

District of Columbia
Office of the State Superintendent of Education

Student Hearing Office
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STUDENT, through the legal guardian¹)	Complaints Filed: June 11, 2010
)	July 13, 2010
Petitioner,)	
)	Prehearing Order: August 30, 2010
v.)	
)	Hearing Dates: September 16, 2010 - Room 6A
)	September 21, 2010 - Room 5B
)	
Respondent.)	Docket Nos.:
)	
Student Attending:)	
)	

HEARING OFFICER'S DECISION

Counsel for Petitioner:	Nicholas R. Ostrem, Esquire Pamela Halpern, Esquire James E. Brown & Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005 (202) 742-2000; Fax: (202) 742-2098
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Counsel for IDEA:	Squire Padgett, Esquire 1111- 14 th Street, N.W. Suite 820 Washington, D.C. 20005 (202) 216-4980 Fax: (202) 216-4986
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¹ Personal identification information is provided in Appendix A.

Jurisdiction

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

Background

Petitioner is a _____ year-old student attending _____

On July 13, 2010, Petitioner filed an Amended Due Process Complaint Notice ("*Complaint*") alleging that _____ had failed to (1) conduct manifestation determinations, (2) develop an appropriate Individualized Education Program ("IEP"), and (3) implement the IEP. In the Prehearing Order issued on August 30, 2010, the Hearing Officer determined the issues to be adjudicated to be as follows:

- _____ alleged failure to conduct manifestation determinations

Petitioner alleges that despite being suspended for more than 10 days during the 2009-2010 school year, _____ did not conduct any manifestation determinations and did not provide an alternative placement or instructional materials to Petitioner during his suspensions. Petitioner also alleges that _____ has not conducted a functional behavior assessment ("FBA") and has not developed an intervention behavior plan ("IBP"). _____ asserts that Petitioner was provided materials and lessons "to maintain his education while suspended." _____ also asserted that Petitioner and his mother failed to "cooperate" with _____ in setting up manifestation determination meetings.² _____ does not dispute that Petitioner was suspended in excess of ten days during the 2009-2010 school year, and it does not dispute the lack of an FBA and IBP.

- _____ alleged failure to develop an appropriate IEP

Petitioner currently receives 18.5 hours of specialized instruction outside general education and 8.5 hours in general education. Petitioner alleges that his lack of academic progress and behavioral difficulties warrant full-time specialized instruction outside general education. _____ asserts that the level of services outside general education prescribed in the April 7, 2010 IEP is provided in a self-contained

² The Hearing Officer directed counsel for _____ to identify the witness in his Five-day Disclosure and provide a brief summary of the witness' testimony on the issue of lack of cooperation.

classroom and was based on Petitioner's current level of performance and current evaluations, and is appropriate for Petitioner.

- alleged failure to implement the IEP

Petitioner alleges that he does not receive all of his counseling services, because his service provider does not always come to get him to provide services. asserts that Petitioner is aware of his responsibility to go to his service provider's office to receive counseling services, but he does not consistently attend the scheduled counseling sessions.

- alleged failure to provide an appropriate placement

Petitioner alleges that he has not made academic progress at is failing every course he is taking, and requires a full-time, therapeutic special education setting. asserts that the level of services prescribed in Petitioner's April 7, 2010 IEP is appropriate and that has and can continue to meet Petitioner's educational needs.

The due process hearing was convened on September 16 and completed on September 21, 2010. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.³ The parties agreed to submit written closing statements on or before September 28, 2010.

Witnesses for Petitioner

Petitioner
Petitioner's Mother
CEO, The
Jenny Bernal, Investigator, Children's Law Center
Dr. Ida Holman, Educational Advocate, James E. Brown & Associates
Yojinde Paxton, Educational Advocate, James E. Brown & Associates

³ The Hearing Officer overruled Petitioner's counsel's objection to the admission of Disclosure on the grounds that it was filed one day late, because Petitioner's counsel offered no proffer as to any prejudice caused by the delay. Sustaining Petitioner's objection would have precluded from rebutting Petitioner's allegations other than through cross-examination. The Hearing Officer considers such a sanction entirely too harsh in light of the absence of any proffer that Petitioner's counsel's ability to prepare for the hearing was impaired. The Hearing Officer sustained Petitioner's objection to testimony from Dr. McCants-Price on behalf of because the witness was not on witness list as required in the Prehearing Order. Subsequently, when the proceeding could not be completed in one day and was continued to September 21st, the Hearing Officer ruled that Dr. McCants would be allowed to testify on the second day of the hearing; Petitioner's counsel would have ample notice and time to prepare for her testimony by the second day of the hearing. This issue became moot when failed to call Dr. McCants-Price as a witness on September 21st.

