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Office of the State Superintendent of Education
Office of Review and Compliance
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STUDENT HEARING OFFICE
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STUDENT[1], by and through her Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Date: March 30, 2011 <u>Representatives:</u> Counsel for Petitioners: Miguel Hull, Esq. Brown and Associates 1220 L Street, NW Suite 700 Washington, DC 20005 Counsel for DCPS: Assistant Attorney General Cherie Cooley, Esq. 1200 First Street, NW Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened March 30, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2006.

BACKGROUND:

Student or "the student" is age in the grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of emotional disturbance ("ED"). The student is enrolled at a DCPS high school hereinafter referred to as "School A." She has been enrolled at School A for the past three school years. The student has had attendance and tardiness issues since attending School A.

The student began to attend school regularly toward the end of the first semester of the current school year up until she gave birth to her daughter in late January 2011. The student's daughter has remained hospitalized due to pre-mature birth and the student has not attended School A since delivering the baby.

An individualized educational program ("IEP") meeting was held for the student at School A on January 18, 2011, at which a vocational evaluation was reviewed by the IEP team. At that meeting the parent requested that the student's IEP be amended to provide a full time special education placement. DCPS did not agree to amend the IEP and provide a full time placement.

The parent Petitioner filed a due process complaint on January 31, 2011, alleging, inter alia, the student's IEP and placement were inappropriate placement and asserting the student was in need of a full time IEP and a full time therapeutic placement. A resolution meeting was held on February 15, 2011. The parties did not resolve the complaint and a pre-hearing conference was conducted on March 11, 2011.[2] This Hearing Officer issued a pre-hearing order on March 14, 2011, stating the issues to be adjudicated, the relief Petitioner is seeking and Respondent's position with regard to the complaint and/or defenses. The Hearing was conducted on March 30, 2011. At the conclusion of the hearing Petitioner counsel submitted a written request for a continuance the decision due date to allow Petitioner to submit a post-hearing brief. DCPS' counsel did not object to the continuance. An order issued March 30, 2011, continued the decision date in this matter for five (5) calendar days to April 6, 2011.

[2] Attempts were made by this Hearing Officer to schedule the pre-hearing conference soon after the resolution session information was made available. This was the first date mutually available for both counsel.

ISSUES: [3]

The issues adjudicated are:

(1) Did DCPS deny the student a FAPE by failing to provide an appropriate IEP and placement? Petitioner alleges the student is in need of a full time special education placement due to her low abilities and achievement. Petitioner alleges School A placement is inappropriate because the student is not in a full time therapeutic setting that meets her unique needs.

(2) Did DCPS deny the student a FAPE by failing appropriate transition goals? Petitioner alleges the goals are inappropriate and generic and do not satisfactorily reflect the recommendations from a recent vocational evaluation.

As relief Petitioner seeks placement and DCPS funding at a private full time special education school, amendment of the student's IEP to include full time program and revised transition plan/goals.

Respondent DCPS maintains that the student's current IEP, placement and location of services are appropriate, and the student has not made progress because she has not taken advantage of the special education and related services DCPS has made available. DCPS asserts that any lack of progress by the student is the result of her truancy and DCPS has taken all necessary and appropriate action to address the truancy.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-13 and DCPS Exhibit 1-10) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: [4]

1. The student is age in the grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of ED. The student is enrolled at a DCPS high school, School A. The student has attended School A for the past three school years. (Student's testimony, Petitioner's Exhibit 2)

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[3] The alleged violation(s) and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined here. However, the parties agreed at the hearing that the issue(s) listed here and as stated in the pre-hearing order dated March 14, 2011, are the issue(s) to be adjudicated.

[4] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may perhaps only cite one party's exhibit.

