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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,¹
through the Parent,

Petitioner,

v.

Respondent.

Date Issued: April 30, 2011

Hearing Officer: Virginia A. Dietrich

Case No:

Hearing Date: 04/11/11 Room 2008
04/14/11 Room 2009

HEARING OFFICER DETERMINATION

Background

Petitioner, the grandmother and legal guardian of Student, filed a due process complaint notice on 02/28/11, alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

Petitioner complained that the District of Columbia Public Schools ("DCPS") had denied Student a FAPE by failing to identify Student as a child with a disability following his enrollment at _____ in mid October 2010. Petitioner alleged that several indicators pointed to Student's need for special education services, i.e., Student was functionally illiterate; his transcript from the prior year showed that he had failed all of his classes; he had behavioral outbursts that resulted in multiple suspensions at _____. Student had a current Individualized Education Program ("IEP") that was developed at the non-DCPS public charter school that Student had attended the previous year; and Petitioner provided DCPS with a current psycho-educational evaluation and psychiatric evaluation in January 2011 that evidenced Student's need for special education services. Petitioner also complained that DCPS was required to have an IEP in place for Student while he attended _____ and didn't. Petitioner contends that Student requires an educational placement in a school with a small class size with one on one support in reading as well as intensive therapeutic supports to address Student's severe emotional needs, and _____ cannot meet these requirements. For relief, Petitioner requests that Student be placed in a nonpublic full-time therapeutic special education school that has intensive behavioral supports.

¹ Personal identification information is provided in Appendix A.

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DCPS asserted that the indicators stated by Petitioner were not that obvious. When Student enrolled at DCPS, no information was provided that he had an IEP and DCPS did not become aware that Student had an existing IEP until litigation was commenced. These factors were compounded by the fact that Student missed quite a bit of school since enrollment due to a psychiatric hospitalization and detention at a juvenile detention facility. DCPS also asserted that Student could receive educational benefit and succeed in a less than full-time public placement.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 38 D.C. Code 2561.02.

Procedural History

This Hearing Officer was assigned to the case on 03/01/11. A resolution meeting took place on 03/11/11 at which time both parties indicated in writing that no agreement was reached by the end of the 30-day resolution period and parties agreed that the case should proceed to a due process hearing. Thus, the 30-day resolution period ended on 03/30/11, the 45-day timeline to issue a final decision began on 03/31/11, and the final decision is due by 05/14/11. See 34 C.F.R. 300.510, 300.515.

The due process hearing was a closed hearing that took place on 04/11/11 and 04/14/11. Petitioner was represented by Sarah Tomkins, Esq. and DCPS was represented by Victoria Fetterman, Esq.. Neither party objected to the testimony of witnesses via telephone.

Petitioner presented the following six witnesses: Student, who testified in person; Petitioner, who appeared by telephone rather than in person due to health problems; Student's mother, who participated in person throughout most of the due process hearing; Child Guidance Clinic Clinical Extern, who participated in person; Child Guidance Supervising Psychologist, who participated by telephone; and Director of Frost School, who participated by telephone. DCPS presented one witness: DCPS school psychologist, who participated by telephone.

Petitioner's disclosures dated 04/04/11, containing a witness list and Exhibits P-1 through P-40, were timely filed and admitted into evidence without objection. DCPS' disclosures dated 04/04/11, containing a witness list and Exhibits R-1 through R-7, were timely filed and admitted into evidence without objection.

The three issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS denied Student a FAPE by failing to identify Student as a student with a disability after Student enrolled at _____ in October 2010.

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Whether DCPS denied Student a FAPE by failing to develop an IEP while Student attended during the 2010-2011 school year.

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement while Student attended during the 2010-2011 school year.

For relief, Petitioner requested a finding of a denial of a FAPE on the above stated issues and DCPS to place and fund Student at School, a full-time nonpublic therapeutic special education school.

Findings of Fact

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

#1. During the 2006-2007 school year, Student attended a DCPS school and had an IEP.² During the 2008-2009 school year, Student attended a DCPS public charter school and had an IEP.³

#2. On 10/05/09, Student attended 9th grade at School with an IEP that classified Student with an Emotional Disturbance disability and prescribed 10 hours/week of specialized instruction in the general education setting, 7 hours/week of specialized instruction outside of general education and 1 hour/week of social emotional services outside of general education.⁴ At least as of 10/28/10, Student attended as a 9th grade student and when Student enrolled at Student did not bring his IEP with him.⁵ While at Student did not receive any special education services.⁶ For the 3rd advisory of the 2010-2011 school year, Student received all failing grades while attending And, as of 04/04/11, Student had 170 unexcused absences from various classes while attending

#3. is a large school with big classes, and it is a tough place with an emotional atmosphere that is difficult to negotiate.⁹ services both disabled and nondisabled students. The school has classes populated only with students with an Emotional Disturbance disability classification and offers disabled students the opportunity to participate in the general education curriculum if appropriate.¹⁰

² P-19.