Witnesses for

Special Education Teacher,
Math Teacher,
Social Worker,
English Teacher,
Dr. Mary Ryan, Psychologist, Mental Health Resources
Special Education Coordinator,

Findings of Fact

1. Petitioner is a _____ year-old student who has attended _____ since the beginning of the 2009-2010 school year.⁴

2. Petitioner attended _____ during the 2008-2009 school year. He was absent 43 days and tardy 117 days.⁵

3. Dr. Mercedes E. Ebanks of The MECCA Group, LLC completed a Comprehensive Psychoeducational Evaluation on June 19, 2009. Dr. Ebanks diagnosed Petitioner with Attention Deficit Hyperactivity Disorder (“ADHD”), Reading Disorder, and Disorder of Written Expression.⁶ Dr. Ebanks’ findings and recommendations, *inter alia*, include the following:

Cognitively, relative strengths were noted in phonemic awareness, but his overall verbal ability, comprehension and knowledge were in the Low range; his cognitive efficiency and processing speed, along with working memory and long term retrieval, were Very Low. Academic testing revealed only slight variability in [Petitioner’s] skill development. His basic reading, math calculations, brief writing, and overall academic skills were in the Very Low range. In math, his skills were in the Low range. He had difficulty with fractions, two digit division and multiplication, as well as with multistep math problems. His spelling and writing were in the Very Low range; he showed poorly developed skills when asked to construct grammatically and structurally correct sentences. Overall, his academic skills are well below expectation for students his age.

Overall, the results of this Psychoeducational portion of the evaluation do indicate significant discrepancies between [Petitioner’s] cognitive ability and academic functioning in the areas of reading and written language. These findings are consistent with previous evaluation results. The current findings suggest a learning disability diagnosis. [Petitioner’s] overall full scale IQ and general ability falls within the Very Low range. His history of

⁴ *Complaint*; testimony of Petitioner.

⁵ Exh. No. 14.

⁶ Petitioner’s Exhibit (“P.Exh.”) No. 4 at 10.

behavioral and attentional problems appears to interfere with his academic performance. An updated speech-language evaluation should be conducted to determine if there are specific language-based deficits in need of remediation presently. His relatively low verbal and nonverbal reasoning abilities may also contribute to poor social judgment and difficulties with social problem solving, which appears to contribute to his behavioral problems at school (peer relations).

A social-emotional evaluation was also requested due to [Petitioner's] poor interpersonal skills, defiance, poor social skills, noncompliance, and aggressive behaviors, which place both him and others around him at increased risk and sufficiently detract from the overall learning environment. Results of the present evaluation indicated that [Petitioner] is a young male student with immature coping skills and social problem solving ability. He expresses concerns of inattention, poor memory, uncertainty, and poor relationships with peers and authority figures. [Petitioner] is a young man who is currently experiencing distress regarding his academic performance and socialization. He has had a difficult time coping with his feelings of inadequacy. He uses avoidance as a means of coping when he is confused. He exhibits difficulty concentrating and is unable to cope with his frustrations. He is easily irritable and in response is intentionally disruptive and mean to others (both adults and peers)...

[Petitioner] would benefit from intensive therapeutic services in individual and group settings to address avoidance behaviors, feelings of inadequacy, and feelings of shame. Because he does not have the skills necessary to deal with his stressors, he attempts to avoid those activities or experiences, particularly those that are challenging for him or that produce elevated levels [of] concern or anxiety. His poor coping skills interfere with his ability to learn and engage the world. These emotional and behavioral difficulties are interfering with [Petitioner's] ability to function successfully in the classroom, and hinder him from developing positive relationships with others.

