

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

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

OSSE  
STUDENT HEARING OFFICE  
2011 FEB 22 AM 9:41

---

PETITIONER, on behalf of  
[STUDENT],<sup>1</sup>

Date Issued: February 19, 2011

Petitioner,

Hearing Officer: Peter B. Vaden

v

Case No:

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Date: February 8, 2011

Respondent.

Student Hearing Office, Room 2006  
Washington, D.C.

---

**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENT (the "Parent"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, the Parent alleges that a November 30, 2010 Individualized Education Program ("IEP") developed for Student by District of Columbia Public Schools ("DCPS") fails to provide a Free Appropriate Public Education ("FAPE").

---

<sup>1</sup> Personal identification information is provided in Appendix A.

Petitioner filed a previous due process complaint against DCPS on September 17, 2010 (Case No. \_\_\_\_\_). That complaint went to a due process hearing before Hearing Officer Seymour DuBow. In his November 23, 2010 Hearing Officer Determination (“HOD”), Mr. DuBow denied Parent’s request for a residential placement after concluding that a residential placement was not the least restrictive environment possible for this Student. *Student through the Parent v. DCPS*, Case No. \_\_\_\_\_ p. 11 (D.C. Office of the State Superintendent of Education, 11/23/2010). In her due process complaint in the present matter, Petitioner again claimed that DCPS had denied Student a FAPE by its refusal to place the student in a residential program. On a motion to dismiss by DCPS, I found<sup>2</sup> that the issue of whether Student requires a residential placement under the IDEA had been fully litigated in the prior due process proceeding. I held that, under the doctrine of collateral estoppel, the Petitioner may not relitigate the issue of residential placement in the present proceeding. I further held that the remaining issues alleged by Petitioner, that the November 30, 2010 IEP is deficient because (a) it reduces specialized instruction from 29 hours to 19.5 hours per week, (b) it does not contain a behavior intervention plan (“BIP”) and (c) it does not provide adequate transition goals, were not litigated in the prior proceeding and not barred by collateral estoppel.

The Student, an AGE young woman, is a resident of the District of Columbia and is eligible for special education services under the primary disability, Emotional Disturbance (“ED”). The Parent’s Due Process Complaint, filed on December 16, 2010, named DCPS as respondent. The undersigned Hearing Officer was appointed on December 17, 2010. The parties met for a resolution session on January 5, 2011. No agreement was reached and the parties decided that the case should proceed to a due process hearing. A prehearing telephone conference was held with the Hearing Officer and counsel on January 4, 2011 to discuss the

---

<sup>2</sup> Decision and Order on Motion to Dismiss, January 31, 2011

hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on February 8, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording system. The Parent appeared in person and was represented by counsel. Respondent DCPS was represented by counsel. The Parent testified and called as witnesses EDUCATIONAL ADVOCATE, and PSYCHOLOGIST. DCPS called as witness SPED COORDINATOR. Parent's Exhibits P-1 through P-11 and DCPS Exhibits R-1 through R-3 were admitted into evidence without objection.

#### **JURISDICTION**

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

#### **ISSUES AND RELIEF SOUGHT**

- a. Whether November 30, 2010 Individualized Education Program ("IEP") denies Student a FAPE because it (i) provides insufficient hours of special education services, and (ii) omits adequate transition goals; and
- b. Whether DCPS denied Student a FAPE by failing to develop a Behavior Intervention Plan ("BIP").

Parent seeks an order to require DCPS to provide full-time special education services to Student in a therapeutic setting and to develop a BIP that addresses Student's school attendance issues.