2. The student has engaged in truant behavior during the 2008-09, 2009-10, and 2010-2011 school years. As a result of the student's truancy she has been repeatedly unavailable when the special education and related services have been made available to her. (DCPS Exhibits 4, 5-4, 8)

3. The student had all failing grade grades during the 2008-09 and 2009-2010 school years. The student was retained in the ninth grade in June 2009 and again in June 2010. (DCPS Exhibits 5-4, & 10, Petitioner's Exhibit 5-1)

4. The parent has been aware of the student's truancy and has attempted unsuccessfully to ensure the student attended school. The parent would ensure that the student left home for school each day. However, the student would often not go to school but instead skip school at her friends' homes. The parent made attempts to speak with the student's teachers when she went to school conferences but there was no significant action the parent was aware of that the school took to address the student's non-attendance. (Parent's testimony)

5. In October 2008, the student willfully cut her arms and legs resulting in her missing school and being hospitalized for several days at the while she underwent psychiatric evaluation and treatment. During her hospitalization at the student was diagnosed with severe emotional problems. The parent notified the School A administration of the student's hospitalization and in response the school assigned a social worker to help the student with her emotional issues. (Parent's testimony)

6. The independent psychological assessment was completed on December 28, 2009, and found:

On the Wechsler Intelligence Scales for Children 4th Edition:

Area	Scaled Scores/Composite	Classification
Verbal Comprehension	71	Borderline
Perceptual Reasoning	90	Average
Working Memory	77	Borderline
Processing Speed	75	Borderline
Full Scale IQ	73	Borderline

On the Wechsler Individual Achievement Test 2nd Edition:

Area	Standard Scores	GE	Percentile
Word Reading	75	5:6	5
Reading Comprehension	62	3:4	1
Pseudoword Decoding	88	4:8	21
Reading Composite	73		4
Numerical Operations	48	2:8	<0.1
Math Reasoning	69	5:2	2

Mathematics Composite	52		0.1
Spelling	90	7:2	25
Written Expression	64	3:0	1
Written Language Composite	75		5

7. This evaluation report concluded by recommending, among other things that "[the student] be placed in a full-time therapeutic program where both her emotional and academic deficits could be adequately addressed." (Petitioner's Exhibit 6-11)
8. (Petitioner's Exhibit 6-5, 6-6, 6-11)

9. The student was ultimately determined eligible for special education services and her initial IEP was developed in February 2010. The IEP prescribed the student receive 15 hours per week of specialized instruction in the general education setting and 30 minutes per week of behavioral support services. The student's location of services remained School A. (Petitioner's Exhibit 5-1)

10. On or about February 19, 2010, the student was charged as a juvenile with aggravated assault. A psychological assessment completed by the D.C. Superior Court Child Guidance Clinical on or about August 5, 2010, included a review of the December 2009 comprehensive psychological and noted that because of low abilities and achievement, she is not likely to be able to keep up with her grade and age level peers. The report also found that she meets the criteria for Posttraumatic Stress Disorder and recommended: small group instruction, a behavior management plan, individual trauma focused cognitive behavior therapy, family therapy, and a mentor among other things. This report also recommended, among several other things, "due to her underdeveloped academic skills and history of repeated behavioral problems, she requires small group instructions, a behavioral management plan (to reinforce positive behavior) and increased opportunities to achieve and master school material." (Petitioner's Exhibit 8-12, 8-13)

11. In September 2010, the Petitioner filed a Due Process Complaint against DCPS. DCPS and the Petitioner executed another Settlement Agreement on or about November 18, 2010 disposing of the issues in the complaint. As part of the Settlement, DCPS was to fund an independent vocational assessment and convene a follow-up meeting to review the completed vocational, review the comprehensive psychological completed the D.C. Superior Court, which had not yet been reviewed by DCPS, and revise the IEP and determine placement. The independent vocational was completed on December 10, 2010 and was sent to DCPS on or about December 16, 2010. The report recommends several different vocational/transitional planning resources that the student can access to pursue her expressed career and vocational interests. (Petitioner's Exhibit 9 & 10)