[Petitioner] exhibits deficits in social skills, emotional control and poor decision-making. These weaknesses are causing him to fall behind academically and compromising his school performance and social interactions. He presently meets the DSM-IV diagnostic criteria for Attention-Deficit/Hyperactivity Disorder, Predominantly Inattentive Type and should receive intensive individual and group therapy. He also meets the criteria for a Reading Disorder and Disorder of Written Expression. Under the provisions of special education services, [Petitioner's] diagnosis fits the criteria as a student that is classified with a Multiple Disability...

Recommendations

It is strongly recommended that [Petitioner] receive intensive special education services to further develop his reading, written language and math skills so that he can earn his high school diploma, high school equivalence certificate, or GED... He will need a high level of individual attention and support to assist him in learning new material...

Given his level of need, [Petitioner] should receive one-to-one tutoring. The tutor should be specially trained to work with students with learning disabilities...

[Petitioner] should participate in individual therapy for a total of 60 to 90 minutes a week. [Petitioner] requires therapeutic services to address his aggression and poor decision-making.

[Petitioner] would benefit from weekly group therapy for 30 minutes to address poor coping and social skills, as well as poor communication and self-esteem...

Behavior intervention should be considered to motivate [Petitioner] to take an interest in his academic and social performance...⁷

4. convened a Multidisciplinary Team ("MDT") meeting on September 11, 2009 to develop Petitioner's annual IEP. The MDT prescribed 18 hours per week of specialized instruction in a combination of special education and general education environments, four hours per week of tutoring, 3.5 hours per week with a Reading Teacher, and 90 minutes per week of psychological counseling.⁸ Petitioner would receive Math and English in a self-contained special education class, and would receive Science and Social Studies in an inclusion setting (co-taught by general and special education teachers in a general education class).⁹ The MDT prescribed extended year services ("ESY"), because he is in "need of continuous academic support to maintain skills acquired during the school year."¹⁰ The MDT classified Petitioner with Multiple Disabilities: Learning Disabled ("LD") and Emotional Disturbance ("ED").¹¹ In light of Petitioner's attendance record at Parker warned Petitioner's mother about IDEAPCS' strict attendance policy.¹² Petitioner's mother signed the IEP, indicating her agreement with its contents. Dr. Holman represented her at the meeting.¹³

⁷ P.Exh. No. 4 at 8-10.

⁸ P.Exh. No. 1, ¶ IV at 1 and ¶ XIII at 4.

⁹ *Id.*, ¶ IX at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.* Meeting Notes at 6.

¹² *Id.*, Advocate's Meeting Notes at 3; testimony of

¹³ *Id.* at 1.

5. In November of 2009, after mid-Advisory grades were issued, began providing Petitioner self-contained classes in Spanish, Biology, and World History in addition to Math and English. Petitioner was in general education environments in four courses: College Transition, Introduction to Technology, JROTC, and Language Network. Petitioner had to be escorted to classes, because he would not go to some of his classes. The social worker would sometimes come to escort Petitioner from his JROTC class to his counseling sessions.¹⁴ There were nine students in the self-contained class.¹⁵

6. Petitioner was to receive two forty-five minute counseling sessions per week. He attended approximately one-half of the scheduled sessions during the 2009-2010 school year. Petitioner made minimal progress on his social-emotional goals during the 2009-2010 school year.¹⁶

7. Petitioner was suspended for two days out-of school on December 4, 2009 for the unauthorized use of an electronic device. The sanction was reduced to a Saturday detail on December 5, 2009.¹⁷

8. Petitioner received a Saturday detention on February 22, 2010 for "class cutting."¹⁸

9. Petitioner received an in-school suspension on February 22, 2010 for use of a cell phone on school premises.¹⁹

10. Patrice Brown of Conaboy & Associates completed a Vocational Evaluation of Petitioner on February 24, 2010. Ms. Brown's findings and recommendations, *inter alia*, include the following:

[Petitioner's] highest level of interest falls within the Mechanical, Industrial, and Selling areas. [Petitioner] indicated moderate interest levels in other areas assessed. [Petitioner's] scores on the OASIS-3:AS reveal his relatively highest abilities in the areas of Spatial Aptitude, although his overall scores were in the low to very low range. Students achieving such low scores tend to have difficulty in many independent work related areas and may require a high level of support and supervision. Taking into consideration [Petitioner's] identified interests and aptitude, the vocational options suggested are: Tire Repairer, Auto Mechanic, Truck/Ambulance Driver, TV & Radio Repairer, Painter, Electronics Worker, Automobile Assembler, Construction Laborer, Motor Vehicle Inspector, Stock Clerk, Product Demonstrator, or Automobile Salesperson...²⁰

¹⁴ Testimony of Petitioner and Mr. Parker.