#### **FINDINGS OF FACT**

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

1. Student is an AGE resident of the District of Columbia. Exhibit P-1
2. Student was identified in 2007 as a child with a disability requiring special education services under the classification, ED. Exhibit P-9 At an Eligibility Meeting on November 30, 2010, the eligibility team determined that Student continues to be eligible for special education services under the classification, ED. Exhibit P-1
3. Student's overall cognitive abilities (Full Scale IQ = 67) are assessed to fall in the Extremely Low range of functioning. Her relative strength emerged in Working Memory (Standard Score = 80) with significant weaknesses found in her non-verbal abilities (Perceptual Reasoning Standard Score = 69). Student's academic assessment reveals difficulties in reading, writing and mathematics. Writing emerged as a relative strength but falls in the Below Average range of functioning and between the 4th and 6th grade levels. Significant difficulties emerged in Mathematics (Standard Score = 64) as functioning ranges between the 1st and 3rd grade levels. Comprehensive Psychological Evaluation, November 4, 2010 (Exhibit P-6)
4. Student exhibits symptoms of depression, Bipolar Disorder, and Psychosis Disorder NOS. She is consistently inconsistent with medications and counseling. Exhibit P-7
5. Prior to attending \_\_\_\_\_ Student was enrolled at PRIVATE DAY SCHOOL ("PDS"). Exhibit P-10 Student's attendance at PDS became sporadic and she stopped going to school. Exhibit P-6 Student transferred from PDS due to nonattendance and fighting. Testimony of Parent
6. In March 2010, Parent enrolled Student at \_\_\_\_\_ for the remainder of the 2009-2010 school year. Exhibit P-6 Student is currently enrolled in the GRADE at \_\_\_\_\_ Testimony of Parent, Exhibit P-2
7. In her April 28, 2009 IEP at PDS, Student was provided 29 hours per week of

specialized instruction and 60 minutes per week of behavioral support services, all outside general education. Exhibit P-9

8. Student has a history of failing to attend school. She had attendance issues at PDS and, after she was enrolled at in the spring of 2010, she did not attend. Exhibit P-6 Student did not go to school for the first term of the 2010-2011 school year at and only resumed attending approximately two weeks before the due process hearing. Testimony of SPED Coordinator

9. In a HOD issued November 23, 2010, Hearing Officer Seymour DuBow found that Student "has chosen to go to school when she wants to and not go when she doesn't want to go." *Student through the Parent v. DCPS, supra*. Hearing Officer DuBow denied Parent's request to order DCPS to fund a residential placement for Student. *Id.*

10. At an IEP team meeting on November 30, 2010, Student's IEP team developed goals for Student in mathematics, reading, written expression and behavior. The team agreed to provide Student 19.5 hours per week of Specialized Instruction in a highly structured, small group, therapeutic environment. In addition, the team agreed that Student would receive 60 minutes per week of behavior support services outside the general education setting. Exhibit P-2

11. Student's specialized instruction would be provided in Emotionally Disturbed/Learning Disabled ("ED/LD") Cluster, separated from non-disabled peers. There are usually 9-10, or as many as 12, students in the ED/LD Cluster classes. Student would be in the general education setting for electives. Testimony of SPED Coordinator

12. The November 30, 2010 IEP contains a transition plan for student that includes a goal for Student to identify at least 3 colleges of interest to her and a goal for Student to be able to complete a job application.

13. At the November 30, 2010 IEP meeting, Parent and her advocate insisted that only a residential placement would meet Student's needs. Parent did not agree with the contents of the IEP. Exhibit P-3

14. On January 5, 2011, DCPS authorized Parent to obtain an Independent Functional Behavioral Assessment and an Independent Vocational Assessment for Student. Exhibit R-2

15. Student was admitted to \_\_\_\_\_ in January 2011 after assaulting Parent. To secure her release from \_\_\_\_\_ Student made a "contract" that she would attend school regularly. Testimony of Parent Student attended \_\_\_\_\_ for the four days preceding the due process hearing. Testimony of SPED Coordinator, Testimony of Educational Advocate

16. In an observation at \_\_\_\_\_ on February 4, 2011, Psychologist interviewed Student and a teacher. Student told Psychologist that she does not like school and does not want to attend. Psychologist observed that Student arrived late for her English class and left the class to talk with other students in the hallway. Student did not attend her next scheduled class. The English teacher was not knowledgeable about Student because of Student's lack of attendance.

