

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

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STUDENT HEARING OFFICE

CONFIDENTIAL

Jane Dolkart, Due Process Hearing Officer
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HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)

DOB)

Student I.D.
Petitioner)

V.)

**The District of Columbia
Public Schools,
Respondent**)

DATE OF HEARING
August 14, 2009

DATE OF COMPLAINT
June 22, 2009

ATTENDING SCHOOL:

COUNSEL FOR PARENT/STUDENT:

**Domiento Hill
James E. Brown & Assoc.
1220 L Street, N.W.
Ste. 700
Washington, D.C. 20005**

COUNSEL FOR DCPS:

**Tanya Chor
Office of the General Counsel
825 North Capitol Street, N.E., 9th Fl.
Washington, D.C. 20002-4232**

STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

August 23, 2009

Representatives:

Petitioner – Domiento Hill
DCPS – Tanya Chor

Hearing Officer:

Jane Dolkart

¹ 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 an year old student who is about to enter the grade and who is eligible for special education under the classification of Other Health Impaired (OHI) as a result of her ADHD. The student was found eligible for special education on March 13, 2008. On July 24, 2008, an IEP was developed which provided the student with 5 hours of specialized instruction and .5 hours of counseling per week. The student has a history of severe behavioral problems during the at least 3 years she has been at . On June 12, 2009, an MDT/IEP meeting was held at which evaluations were reviewed and the student's IEP was revised to reflect 15 hours of specialized instruction and .5 hours of counseling per week, and ESY for the summer of 2009.

This complaint was filed on June 22, 2009, alleging that the student was suspended for more than 10 days in the 200-2009 school year and no manifestation meetings were held. The complaint also alleges that the June 12, 2009 IEP contains an insufficient number of hours of services and an inappropriate placement because the student requires placement in a full time structured therapeutic special education setting with small classes.

DCPS filed a waiver of resolution session on June 23, 2009.

A request for continuance was filed on July 22, 2009, and was granted on July 24, 2009.

A pre-hearing conference was held on June 29, 2009, and a pre-hearing order was issued on July 7, 2009.

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 hold manifestation meetings when the student was suspended for more than 10 days in the 2008-2009 school year?
2. Failing to provide an appropriate IEP because the student requires increased hours of specialized instruction and counseling?

3. Failing to provide an appropriate placement because the student requires placement in a full time structured therapeutic setting with small classes?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated August 6, 2009, containing a list of witnesses with attachments P 1-64. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's mother, the student's educational advocate, and the Admission Director at

DCPS submitted a five day disclosure letter dated July 17, 2009, containing a list of witnesses. No attachments were submitted and no witnesses were called.

V. FINDINGS OF FACT

1. This is an year old student who is about to enter the grade and who is eligible for special education under the classification of Other Health Impaired (OHI) as a result of her ADHD. The student was found eligible for special education on March 13, 2008. On July 24, 2008, an IEP was developed which provided the student with 5 hours of specialized instruction and .5 hours of counseling per week. The student has a history of severe behavioral problems during the at least 3 years she has been at . On June 12, 2009, an MDT/IEP meeting was held at which evaluations were reviewed and the student's IEP was revised to reflect 15 hours of specialized instruction and .5 hours of counseling per week, and ESY for the summer of 2009. The specialized services and counseling are to be provided in an out of general education setting. (P 12, 15, 47).