¹⁵ Testimony of

¹⁶ Testimony of

Exh. No. 15.

¹⁷ P.Exh. No. 10

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ P.Exh. No. 6 at 7.

Ms. Brown recommended that Petitioner participate in regular transition services classes, and her report included numerous source materials and websites to explore career alternatives.²¹

8. reconvened an MDT on February 26, 2010 to revise Petitioner's IEP. The MDT prescribed 18.5 hours of specialized instruction per week outside general education, 8.5 hours per week in general education, 90 minutes per week of behavioral support services, and 45 minutes per week of speech and language services.²² The IEP included a Post-Secondary Transition Plan. The goal in the Plan was for Petitioner to "begin to research vocational schools in the Maryland and Washington, D.C. area to see the educational requirements they may have." The suggested area of employment was for Petitioner to "look for Mechanical apprenticeship opportunities for the summer." The courses of study recommended to support Petitioner's career goals was "College Transition (2009-2010)/Career Exploration (2010-2011)."²³ At Dr. Holman's request, agreed to limit Petitioner's out-of-school suspensions by taking other measures at school.²⁴

9. Petitioner was caught using a cell phone on April 28, 2010, but his case manager had the out-of-school suspension reduced to after-school detention.²⁵

10. On May 17, 2010, Petitioner was suspended for four days out-of-school for eight violations of the school code on May 12, 2010.²⁶

11. On June 3, 2010, Petitioner was suspended for three days out-of-school for four violations of the school code.²⁷

12. In the Second Advisory period for the 2009-2010 school year, Petitioner failed four of eight courses due to poor performance and two others for excessive absences.²⁸ In the Fourth Advisory for the 2009-2010 school year, Petitioner failed every course due to excessive absences.²⁹ Petitioner would have passed all of his courses except Science but for his attendance.³⁰

13. Dr. Ryan evaluated Petitioner on August 10, 2010. Her findings and recommendations, *inter alia*, include the following:

²¹ *Id.* at 8-11.

²² P.Exh. No. 2 at 6.

²³ *Id.* at 11.

²⁴ *Id.*, Advocate's notes at 3.

²⁵ P.Exh. No. 10.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Exh. No. 16 at 3.

²⁹ Exh. No. 33 at 4.

³⁰ Testimony of Ms. Clarkson and Mr. Emessiene; Exh. No. 28. Ms. Clarkson testified that under system, a student fails a subject if he or she earns ten points during an Advisory Period: Tardy – ½ point, Unexcused Absence – 2 points, Excused Absence – 1 point, Suspension – 1 point, and court appearance or doctor's visit – 0 points. Petitioner would have failed Science even if attendance were not an issue, because he failed to complete a required project.

disability ("SLD") and other health impaired ("OHI") disabilities. Monroe has a Certificate of Approval from OSSE. Classes are co-taught with certified special education teachers and general education teachers who are certified in content areas. The average student to teacher ratio is 5:1. Monroe employs a licensed psychologist, speech and language therapist, occupational therapist, and social workers.³⁵

Conclusions of Law

Failure to Comply with Disciplinary Procedures

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local education agency ("LEA"), the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or (2) if the conduct in question was the direct result of the LEA's failure to implement the IEP.³⁶ A change of placement occurs if the removal is for more than 10 consecutive school days, or multiple removals during the school year constitute a pattern

Because the series of removals total more than 10 school days in a school year;

Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.³⁷

If the MDT determines that the conduct was a manifestation of the child's disability, the MDT must either (1) conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (2) review the existing behavioral intervention plan, and modify it, as necessary, to address the behavior. The LEA must also return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.³⁸

³⁵ Testimony of

³⁶ 34 C.F.R. §300.530(e)(1).

³⁷ 34 C.F.R. §300.536(a).

³⁸ 34 C.F.R. §300.530(f).