Testimony of Psychologist

### CONCLUSIONS OF LAW

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

### DISCUSSION

Under the U.S. Supreme Court's decision in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Hearing Officer

must address two questions that are aimed at DCPS's paralleling responsibilities to comply with the procedural and substantive requirements of the IDEA: First, has the State complied with the procedures set forth in the Act? And second, 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, 102 S.Ct. 3034. Parent does not contend that the November 30, 2010 IEP developed for Student was procedurally deficient. Therefore, my inquiry is limited to whether the IEP was reasonably calculated for Student to receive sufficient educational benefits to meet the requirements of a FAPE. *N.S. v. Dist. of Columbia*, 709 F. Supp. 2d 57, 60, 54 IDELR 188 (D.D.C. 2010). The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, in this case the Parent. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

1. DOES THE NOVEMBER 30, 2010 IEP DENY STUDENT A FAPE BECAUSE (i) IT PROVIDES INSUFFICIENT HOURS OF SPECIAL EDUCATION SERVICES OR (ii) IT LACKS AN ADEQUATE TRANSITION PLAN?

(i) Sufficiency of Special Education Services

Student's November 30, 2010 IEP provide that she will receive 19.5 hours per week of Specialized Instruction and 1 hour per week of Behavioral Support Services, all outside general education. Petitioner contends that this level of services is insufficient because Student's April 28, 2009 IEP specified that Student would receive 29 hours per week of Specialized Instruction at PDS. Student, in fact, took little advantage of the services offered in the 2009 IEP because she did not regularly attend school after the IEP was developed. She also has been absent from for most of the present school year. She only resumed attending school several days before the due process hearing.

In her present due process complaint, Parent again sought a residential placement to address Student's non-attendance and other education issues. However, in his November 23, 2010 HOD, Hearing Officer DuBow determined that Student did not need a residential placement to receive a FAPE and that her non-attendance was not caused by her disability, but was rather a matter of Student's choice. I have held that Parent is barred from raising the issue of Student's needing a residential placement in the present case by the doctrine of collateral estoppel. Limited by that ruling, Parent contends that Student's November 30, 2010 IEP is still inadequate because it does not provide for full time special education in a therapeutic setting.

At the November 30, 2010 IEP meeting, the IEP team determined that Student needed remediation in reading, written expression and mathematics. Exhibit P-3 Student's difficulties in these subjects are confirmed by the academic assessments reported in the November 4, 2010 Comprehensive Psychological Evaluation. The November 30, 2010 IEP provides for specialized instruction in reading, written expression and mathematics, outside of the general education setting. Student would be instructed in a small group setting with other students with similar learning abilities. *Id.*

Psychologist opined in her testimony at the hearing that Student needs a full time therapeutic school and that placing Student in a less restrictive environment at was not appropriate for her. However, the same witness previously opined that a full time therapeutic day school placement failed to meet Student's needs. November 4, 2010 Comprehensive Psychological Evaluation, p. 12 (Exhibit P-6) Psychologist has not reevaluated Student since issuing her November 4, 2010 report. I am not persuaded that there is any basis for Psychologist's apparent revised opinion that Student would now benefit from a full time therapeutic day program.

In *Garcia v. Board of Educ. of Albuquerque*, 2007 WL 5023652, (D.N.M. 2007), the Court addressed the problem of a high school student who had a pattern of extreme truancy. The Court found that the “IDEA does not provide a remedy for this kind of case - where the access to a free and appropriate public education is wide open, but the student refuses to attend school and refuses the numerous and extensive educational opportunities afforded to her.” *Id.* In this case, for most of the last two years, Student has likewise refused to attend school, whether placed at a full time therapeutic private school or in the ED/LD cluster at the public high school. Based on this evidence, to conclude that Student would not be likely to receive educational benefit from the special education services offered in her November 30, 2010 IEP – if Student attended school – would be speculation. I find therefore that the Parent has failed to establish that the November 30, 2010 IEP is not reasonably calculated for Student to receive a FAPE. DCPS prevails on this issue.