2. The student was suspended for at least 15 days during the 2008-2009 school year. No manifestation determination meeting was ever held. No Functional Behavioral Assessment (FBA) was ever conducted, and no Behavioral Intervention Plan (BIP) is in place. (P 33, 59-63)

There are six "Notice of Student Disciplinary Action Suspension Level I" in the record, dating from September 10, 2008 through February 5, 2009. Under "Brief Description of Incident" every one of the notices lists a physical altercation with another student as part of the incident. In addition, there are comments about disruptive behavior in the cafeteria and in class, refusal to follow orders, and yelling at teachers and the principal. The notices also indicate that before each one there were prior reprimands, school detentions, parent conferences, sessions with the guidance counselor, and/or sessions with the Assistant Principal. (33, 59-63)

3. Teacher comments on the student's 2008-2009 report card indicate that the student frequently disrupts the class, is often out of her seat, is always seeking attention, and has trouble conforming to the school and classroom rules. The student's progress was described as slow, making it difficult for her to keep up with the rest of the class. (P 64)

4. On January 3, 2008, the student was administered a psycho-educational evaluation. The student's cognitive level was ascertained through the Wechsler Intelligence Scale for Children-IV (WISC-IV) The student's full scale IQ fell in the borderline range, her verbal comprehension was in the extremely low range, and her perceptual reasoning was in the borderline range. The student's academic achievement was measured by administering the Wechsler Individual Achievement Test-2nd Edition (WIAT-2) The only ability achievement discrepancies found were in higher performance than expected on numerical operations and written expression. The student's word reading, reading comprehension, and decoding were all at the pre-K to K.6 level. Her numerical operations was at the 1.2 level, and her math reasoning was at the K.6 level. The student's written expression was at the 1.5 level. (P 6)

5. According to the student's June 12, 2009 IEP, the student is performing at the 3rd grade level in math, based on a math placement test given on January 9, 2009, on the 2.5 grade level in reading, based on the Slosson Oral Reading Test, and on the 2nd grade level in spelling based on weekly spelling tests. The justification for ESY as stated on the student's IEP was that she had made considerable progress and her teachers did not want her to regress. The student has made academically progress in reading, math and written expression. (P 47)

6. There were 27 students and 1 teacher in the student's 3rd grade classroom. (Testimony of educational advocate)

7. At the June 12, 2009 IEP meeting, the SEC mentioned that _____ would be an inclusion school for the 2009-2010 school year. No further information was provided by either party. (Testimony of educational advocate)

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 (3rd 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).

A. Failure to Conduct a Manifestation Review

The IDEA and its implementing regulations provide detailed procedures which must be followed if a school is seeking a change in placement for a child with a disability due to that child’s violation of a code of student conduct. *See*, 20 U.S.C. § 1415(k), 34 C.F.R. § 300.530. A disabled child who is suspended from school for ten days or less is subject to the same disciplinary procedures as a child who is not disabled. 20 U.S.C. § 1415(k) (1) (B).

However, if the suspension exceeds 10 school days It is considered a change of placement, and a Manifestation Determination must be made. Within ten school days of a decision to change the placement of a disabled child because of a violation of a code of student conduct, the LEA, parent and IEP team are required to review the student’s file to determine

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or

(II) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.

20 U.S.C. § 1415(k) (1) (E)(i).

If a determination is made that the conduct was a manifestation of the child's disability, the IEP team is to conduct a functional behavioral assessment and implement a behavioral intervention plan for the child. Where a behavioral intervention plan is already in place, the plan is to be reviewed and modified as necessary. 20 U.S.C. § 1415(k) (1)(F).

The record supports a finding that the student's behavior was a manifestation of her disability. As a result of not conducting the manifestation review, the student was absent for at least 5 school days when she should have been attending school. Further, DCPS did not conduct a functional behavioral assessment or develop a behavioral intervention plan as required by the IDEA. The student was denied FAPE because she missed school days she should not have missed, and steps that should have been taken to control her behavior were not taken. Although the student made academic progress, there is no question but that her behavior interfered with her educational progress.

DCPS will be ordered to fund an independent FBA and an independent BIP. Additionally, the student's counseling is to increase from .5 hours per week to 1.5 hours per week, in two 45 minute sessions.

B. Appropriateness of the IEP

Petitioner argues that the student's behavioral problems are such that she cannot make academic progress unless she is given a full time IEP and placed in a private therapeutic school for children with emotional problems.