³ P-22; P-24.

⁴ P-29.

⁵ P-37; Testimony of Student's mother.

⁶ Testimony of Student's mother, Student's grandmother.

⁷ P-37.

⁸ R-3.

⁹ Testimony of Supervising Clinical Psychologist.

¹⁰ DCPS school psychologist.

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#4. Student's emotional impairments are quite severe; he is very aggressive and can engage in reactive violence.¹¹ Student has temper outbursts at that consist of cursing both teachers and students inside and outside of class, and he is involved in arguments with students who want to fight him on a daily basis.¹² Student has been involved in fights with other students that has led to suspension from school.¹³ Fighting is a dangerous situation for Student because Student has the capacity to harm others and lacks emotional control. Student has great difficulty managing anger; he can lash out with minimal provocation. If pushed, Student will lapse into a rage and justify force that is disproportionate to the threat. Student also evidences depression, irritability, and elevation of social estrangement.¹⁴ Student's concerns over hurting himself and others that he expressed during a psycho-educational evaluation led to an emergency in-patient psychiatric hospitalization in December 2010.¹⁵ At the time of the due process hearing, Student was clinically still considered to be a danger to himself and to others. Student requires medication to take the edge off his irritability to cure the idea that he needs to kill someone to take the edge off. And, even with medication, Student exhibits irritability because the medication is not effective in completely eradicating the irritability. If Student gets irritable, it should be addressed immediately before it escalates and gets out of control.¹⁶

#5. Student's difficulty with reading prevents him from achieving academically and sets up a chain reaction for social problems. Student's frustration over his inability to read leads to anxiety and irritability.¹⁷ When kids call Student stupid and say he cannot read, Student gets into fights.¹⁸ Student's attendance issues are related to avoidance of class so that he won't subject himself to ridicule because he can't read. Student will either attend class and engage in off task behavior to take the focus away from him or skip class altogether. In Student's general education classes at Student never completes the class assignments because he cannot read the written instructions and no one helps him with it.¹⁹ Student's inability to master building blocks of reading make grade level work very difficult for him; he cannot use contextual information from peers and his self-consciousness means it is unlikely that he would ask for help in front of other students. And, Student's emotional response to completing academic work that requires reading and writing was so severe that rather than risk aggravating Student's agitation, the evaluator discontinued achievement testing during a psycho-educational evaluation conducted in December 2010.²⁰

#6. In January 2011, Petitioner provided DCPS with a copy of and a request to review the psycho-educational evaluation completed in December 2010 that indicated that Student had a severe emotional disability that made him a danger to himself and others in the community, that Student was functionally illiterate and that Student was having academic difficulties in school.²¹

¹¹ Testimony of Supervisory Clinical Psychologist.

¹² Testimony of Student.

¹³ *Id.*

¹⁴ Testimony of Supervisory Clinical Psychologist.

¹⁵ Testimony of psycho-educational evaluator; P-18.

¹⁶ Testimony of Supervisory Clinical Psychologist.

¹⁷ *Id.*

¹⁸ Testimony of Student's mother.

¹⁹ Testimony of Student, Supervisory Clinical Psychologist.

²⁰ Testimony of psycho-educational evaluator; P-18.

²¹ P-11.

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It wasn't until 03/29/11, after the due process complaint was filed, that DCPS offered to meet with Petitioner to discuss the evaluation.²²

#7. Student requires an educational placement that has a calming effect on him; a placement where the atmosphere is not charged and where he can count on a certain degree of structure and order because Student is readily wrapped up in emotional turmoil and can easily misconstrue threats and be set off.²³ He needs an extremely small class size where the teacher to student ratio is smaller than 1 to 15, where he can receive one to one or one to two instruction in reading, a peer group with the same academic weaknesses, an environment where the potential for conflict can be controlled, and an environment with a psychiatrist on staff. Student also needs school-based therapy.²⁴

#8. School is a small nonpublic special education school with a controlled environment that is calm and friendly. The school has intensive behavioral supports in place, i.e., a special room where Student can talk about his problems, an animal room that Student said he would utilize to calm down during an emotional crisis, group counseling twice a day and if conflicts arise the group convenes to address the conflict, individual counseling as needed, and support staff that includes a psychiatrist.²⁵ Each class has between 4-6 students with one teacher. Related services are available and the school has a reading specialist. School provides services to students with an Emotional Disturbance disability and the school has a Certificate of Approval from the Office of the State Superintendent of Education ("OSSE") in the District of Columbia. School accepts students without a full-time IEP on the basis that a student's needs can be met, and Student has been accepted at School. Student's severe educational deficits and severe emotional disability needs can be met at School.²⁶ Student is excited by the learning model at Frost School and wants to attend.²⁷

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 are as follows:

"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." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

²² P-13.