(ii) Transition Plan

Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually thereafter, the IEP must include—

- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

34 CFR § 300.320(b). As with the rest of the IEP services, the adequacy of the transition plan is judged by whether the plan is reasonably calculated to enable the child to receive educational benefits. *Rowley, supra*, 458 U.S. at 206-07. The November 30, 2010 IEP contains a transition plan that includes a goal for Student to identify at least 3 colleges of interest to her and a goal for Student to be able to complete a job application. These goals, especially identifying colleges of

interest, are clearly not appropriate for this Student, who has not attended high school for most of the last two years. DCPS has offered to fund an independent vocational assessment for Student. When the vocational assessment is completed and provided to DCPS, DCPS must convene Student's IEP team to develop and implement an appropriate transition plan for Student. Parent prevails on this issue.

2. HAS DCPS DENIED STUDENT A FAPE BY FAILING TO DEVELOP A BEHAVIOR INTERVENTION PLAN?

The IDEA requires, in the case of a child whose behavior impedes the child's learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). In this case, it is self-evident that Student's failure to attend school impedes her learning. Consequently, pursuant to 34 CFR § 300.324(a)(2)(i), the IEP team must develop and implement a BIP directed at producing positive changes in Student's behavior. DCPS has authorized Parent to obtain an independent Functional Behavioral Assessment ("FBA") at the school system's expense. When the FBA is completed and provided to DCPS, DCPS must convene Student's IEP team to develop and implement an appropriate BIP for her. The Parent prevails on this issue.

REMEDIES

Parent requests an award of compensatory education for the denial of a FAPE to Student. I have found that DCPS denied FAPE to Student in two respects: (1) by not providing an appropriate transition plan in Student's November 30, 2010 IEP and (2) by not developing a BIP for Student. The IDEA gives Hearing Officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. The "ultimate award" must "provide the educational benefits that likely would have accrued from special

education services” that the school district “should have supplied in the first place.” A compensatory award must “rely on individualized assessments” after a “fact specific” inquiry. “In formulating a new compensatory education award, the hearing officer must determine ‘what services [the student] needs to elevate him to the position he would have occupied absent the school district’s failures.’” *Stanton v. Dist. Of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) (citations omitted).

The Parent presented no evidence at the due process hearing as to what, if any, educational benefits the Student missed from not having an appropriate transition plan in her November 30, 2010 IEP or from DCPS’s failure to develop a BIP for Student. Student refused to attend school both before and after the November 30, 2010 was developed. DCPS students were on winter break from December 20 through 31, 2010. By January 5, 2011, DCPS had offered to pay for both an independent Vocational Assessment and an FBA for Student. Considering all of the circumstances in this case, I find it unlikely that Student lost any educational benefit from the failure of DCPS to provide an appropriate transition plan in the November 30, 2010 IEP or from DCPS’s failure to develop a BIP for Student.<sup>3</sup> Accordingly, I find that Parent has not established that Student is entitled to an award of compensatory education.

#### SUMMARY

In summary, I find that Parent has not established that DCPS’s provision of 19.5 hours per week of specialized instruction, in Student’s November 30, 2010 IEP, was a denial of FAPE. I further find that DCPS must amend Student’s IEP to provide an appropriate transition plan and

---

<sup>3</sup> I do not consider whether a BIP should have been developed earlier in the 2010-2011 school year, because that claim could have been raised in Parent’s prior due process complaint in Case No. 2010-1190. *See, e.g., Friendship Edison Public Charter School v. Suggs*, 562 F.Supp.2d 141, 148 (D.D.C. 2008) (Under the doctrine of *res judicata*, or claim preclusion, a final judgment on the merits precludes the parties from relitigating issues that were or could have been raised in that action.)

that DCPS must develop and implement a BIP for Student. An award of compensatory education is not appropriate under the circumstances in this case.

**ORDER**

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

Within 10 school days of DCPS's receipt of the independent FBA and vocational assessment described in this decision, DCPS shall convene Student's IEP Team to amend Student's IEP to provide an appropriate transition plan and to develop and implement a BIP for Student. All other relief requested by the Parent in her Due Process Complaint is denied.

Date: February 19, 2011

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

**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).