Petitioner has failed to meet her burden of proof that the student requires additional academic supports beyond those provided in her June 2009 IEP. The student is making academic progress and her June 2009 IEP increases her specialized instruction from 5 to 15 hours, all in an out of general education setting. There is some confusion as to whether [redacted] will be able to provide the out of general education setting indicated on the student's IEP. Under no circumstances are the student's 15 hours to occur in a general education classroom. It is clear that the student's behavior requires that she be in a smaller, structured classroom for her academic classes. If [redacted] cannot provide the services the student requires, she must be placed in another placement.

Concerning the student's behavioral difficulties, [redacted] has failed to appropriately address this student's behavior for at least the past three years. An HOD was required to get the school to commence the child find process and conduct evaluations to determine eligibility for special education. The HOD was issued in December 2007, and the evaluations were completed in January 2008. Yet, it took until July 2008, to finally find the student eligible for special education. In spite of the student's severe behavioral problems, the only behavioral intervention put in place was .5 hours of counseling. The student's behavioral problems have continued unabated, yet her June 2009 IEP provides

the same .5 hours of counseling and does not contain an FBA or a BIP. The student requires far more behavioral support than she has been receiving. Her IEP is inappropriate and denies the student FAPE because of its failure to include sufficient behavioral supports.

C. Appropriateness of the placement

The Supreme Court has spoken on the level of education that the states are required to provide to disabled children. “[T]he education must be sufficient to confer some educational benefit upon the handicapped child.” *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. V. Rowley*, 458 U.S. 176, 200-01 (1982). A free and appropriate education (FAPE) does not require the best possible education. It does require that the IEP and placement must confer a meaningful educational benefit gauged to the child’s potential. *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000).

If there is an appropriate public placement available that is “reasonably calculated to enable the child to receive educational benefits,” the District need not consider private placement. This is true even though a private placement might better serve the child, *See Hendrick Hudson Dist. Bd. Of Educ. V. Rowley*, 458 U.S. 176, 207 (1982). However, “[i]f no suitable public school is available [DCPS] must pay the costs of sending the child to an appropriate private school.” *Jenkins v. Squillacote*, 935, F.2d 303, 305 (D.C. Cir. 1991). See also, *Burlington School Committee v. Mass. Dept. of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

Additionally, “to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are [to be] educated with children who are nondisabled”. 34 CFR § 300.114 (a) (2) (i).

Placement decisions must be made in conformity with the child’s IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines whether a placement is appropriate, not the other way around. *See, Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (DDC 2006). In this case, Petitioner has failed to prove that the student requires a full time placement in order to make educational progress. Therefore, the student is not eligible to be placed in a full time special education program. The student’s placement is appropriate so long as it can provide the 15 hours of specialized instruction in a small classroom, out of general education setting, and can provide the necessary behavioral supports.

VII. SUMMARY OF RULING

DCPS has denied the student FAPE by failing to conduct manifestation reviews when the student was suspended for more than 10 days in the school year.

DCPS denied the student FAPE and provided an inappropriate IEP by failing to provide sufficient behavioral support including an FBA, a BIP, and increased counseling.

DCPS has not otherwise provided the student with an inappropriate IEP.

DCPS has not provided the student with an inappropriate placement.

VIII. ORDER

It is hereby **ORDERED** that

1. DCPS shall fund an independent FBA and an independent BIP for the student. Within 15 days of receipt of the FBA and the BIP, DCPS shall convene an MDT meeting to discuss implementation of the BIP and to revise the student's IEP appropriately.
2. DCPS shall revise the student's IEP to provide 1.5 hours of counseling per week in two 45 minute sessions. The revision shall be completed and the counseling shall begin no later than September 8, 2009.
3. If _____ cannot provide the student with 15 hours per week of specialized instruction in an out of general education, small class setting, and 1.5 hours of counseling per week, DCPS shall convene a placement meeting no later than September 1, 2009, and shall change the student's placement to a location where she can obtain the services in her IEP.
4. Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

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: August 23, 2009