

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION  
OFFICE OF COMPLIANCE & REVIEW  
STATE ENFORCEMENT & INVESTIGATION DIVISION  
STUDENT HEARING OFFICE**

**CONFIDENTIAL**

Jane Dolkart, Due Process Hearing Officer  
1150 5<sup>th</sup> Street, S.E.  
Washington, D.C. 20003  
202-698-3819; 202-698-3825 (Fax)

OSSE  
STUDENT HEARING OFFICE  
200 FEB -8 AM 11:13

**HEARING OFFICER'S DETERMINATION**

IN THE MATTER OF:	)	
	)	
	)	
	)	DATE OF HEARING
	)	January 26, 28, 2010
Petitioner,	)	
	)	DATE OF COMPLAINT
V.	)	October 23, 2009
	)	
<b>The District of Columbia</b>	)	ATTENDING SCHOOL:
<b>Public Schools,</b>	)	
Respondent	)	

**COUNSEL FOR PARENT/STUDENT:** **Roberta Gambale**  
**James E. Brown & Assoc.**  
**1220 L Street, N.W.**  
**Ste. 700**  
**Washington, D.C. 20005**

**COUNSEL FOR DCPS:** **Nia Fripp**  
**Office of the General Counsel**  
**825 North Capitol Street, N.E., 9<sup>th</sup> Fl.**  
**Washington, D.C. 20002-4232**

STUDENT<sup>1</sup>, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S  
DETERMINATION

February 6, 2010

Representatives:

Petitioner – Roberta Gambale  
DCPS – Nia Fripp

Hearing Officer:

Jane Dolkart

---

<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

# HEARING OFFICER'S DECISION AND ORDER

## I. INTRODUCTION

This is a            year old student presently completing the            grade at            for the second time and found eligible for special education on March 18, 2008 as a student with a Learning Disability (LD). The student's most recent IEP, completed on March 30, 2009, provides for 15 hours of specialized instruction in a general education setting, 1 hour of counseling, and 1 hour of S/L therapy per week. The student has had a serious truancy problem for at least the past three school years. On April 17, 2009, a due process complaint was filed, alleging that an MDT/IEP meeting was held on March 30, 2009, without the presence of the parent, a transition plan was developed without the presence of the student, the student's 2008-2009, IEP was not implemented, and both the 2008-2009 and 2009-2010 IEP were inappropriate. An HOD was issued on June 29, 2009, finding in favor of DCPS on all issues. Thus, it has already been determined that the student's 2009-2010 IEP is appropriate.

However, The HOD noted that the student did seem to have some emotional problems impacting on his truancy. At an MDT meeting held on June 8, 2009, DCPS agreed to fund a psychiatric evaluation, and on June 9, 2009, Petitioner received an IEE letter authorizing an independent psychiatric evaluation at DCPS expense. Since the March 30, 2009, IEP meeting, a psychiatric evaluation and a functional behavioral assessment have been completed for the student and provided to DCPS.

The present due process complaint alleges that DCPS failed to implement the student's March 30, 2009, IEP during the 2009-2010 school year, failed to convene a meeting to review the new evaluations and revise the student's IEP if necessary, failed to develop a behavioral intervention plan (BIP) or otherwise address the student's attendance issues, and failed to provide an appropriate placement for the student.

A pre-hearing conference was held on November 30, 2009, and a Pre-Hearing Order was issued on December 3, 2009.

A due process complaint disposition was signed November 18, 2009.

An interim order for a continuance was filed on January 8, 2010, continuing the hearing until January 27, 2010. On January 25, 2010, Petitioner filed a motion to withdraw the due process complaint without prejudice because the parent could not be present at the hearing. The Hearing Officer informed Petitioner that the complaint would be dismissed with prejudice at which time Petitioner agreed to go forward with the January 27, 2010, hearing.

## II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

### **III. ISSUES**

Has DCPS denied the student FAPE by

1. Failing to implement the student's March 30, 2009, IEP for the 2009-2010 school year by failing to provide specialized instruction, counseling, and speech and language services, and failing to implement the student's transition plan?
2. Failing to convene a meeting to review the psychiatric evaluation and the functional behavioral plan (FBA) and revise the student's IEP, if appropriate?
3. Failing to develop a BIP or discuss other strategies to address the student's attendance issues?
4. Failing to provide an appropriate placement?

