

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

STUDENT, a minor, by and through
her Parent¹

Petitioner,
v

SHO Case No:
Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

2011 OCT -3 AM 9:12
OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On July 19, 2011 Parent, on behalf of her child (“Student”), filed an Administrative Due Process Complaint Notice (“Complaint”), HO 1,² requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education (“FAPE”) to Student by District of Columbia Public Schools (“DCPS”) under the Individuals with Disabilities Education Act, as amended (“IDEA”). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). Respondent filed a Response to Parent’s Administrative Due Process Complaint Notice (HO 5) on August 2, 2011. A resolution meeting was held on July 27, 2011. (R 11). The parties were not able to reach an agreement. DCPS’ representative executed a Resolution Period Disposition Form on the same date indicating there had been no resolution and noting parent, the

¹ Personal identifying information is provided in Appendix A, attached hereto.

² Hearing Officer Exhibits will be referred to as “HO” followed by the exhibit number; Petitioner’s Exhibits will be referred to as “P” followed by the exhibit number; and Respondent’s Exhibits will be referred to as “R” followed by the exhibit number.

Petitioner herein, had participated by telephone. HO 4. The 45 day timeline began to run on August 18, 2011, and my Hearing Officer Determination ("HOD") is due on October 2, 2011.

I held a telephone prehearing conference on August 24, 2011. HO 8. By agreement of the parties, the hearing was scheduled for September 15, 2011.

One of the issues raised by Petitioner was a denial of a free, appropriate, public education ("FAPE") resulting from Respondent's alleged failure to comply with a hearing officer determination ("HOD") dated June 2, 2011. I requested and received pre-hearing briefs on whether I had the authority to enforce an HOD. (HO11 & 15) DCPS' brief included a Motion to Dismiss the claim for enforcement. Petitioner filed a reply opposing the Motion to Dismiss. (HO 16)³ At the beginning of the hearing on September 15, 2011, I ruled on the record that I would allow the claim regarding the failure to comply with the HOD to the extent that the failure to comply with the HOD, if there was such a failure, was a denial of FAPE. I stated this was distinct from any claim to enforce the HOD which was not within my authority as a hearing officer. For these reasons I denied the request to dismiss the claim.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

³ Petitioner's reply indicated that Petitioner had viewed the Motion to Dismiss as a Motion to dismiss the entire case. I stated on the record that I read the Motion to Dismiss as a motion to dismiss the particular claim. Respondent's counsel did not disagree with my statement.

ISSUES

The issues are whether DCPS denied Student a FAPE by:

- 1) Failing to comply with the Hearing Officer Determination dated June 2, 2011;
- 2) Failing to develop an appropriate IEP at the June 16, 2011 IEP meeting. DCPS did not review all information provided at the meeting. Student's eligibility classification was changed without proper justification.⁴ The IEP does not include sufficient services. The IEP drafted on June 16, 2011 was not finalized, but DCPS has not held a follow-up meeting to finalize the IEP. The IEP does not include the provision of a dedicated aide to Student; and
- 3) Failing to provide Student an appropriate placement in a full time, special education, therapeutic environment.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner found in Appendix B are:

- P-2⁵ Intent to Observe Letter, September 6, 2011
- P-3 Emails Regarding Objections to the June 16, 2011 IEP Meeting, June to July 2011
- P-4 Letters of Invitation for MDT Meetings, July to August 2011
- P-5 Emails Regarding Addendum to Dr. Nelson's Psychological Report, May to June 2011
- P-6 Emails Regarding Letter of Invitation for MDT Meeting per HOD, June 2011
- P-7 IEP Progress Report, April 11, 2011
- P-8 Acceptance Letter from May 20, 2011
- P-9 IEP, June 16, 2011
- P-10 DCPS' IEP Meeting Notes, June 16, 2011
- P-11 Behavior Intervention Plans and FBA, February 7, 2011, April 8, 2011 and June 16, 2011
- P-12 IEP, April 5, 2011
- P-13 IEP, September 14, 2010
- P-14 IEP, October 15, 2009
- P-15 Comprehensive Psychological Evaluation with Addendum, May 16, 2011
- P-16 Comprehensive Psychological Evaluation, May 16, 2011
- P-17 Functional Behavior Assessment, May 18, 2011
- P-18 Parent's call log from school, May 3 to May 12, 2011

⁴ Petitioner suggests the MDT indicated the student was not eligible for special education in that he did not qualify as either Emotionally Disabled or Other Health Impaired (ADHD). Respondent's counsel stated Student has an IEP dated June 16, 2011 that indicates he is Emotionally Disabled and that DCPS intends to provide him IDEA services.