In this case, there was no showing of a change of placement. The documentation and testimony established that Petitioner's out-of-school suspensions totaled only seven days during the 2009-2010 school year: infractions on May 17th and June 3rd. This falls short of the ten-day threshold that would trigger the change of placement procedures described above. Therefore, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that _____ failed to follow appropriate procedures under 34 C.F.R. §§ 530 and 536.

Failure to Develop an Appropriate IEP

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* ("Rowley"),³⁹ the Supreme Court set forth the requirements for IEPs:

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). § 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child, consists of a written document containing

"(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." § 1401(19).

Local or regional educational agencies must review, and where appropriate revise, each child's IEP at least annually. § 1414(a)(5). See also § 1413(a)(11).⁴⁰

When Petitioner first enrolled at _____ for the 2009-2010 school year, the MDT prescribed 18 hours per week of specialized instruction in a combination of special education and general education environments, four hours per week of tutoring, 3.5 hours per week with a Reading Teacher, and 90 minutes per week of psychological counseling. Petitioner would receive Math and English in a self-contained special education class, and would receive Science and Social Studies in an inclusion setting (co-taught by general and special education teachers in a general education class). The MDT also prescribed ESY. Petitioner's mother and advocate agreed with this program. When mid-Advisory reports revealed that Petitioner was struggling, in November 2009,

³⁹ 458 U.S. 176 (1982).

⁴⁰ *Id.* at 181-82.

unilaterally moved Petitioner into the self-contained class for Science and Social Studies. This change was subsequently reflected in a revised IEP when the MDT was reconvened in February 2010. Dr. Holman testified that she considers the revised IEP to be a full-time special education IEP. Petitioner received all of his core subjects in self-contained classes, and was prescribed 7.5 hours of individual tutoring and services from a reading specialist. Petitioner's witnesses offered no criticism of the goals and objectives in the IEP, and no persuasive suggestion as to how the IEP could have been supplemented to better meet Petitioner's needs. Therefore, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that _____ failed to develop an appropriate IEP.

Although Petitioner has not yet reached the age of 16, IDEIA regulations require that when a student turns 16, his or her current 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.⁴¹

Petitioner's counsel did not raise this issue, but the Hearing Officer notes that Petitioner's transition plan does not remotely reflect the findings and recommendations in Petitioner's vocational assessment. Nor does it include the measurable postsecondary goals, transition services, and courses of study mandated in the regulations. Rather, the transition plan imposes the entire burden on Petitioner to determine and prepare for his post-secondary career. The parties should reconvene the MDT prior to Petitioner's birthday to develop a meaningful transition services plan.

Failure to Implement the IEP

Petitioner missed one-half of his counseling sessions, because he failed to attend them. Petitioner admitted that there were several classes that he elected not to attend, and that often he was escorted to class because of his proclivity to skip classes. _____ testified that she often escorted Petitioner to her counseling sessions, but she stopped doing so because it was Petitioner's responsibility to get to the sessions on his own.

At the conclusion of the hearing, the Hearing Officer noted that D. C. law imposes the responsibility of general education students to attend school on the parents and the students. There is no obligation on the LEA to address general education students' attendance. The Hearing Officer invited Petitioner's counsel to provide any authority he was aware of that would impose responsibility on LEAs to ensure the attendance of disabled students. *Petitioner's Closing Argument* provided no such authority. Therefore, the Hearing Officer concludes that Petitioner has failed to meet his burden of proving that _____ failed to implement Petitioner's IEP.

⁴¹ 34 C.F.R. §300.320(b).

Failure Provide an Appropriate Placement

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (“Rowley”),⁴² the Supreme Court held that the local education agency (“LEA”) must provide an environment in which the student can derive educational benefit.

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon the States which receive funding under the Act...The statutory definition of “free appropriate public education,” in addition to requiring that States provide each child with “specifically designed instruction,” expressly requires the provision of “such... supportive services... as may be required to assist a handicapped child to benefit from special education”...We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.⁴³

Therefore, Petitioner had the burden of proving that _____ failed to offer an environment in which Petitioner could derive educational benefit.