### **IV. DOCUMENTS AND WITNESSES**

Petitioner submitted a five day disclosure letter dated December 9, 2009, containing a list of witnesses with attachments P 1-21. The disclosure was admitted in its entirety with the exception of the last two pages of P 10. Petitioner called as witnesses the student, the student's mother, an independent psychologist, and Assistant Educational Director at

DCPS submitted a five day disclosure letter dated December 11, 2009, containing a list of witnesses with attachments DCPS 1-15. The disclosure was admitted in its entirety. DCPS called as witnesses the SEC at the student's social worker at and the student's case manager and special education teacher at

### **V. FINDINGS OF FACT**

1. This is a year old student presently completing the grade at for the third time and found eligible for special education on March 18, 2008 as a student with a Learning Disability (LD). The student's most recent IEP, completed on March 30, 2009, provides for 15 hours of specialized instruction in a general education setting, 1 hour of counseling, and 1 hour of S/L therapy per week.
2. The student has had a serious school attendance problem for at least the past three years. During the first semester of the 2009-2010 school year the student failed to attend

most classes, although he was usually in the school building. At the end of the first advisory was receiving an F in three of his four classes, and a D+ in the fourth class. The reason listed for his failing grades was excessive absences. (DCPS 3, 4, 5)

3. The student received inclusion special education instruction in his algebra and English classes last semester. His English class had a full time special education teacher and his algebra class a full time aide providing inclusion instruction. He did not receive special education instruction in environmental science or Spanish. (Testimony of

4. Speech and Language services were made available to the student on a weekly basis. However, the speech and language teacher could never find the student at his scheduled time. (DCPS 13)

5. \_\_\_\_\_ has been the student's case manager since early September 2009. He began contacting the student's mother about the student's attendance in mid-September. It was hard to reach the mother but when he did reach her talked with her about the student's non-attendance.

\_\_\_\_\_ started an intervention plan in October that was based on greater parental involvement and a token economy in hopes that external influences might motivate the student. The student received an attendance challenge in the form of attendance sheets which he was to have signed by each of his teachers and his mother each day. If the student attended all classes in a given day he could receive rewards, and if he attended all of his classes in a week he could earn a larger reward in the form of a gift certificate. The mother never signed any of the attendance sheets and indicated to \_\_\_\_\_ that she never received any. The student's attendance improved for a few weeks and then reverted to previous non-attendance levels. In January \_\_\_\_\_ determined to discuss more rigorous enforcement of attendance with the student's mother. \_\_\_\_\_ has contacted the mother dozens of times to set up a meeting, but has only spoken with her three times. He tried to set up the meeting but the mother did not follow through. A meeting was finally scheduled for January 22, 2010, but the parent did not show up.

\_\_\_\_\_ coordinates transition services for the special education students on his case load. He has not been able to implement the student's transition services because the student is not available.

\_\_\_\_\_ has met with the student between 15-20 times this school year. \_\_\_\_\_ described the student as kind, deferential, and having good interactions with peers and teachers. \_\_\_\_\_ has not observed any anxiety on the part of the student. When the student attends class he does well and is able to complete the work.

(Testimony of \_\_\_\_\_ DCPS 9, 14)

6. The student has been provided counseling services per his IEP with \_\_\_\_\_ the school social worker. The student attends his group counseling sessions and participates fully in the group sessions. \_\_\_\_\_ has a good rapport with the

student. The student does not appear depressed. He sounds enthusiastic about school, says he will attend, and then does not show up. has not seen improvement in the student's attendance.

believes that if the student was afraid or anxious about attending class he would tell

has offered to mentor the student and get together with him on weekends. Neither the student nor the parent has followed up on the offer.

(Testimony)

7. the SEC at testified. She indicated that the student is pleasant, interacts well with others, and does not get into trouble. The student's teachers have positive things to say about the student. He can do the work and participates when he comes to class. (Testimony of

8. The student received a psychiatric evaluation from The report was completed on August 6, 2009. A psychological evaluation completed on December 19, 2008, had diagnosed the student with General Anxiety Disorder. The psychiatric report rejects that diagnosis in favor of a diagnosis of Social Phobia. This form of Anxiety Disorder is characterized by marked and persistent fear of one or more social or performance situations where a person is exposed to scrutiny by others. For this student, the feared social situation is being in the classroom.

The report notes "Fortunately, [the student] has access to specialized services at school and should be able to overcome these symptoms." The report does not recommend medication at this time, it does recommend individual and group counseling, and recommends that the student continue to receive specialized instruction as outlined in his IEP. believed the student was fully capable of completing high school.

testified concerning the report but did not add anything to the written document.

(P 11)

9. DCPS was provided a copy of the psychiatric report in August 2009, but did not review it until November 2009, after the due process complaint was filed. (P 10, 11)

10. A resolution/IEP meeting was held on November 30, 2009. Present at the meeting were the student, the student's mother, the student's attorney, the school psychologist, a DCPS compliance officer, the speech/language therapist, the special education teacher, the SEC, the student's case manager, and the DCPS attorney. The psychiatric evaluation was reviewed at the meeting. The school psychologist agreed with an ED classification for the student but questioned the Learning Disabled (LD) classification the student presently has. The parent was opposed to removing the LD classification. No final

resolution regarding the classification was reached. The parent indicated that the student required a smaller setting with smaller classes and more individualized attention. DCPS rejected a change of placement.