²³ Testimony of Supervisory Clinical Psychologist.

²⁴ Testimony of psycho-educational evaluator, Supervisory Clinical Psychologist.

²⁵ Testimony of Director of Student.

²⁶ Testimony of Director of P-31.

²⁷ Testimony of Director of Student.

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The first issue to be addressed is whether Student was denied a FAPE by DCPS failing to identify Student as a student with a disability during the 2010-2011 school year while Student attended

With the exception of the 2009-2010 school year when Student attended School, Student attended DCPS schools as far back as the 2006-2007 school year. And, during the 2006-2007 and 2008-2009 school years, Student received special education services through an IEP.²⁸

When Student transferred to during the 2010-2011 school year, he did not bring with him a copy of the IEP that existed at School that would have put DCPS directly on notice that Student required special education services.²⁹ However, regardless of whether or not Student brought a copy of his existing IEP with him when he enrolled at 34 C.F.R. 300.323(g) requires DCPS to take reasonable steps to promptly obtain Student's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to Student, from the previous public agency in which Student was enrolled. If DCPS had done this, DCPS would have been able to identify Student as a child who required special education services. 34 C.F.R.300.111 requires DCPS to identify all children with disabilities who are in need of special education and related services and DCPS failed to do so while Student attended DCPS, as the local education agency, should have had a cumulative file on Student because Student had previously attended DCPS schools and DCPS should have accessed it when Student enrolled at

And, if DCPS had acquired or accessed Student's prior academic records as required, DCPS would have known not only that Student had a previous IEP, but also that Student was repeating the 9th grade for the second time,³⁰ an indicator that Student might be in need of special education services.

While at during the 2010-2011 school year, Student had an inordinate amount of absences from class, namely 170.³¹ Additionally, Student credibly testified that he never completed written class work. These facts were also indicators that should have prompted DCPS to identify and evaluate Student to determine whether he was a student in need of special education services.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

In this case, DCPS' failure to identify Student as a child in need of special education services shortly after his enrollment at resulted in Student not receiving the special

²⁸ Finding #1.

²⁹ Finding #2.

³⁰ *Id.*

³¹ *Id.*

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education services he was entitled to under his 10/05/09 IEP and as a result, he was denied a FAPE because he did not receive the educational services he needed in order to access the general education curriculum. The evidence was clear that Student avoided school and class because he was unable to read and complete class assignments in the general education curriculum.³²

Petitioner met her burden of proof that DCPS denied Student a FAPE by failing to identify Student as a child in need of special education services while Student attended during the 2010-2011 school year.

The second issue to be addressed is whether Student was denied a FAPE by DCPS failing to develop an IEP while Student attended during the 2010-2011 school year.

As discussed under Issue #1, it is clear that Student had an existing IEP and required special education services while attending but did not receive any. Pursuant to 34 C.F.R. 300.323(e), DCPS was required to develop, adopt, and implement a new IEP for Student, who had transferred from School to , but DCPS did not do so. In January 2011, Petitioner provided DCPS with a psycho-educational evaluation that illuminated Student's behavioral and academic difficulties along with a request to review the evaluation, but DCPS did not respond to the request until late March 2011.³³ DCPS' failure to provide Student with an IEP while Student attended was a violation of the IDEA.

As a result of not having an IEP while Student attended during the 2010-2011 school year, Student did not receive the special education services he was entitled to under the existing 10/05/09 IEP and consequently he was denied a FAPE. The evidence was clear that Student was functionally illiterate and incapable of doing any class work at all that required reading and writing. Without an IEP, Student was deprived of all educational benefit because he couldn't read or write and couldn't understand or participate in the most basic fundamentals of the educational experience.

Petitioner met her burden of proof that Student was denied a FAPE by failing to develop an IEP for Student while he attended Ballou during the 2010-2011 school year.

The third issue to be addressed is whether Student was denied a FAPE by DCPS failing to provide Student with an appropriate placement at Ballou during the 2010-2011 school year.