The Hearing Officer has already concluded that Petitioner’s IEP was reasonably calculated to provide educational benefit. The record is also clear that Petitioner is performing well below grade level and made no meaningful progress at _____ during the 2009-2010 school year. Thus, either _____ staff is not competent to implement the IEP, or Petitioner’s absences are the primary cause of his poor academic performance.

The Hearing Officer invited the parties to brief the issue of the impact of a disabled student’s absences on the LEA’s obligation to provide a free appropriate public education (“FAPE”). The Hearing Officer provided the parties’ counsel copies of his previous decisions involving this issue, and stated that in previous cases, absent a showing that the student’s truancy was a consequence of his disability, the Hearing Officer has ruled that the student’s poor performance could be attributed to his or her failure to attend classes.

In *Petitioner’s Closing Argument*, Petitioner’s counsel opined that the Hearing Officer’s “analysis lacks both practicality and sound reason,” but offered no authority that would afford the Hearing Officer greater wisdom or direction. The only case cited by Petitioner’s counsel was *Letter to Borucki*,⁴⁴ which the Hearing Officer distinguished in one of the decisions the Hearing Officer provided to counsel. In *Letter to Borucki*, the U.S. Department of Education’s Office of Special Education Programs stated that the

⁴² 458 U.S. 176 (1982).

⁴³ *Rowley*, *supra*, at 200-01.

⁴⁴ 16 IDELR 884 (OSEP 1990).

Education of the Handicapped Act, the first law enacted to ensure access to public education for disabled students, required school districts to provide services even when students do not cooperate with school officials:

[w]hile EHA-B does not require that school officials be held accountable for a student's progress, the failure of a student to cooperate with school staff does not relieve the school officials of the responsibility to provide a FAPE to that child...

Your letter indicates that in this situation, the placement team believes that the child's current placement is appropriate. However, the student's failure to cooperate with school staff may be an indication of the need for a reevaluation, a revision in the child's IEP, or a change in the child's educational placement.

In this case, there was no evidence that [redacted] abandoned its obligation to provide services to Petitioner. It offered small, self-contained classes, tutoring, a reading specialist, and after-school tutoring. Petitioner simply failed to make himself available for these services, resulting in failing grades.

Moreover, there was no showing that Petitioner's absenteeism was caused by a disability. Dr. Ebanks found as follows:

[Petitioner] would benefit from intensive therapeutic services in individual and group settings to address avoidance behaviors, feelings of inadequacy, and feelings of shame. Because he does not have the skills necessary to deal with his stressors, he attempts to avoid those activities or experiences, particularly those that are challenging for him or that produce elevated levels [of] concern or anxiety. His poor coping skills interfere with his ability to learn and engage the world. These emotional and behavioral difficulties are interfering with [Petitioner's] ability to function successfully in the classroom, and hinder him from developing positive relationships with others.

Petitioner's counsel argued that Petitioner "stated that the few times he did not go to class were because he knew that he would not learn anything in that particular class based on past experience, and/or he reasonably believed that he would be targeted in the class and receive some form of repercussion." Avoiding class because he knew he would not learn anything is not evidence of an attempt to avoid a stressful situation. As for being "targeted," Petitioner offered no testimony that would suggest that such a fear was even remotely realistic. The narratives in Petitioner's disciplinary reports indicate that he was always the aggressor, not the target of aggression. At no time in the hearing did Petitioner testify that he was insecure about his ability to perform in the class, was reluctant to reveal his deficiencies to his peers, or that he skipped classes due to his performance anxiety.

In the absence of direct evidence, the Hearing Officer will not speculate as to the reasons Petitioner chooses not to attend classes. However, there has been no showing that Petitioner's absences during the 2009-2010 school year were consequences of a disability. This conclusion is corroborated by Petitioner's performance during the current school year. He has missed only one day (other than the day of his testimony in this proceeding), and is performing well in class. According to _____ he is "absolutely" on track to have a successful year, and both his behavior and motivation are markedly improved.

The Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS failed to provide an appropriate placement.

ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented during the hearing, and the representations of the parties' counsel at the hearing, this 8th day of October 2010, it is hereby

ORDERED, that the *Complaint* is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED, that this Order is effective immediately.

Notice of Right to Appeal Hearing Officer's Decision and Order

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision 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 of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

/s/
Terry Michael Banks
Hearing Officer

Date: October 8, 2010