A draft IEP was prepared which included a BIP which was developed in October. The BIP was reviewed. The parent would not sign the IEP.

DCPS offered to provide the student with 2 hours/week of tutoring for 10 weeks with a tutor of the parent's choice and 1 hour/week of mentoring for 6 months. indicated his willingness to work with the student on weekends in addition to the other mentor.

At the meeting, the student stated that he did not want to go to a smaller school in Virginia.

(DCPS 10, Testimony of

11. The student's mother testified. She indicated that she did not know why the student was skipping classes and that he has never told her he is scared to go to class. The mother wants the student in a smaller setting where it would not be easy for the student to go to school and leave or hide. She wants a setting where the student is made to go to class. (Testimony of mother)

12. the SEC at testified that has a job training program called the where students are placed in jobs at such places as Giant supermarket and Marriott Hotels. The student is not enrolled in the program because of his attendance and seeming lack of motivation.

also indicated that at the resolution meeting they discussed with the student the school's credit recovery program where students can make up classes they have failed by taking courses in the evening.

does have several out of general education English and math classes with small class sizes and two teachers. Carnegie units can be earned in these classes.

(Testimony of

13. The student testified. He indicated that he wants a high school diploma and would like to go to college. He also indicated he wanted to play in the NBA. The student agreed that he does not go to class and that there is nothing the school can do until he makes up his mind to attend class.

The student indicated that he is not looking at other schools besides and does not know if he would attend any other school. He did not recall having gone to for a school visit.

The student is aware of the fact that he turns in a few weeks and will have to make his own decisions concerning whether he wishes to continue to attend school.

(Testimony of student)

## VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees “all children with disabilities” “a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

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 State educational agency..., (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEA’s guarantee of FAPE “is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a “basic floor of opportunity” for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10 (3<sup>rd</sup> Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See*, 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include “a statement of the child’s present levels of educational performance, ... a statement of measurable annual goals, [and] a statement of the special education and related services ... to be provided to the child...” 20 U.S.C. ¶ 1414(d)(1)(A).

Pursuant to IDEA § 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 IDEA § 1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that the 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.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast*, 546 U.S. 49 (2005).

Petitioner has failed to meet his burden of proof concerning any of the issues raised in the due process complaint and has failed to prove that the student was denied FAPE. All of the testifying witnesses were credible.

DCPS has attempted to implement the student's March 30, 2009, IEP. The school has made available specialized instruction, counseling and speech and language services. The student has failed to avail himself of these services by virtue of his non-attendance. He has chosen to attend his counseling sessions. The school cannot implement the student's transition plan if he does not attend classes. The problem is the student's lack of attendance, not the failure to provide the services on his IEP.

DCPS should have convened a meeting earlier than three months after receiving the psychiatric evaluation. However, the student has not suffered any harm as a result of that failure since the student was receiving counseling and strategies were attempted to address the student's attendance issues. Likewise, a formal BIP should have been made part of the IEP earlier, but an informal BIP was in place and was being implemented. Even following a meeting, the student's IEP has not been revised and the parent has not approved the proposed BIP or proposed a different BIP.

DCPS did develop an informal BIP and began to implement strategies to address the student's attendance starting in September and continuing to the present. attempted to get the parent more involved in monitoring the student's attendance along with the school. has met numerous times with the student and established a token economy in hopes of providing incentives for the student to attend class. testified that more intensive efforts to get the student to class will be tried this semester. Also, the student is taking an out of general education English class with with only 8 students in the class. Hopefully, the student will attend this class.

The Hearing Officer suggests that the school consider placing the student in a math out of general education class as well, and consider other classes with small student teacher ratios. Also, the school might enroll the student in the to see if a more "hands on" learning environment might be an incentive for the student to attend.

Lastly, is an appropriate placement. First and foremost, the student turns 18 in a few weeks and has made it clear he does not want to attend a "small private school in Virginia." He cannot be made to attend and efforts to change the student's placement are likely futile. Second, can provide the specialized instruction and behavioral strategies necessary for this student. The independent psychiatric evaluation indicated as much and did not recommend that the student be placed in a small therapeutic private school. The student may have a diagnosis of Social Phobia, but it is not severe and does not necessitate a change of placement.

## VII. SUMMARY OF RULING

Petitioner has failed to meet her burden of proof that DCPS has denied the student FAPE.

### **VIII. ORDER**

It is hereby **ORDERED** that the due process complaint be dismissed with prejudice.

**This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.**

/s/ Jane Dolkart  
Impartial Hearing Officer

Date Filed: February 6, 2010