12. The student became pregnant near the start of the 2010-2011 school year. As a result of morning sickness and depression the student missed significant amounts of school. Sometime before the end of the first semester the student returned the school and the school staff adjusted the student's schedule to include some self-contained special education classes. The student began to attend school more regularly and attended

regularly until late January 2011 when she gave birth to her daughter. The student continued to struggle academically in her classes and despite the fact that she attended some self-contained special education classes along with her general education classes she found it extremely difficult to concentrate because of other students' disruptive behavior. Since giving birth to her daughter the student has not yet returned to school. The student is more committed to completing her education and pursuing vocational and career training and wants to attend a full time special education school where she has been accepted. (Student's testimony)

13. On January 19, 2011, DCPS convened an IEP meeting. The parent attended the meeting along with her educational advocate. The team agreed the student had significant emotional issues, depression and truancy. The team discussed the things could be done to improve the student's attendance. The parent's advocate requested that the student have vocational training made available to her light of the recent evaluation and because the student lack of academic progress. The parent requested that the student's IEP be amended to provide a full time IEP and placement and that the student receive a change in schools. DCPS did not agree to a full time IEP or a change in placement. However, the student's IEP was amended included 13 hours per week of specialized instruction outside the general education setting and 13 hours per week of specialized instruction in the general education setting. The IEP includes has a post secondary transition plan and goals including a goal of accessing resources to indentify and pursue the student's stated career interests. (Mr. Fernandez's testimony, Petitioner's Exhibits 2, 3, 4)

14. The student has been accepted at which is located in Silver Spring, Maryland. Pathways are a full-time special education school that provides therapeutic, academic and vocational services to special education students. are licensed by the state of Maryland and the District of Columbia to provide educational services. offer credits toward a high school diploma for District of Columbia students. The school has 25 students who regularly attend the school program and approximately 15 students who receive services in the community and/or in the home with dedicated one to one instructors. The school has certified special education teachers and certified relates service providers. can provide the student specialized instruction and behavior support services to the student. provides vocational and transition services and work internships for its students. (Ms. Pressley's testimony)

CONCLUSIONS OF LAW:

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

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief. [5] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

34 C.F.R. § 300.17 provides that a free appropriate public education or FAPE means 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 SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Issue: (1) Did DCPS deny the student a FAPE by failing to provide an appropriate IEP and placement?

Conclusion: DCPS Has Failed To Place the student in an appropriate placement and develop an appropriate IEP.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

Additionally, the public agency must also ensure that an appropriate IEP is in place for the beginning of each school year. 20 U.S.C. § 1414 (d) (4) (A) (i); 34 C.F.R. § 300.323 (a); and D.C. Mun. Regs. Tit. 5 § 3010.1.

A student's placement is to be in the least restrictive environment and ***in a school that is capable of meeting the student's special education needs***. See Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C.§ 1402 (9) (D) ("FREE APPROPRIATE PUBLIC EDUCATION- The term 'free appropriate public education' means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved" [and] "are provided in conformity with the individualized education program"); § 1401 (29) (D) ("The term 'special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . .]."); 34 C.F.R. § 300.17 & 39; 34 C.F.R. § 300.116 (placement is to be based on student's IEP as determined by team including the parents); 34 C.F.R. § 300.327 & 300.501 (c); D.C. Mun. Regs. Tit. 5 §

[5] Based solely upon the 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 FAPE.

3013.1-7 (LEA to ensure that child's placement is based on the IEP); and D.C. Mun. Regs. Tit. 5 § 3000.

In this case the student's IEP developed on January 19, 2011, does not seem appropriate. The placement in the current IEP and at School A seems completely inappropriate and the student's truancy should not be held against the student.

DCPS counsel asserted that DCPS has complied with the IDEA with respect to the student and developed an appropriate IEP. DCPS counsel asserted that DCPS had made FAPE available to the student and she had not made her self available to the services provided due to her chronic truancy. DCPS counsel also assert that the compulsory attendance law of the District of Columbia require action be taken by the parent to address truancy and does not create an additional duty on the LEA. This Hearing Officer is not convinced by this argument.