Student has a very severe emotional disturbance, the inability to control aggressive outbursts to perceived threats, a high level of irritability that cannot be adequately controlled by medication, and Student was a danger to himself and others in December 2010 when he was hospitalized at a psychiatric hospital as a result of responses given during a psycho-educational evaluation, and is still a danger to himself and others in the community.³⁴ Student's emotional disability as it manifests itself with respect to academics was so maladaptive and severe that

³² Finding #5.

³³ Finding #6.

³⁴ Finding #4.

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academic achievement testing was terminated by the evaluator during a psycho-educational evaluation in December 2010 in order to quell Student's rising irritability.³⁵ And, that was significant because it occurred in an extremely controlled environment of one room occupied by a trained evaluator and Student. At the due process hearing, simple questioning about academic abilities put Student into a tense and defensive emotional posture that was evident in his physical demeanor: he appeared to be tightly coiled and ready to spring at the least non-threatening stimulus.

The DCPS psychologist stated that "there is no way to plan educationally for a child if the child is not attending class." In this case, there are many serious impediments to proper educational planning for Student. Student cannot read or write; he is functionally illiterate. Student's illiteracy causes him anxiety and irritability and makes him avoid school and class at Ballou. Student's anxiety and irritability can arise from the slightest provocation and Student can easily misperceive threats and lash out aggressively and harm others. Everyday at Ballou, Student encounters students who want to fight him and Student has been suspended for fighting. And, Student's irritability cannot be adequately controlled with medication. Without a doubt, Student's severe emotional disturbance affects his academic performance and interferes with learning.

The level of random stimuli that Student would be exposed to at a public high school placement combined with Student's emotional profile dictates against continued placement at a public high school. Student is unable to self-control his anger and rage and has admitted that he has the capacity to kill while engaged in a fight.³⁶ In the general public school environment, Student is a loose cannon waiting to go off. In the general public school environment, Student poses a danger to himself and others. For the safety of other students and Student, Student requires a very controlled and calm school environment with intensive behavioral supports, small size class, one to one academic assistance, and school based therapy with access to a psychiatrist.³⁷ It would be irresponsible to Student and to society to decide anything less than placing Student at School.

Most prevalent in the Hearing Officer's Determination that is an inappropriate placement and that Frost School is an appropriate educational placement for Student is that the severity of Student's emotional disturbance requires a highly structured calming environment with intensive behavioral management supports in place. The group counseling twice a day, the animal room that Student testified to would help him calm down, and the presence of a part-time psychiatrist on staff is the crisis intervention type of educational environment that Student needs to help protect himself and others.³⁸ Without this type of intensive therapeutic environment, Student will be unable to learn. Student currently is a danger to himself and others; he is a person who misperceives threats, a person whose reactions to perceived threats takes the form of violence and lashing out, and a person whose behavior cannot be self-regulated or regulated with medication.

³⁵ Finding #5.

³⁶ P-18.

³⁷ Finding #7.

³⁸ Finding #8.

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The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1. The least restrictive environment provisions of the IDEA require that to the maximum extent appropriate, children with disabilities are to be educated with children who are nondisabled and removal of children with disabilities from the regular educational environment should occur only if the nature or severity of the disability is such that regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114.

34 C.F.R. 300.115 requires DCPS to provide Student with a placement along the continuum of alternative placements that can meet Student's educational needs. Special education placements are to be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia. DCPS is not required to consider a private school placement when appropriate public placement options are available. 38 D.C. Code 2561.02(c).

The Hearing Officer determines that a full-time nonpublic special education school, i.e., School, is the least restrictive environment and the most appropriate placement for Student's educational needs to be met at the present time. Student's current IEP is insufficient to meet his educational needs. School can meet Student's educational needs that flow from his severe and dangerous emotional disability; School accepts students with a primary disability of Emotional Disturbance; and School is approved by the OSSE.³⁹ the public school placement that Student currently has, comingles disabled with nondisabled peers and is a difficult environment to emotionally navigate⁴⁰. The Hearing Officer determines that continued placement of Student at poses a serious risk of serious harm to Student and other students attending the school.

Petitioner met her burden of proof that Student was denied a FAPE by DCPS failing to provide Student with an appropriate placement while Student attended during the 2010-2011 school year.

ORDER

DCPS shall place and fund Student at Frost School within thirty (30) calendar days of the date of this Order, with transportation.

IT IS SO ORDERED.

³⁹ Finding #8.

⁴⁰ Finding #3.

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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).

Date: April 30, 2011

/s/ Virginia A. Dietrich

Hearing Officer

Copies to:

Petitioner (U.S. mail)

Petitioner's Attorney: Sarah Tomkins, Esq. (electronically)

DCPS' Attorney: Victoria Fetterman, Esq. (electronically)

DCPS (electronically)

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