forth in the IEP and allows for its implementation. *See Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 25 (D.D.C. 2004) (citing *Petties v. District of Columbia*,238 F. Supp. 2d 114, 116 (D.D.C. 2002) and *34 CFR 300.116*

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)

The student enrolled at DCPS's School at the beginning of the 2011-2012 School Year. DCPS adopted the February 2, 2011 IEP calling for 15 hours per week of specialized instruction outside of general education. DCPS provided those hours of specialized instruction outside of general education. (See Findings of Fact III. #3) The student's report card shows that the student has received passing grades in all her classes. Three of her four classes are taught by a special education teacher. The student's IEP Progress Report written by the special education teacher show that the student is progressing in meeting her IEP goals in

mathematics and written expression. (See Findings of Fact III. #1-3) The placement at

is implementing the student's IEP that is providing educational benefits to the student and reasonably promotes the child's educational success.

Counsel for petitioner in his complaint also alleges that DCPS failed to provide a dedicated aide. The February 2, 2011 IEP, however, does not provide for a dedicated aide and the parent signed that she agreed with the contents of that IEP. (See Findings of Fact III. #4) Counsel for petitioner offered no evidence that a dedicated aide was requested or needed. Counsel for petitioner has failed to meet his burden of proof that DCPS failed to provide an appropriate placement for the student at for the 2011-2012 School Year.

ORDER

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

The case is DISMISSED with prejudice on all three issues raised in the due process complaint and counsel for petitioner's request for relief is DENIED.

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: 1/3/12 _____Seymour DuBow /s/_____

Hearing Officer