There was no evidence presented by the LEA that it took affirmative actions to effectively address the student's truancy or to access whether it was a function of her disability. The fact that the student has remained in the same grade for the past three school years and the student's IEP has remained unchanged until recently to provide a higher level of services and/or a more restrictive setting is irresponsible. The LEA has an affirmative duty to ensure that a student is accessing the services that being made available to her. In this instance there is evidence of little if any effort by the LEA in this regard. Added to this are the facts presented at the hearing showing that student has been frustrated at School A when she has attended and been unable to access the services because of disruptions caused by other students.

According to the student's assessments, she functions several years below where she should be and has severe emotional issues. The student's cognitive scores are for the most part on the borderline level and she has been diagnosed with Post-traumatic stress disorder ("PTSD"); Attention Deficit Hyper-Activity Disorder; and Depression and has had these conditions for several years. She has been in the ninth grade since the 2008-209 school year. Additionally, in the fall of 2008, she was hospitalized for a couple of weeks at the Psychiatric Institute of Washington for mental health observation and treatment after having been found cutting herself and threatening to take her own life.

This student's truancy appears in-and-of itself directly tied to her disability and should therefore be addressed through special education. It is well established that "[t]the failure of a student to cooperate with school staff in attaining goals and objectives in the student's IEP does not relieve school officials of the responsibility to provide FAPE to that child. . . [T]he student's failure to cooperate with school staff may be an indication of the need for reevaluation, a revision to the child's IEP, or change in the child's educational placement." Ranocas Valley Regional Board of Education, 41 IDELR 46 (NJ SEA 2004) quoting Letter to Borucki, 16 EHLR 884 (U.S. Dept of Educ. Off. of Sp. Ed. Programs 1990)).

Given the student's extremely low level of functioning, her severe emotional needs, her academic failure and her propensity not to attend school it is clear that the student requires a full-time IEP and placement at a full-time school that can provide credits towards a high school diploma.

There was sufficient evidence presented that can provide the specialized instructional therapeutic supports and vocational services that will more appropriately address the student academic deficits and emotional difficulties and provide her the structure and individualized attention that are likely to afford her academic success. Accordingly, this Hearing Officer concludes the student should be and will be placed at with DCPS funding.

Issue (2): Did DCPS deny the student a FAPE by failing appropriate transition goals? Petitioner alleges the goals are inappropriate and generic and do not satisfactorily reflect the recommendations from the recent evaluation.

Conclusion: Petitioner did not sustain the burden of proof that the student student's IEP did not contain appropriate transition goals and the student was thus denied a FAPE.

An IEP that will be in effect when a student turns 16 is to include "appropriate measurable postsecondary goals based upon age appropriate transition assessments related training, education, employment, and where appropriate, independent living skills." 20 U.S.C. § 1414 (d) (1) (A) (i) (VIII); 34 C.F.R. § 300.320 (b); 34 C.F.R. § 300.43 (transition services are part of special education).

The student's current IEP contains a post-secondary transition plans and goals. Although the recent vocational evaluation had long list of resources that can be used by the student to plan and pursue her career interests, there was insufficient evidence presented from which this Hearing Officer could conclude that the goals in the current transition plan are inappropriate. The plan includes the goals of accessing training and career resources. The recent evaluation lists a litany of resources that can be accessed. The fact that the current plan does not include specific resources and the evaluation does not render the plan and goals inappropriate. Petitioner has failed to present sufficient evidence, either documentary or testimonial, that would support a finding that that student was denied a FAPE in this regard.

ORDER:

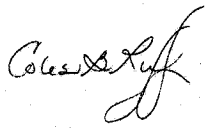
1. DCPS shall within fifteen (15) calendar days of date of this Order place and fund the student's attendance at for the remainder of the 2010-2011 school year and provide transportation services.

2. Within thirty calendar days of the student attendance at DCPS shall convene an IEP meeting to review and revise the student's IEP to provide for fulltime special education services and to review the student's progress at Pathways.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process

hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: April 6, 2011