⁵ P 1 was withdrawn as it duplicated hearing officer exhibits.

- P-19 Advocate's MDT Meeting Notes, February 7, 2011
- P-20 DCPS' MDT Meeting Notes, February 7, 2011
- P-21 Report Cards and Progress Notes, 2008-2009, 2009-2010 and 2010-2011 school years
- P-22 Attendance Summary, August 16, 2010 to May 16, 2011
- P-23 Suspension and Disciplinary Records, August 23, 2010 to May 16, 2011
- P-24 Teacher Notes from Computer, September 21, 2010 to May 13, 2011
- P-25 Classroom Observation Notes, December 13, 2010
- P-26 Correspondence between Brown & Associates and Billy Kearney, Principal Regarding Student Suspensions, October 5, 2010
- P-27 Social Work Evaluation Report, October 2, 2008
- P-28⁶ Comprehensive Psychological Evaluation, August 28, 2008
- P-29 Educational Evaluation, July 15, 2008
- P-30 Speech and Language Evaluation, October 22, 2008
- P-31 Request for Evaluation, October 20, 2008
- P-32 SSDI Application, May 22, 2007
- P-33 Chithalina Khanchalern's Resume
- P-34 Dr. Natasha Nelson's Resume

Exhibits admitted on behalf of Respondent found in Appendix C are:

- | | | |
|------------------|---------|----------------------------------|
| R-9 ⁷ | 4-18-10 | IEE |
| R-11 | 7-27-11 | Resolution Session Meeting Notes |
| R-12 | 8-2-11 | Email |
| R-13 | | Email re scheduling IEP meeting |

Exhibits admitted on behalf of Hearing Officer found in Appendix D are:

- 1 Administrative Due Process Complaint Notice dated July 19, 2011
- 2 Notice of Hearing Officer Appointment dated July 20, 2011
- 3 Prehearing Conference Scheduling Letter and Timeline Order of July 21, 2011
- 4 Resolution Period Disposition Form executed by DCPS only July 27, 2011 & noting Petitioner's participation by telephone
- 5 DCPS Response dated August 2, 2011 to Administrative Due Process Complaint (Attached is Response dated April 11, 2011 sent in error)
- 6 Prehearing Notice dated August 8, 2011
- 7 Order granting continuance dated 8/27/11
- 8 Prehearing Conference Order dated August 27, 2011
- 9 Order dismissing case involving the same parties
- 10 Hearing Officer Determination re case involving the same parties
- 11 Petitioner's Pre-trial brief on Hearing Officer's Authority to Determine HOD Violations

⁶ P 28 was admitted for the limited purpose of providing background information

⁷ R 1 through 8 and R 10 were withdrawn as they duplicated Petitioner exhibits.

- 12 Miscellaneous emails
- 13 Proposed Hearing Officer Exhibits
- 14 DCPS' Prehearing memorandum of law Regarding the Proper Procedure to Address Compliance with Hearing Officer Determinations and Motion to Dismiss Petitioner's Administrative Due Process Complaint
- 15 Petitioner's Opposition to Motion to Dismiss

B. Testimony

Petitioner testified and presented the following witnesses:

- Natasha Nelson, Psy.D., admitted as an expert in clinical psychology⁸
- Chithalina Khanchalern, Educational Advocate, James E. Brown & Associates
- Assistant Education director,

DCPS presented no witnesses.

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. Student is a _____ year old, special education student at _____ School. He is in the _____ grade. Student receives special instruction inside general education and behavior support services. He is classified as a student with an emotional disability. Student began receiving special education and related services when he attended _____ Elementary School. P 9; P14; p15; Testimony of Petitioner; Testimony of Khanchalern..
2. Student has attention deficit hyperactivity disorder ("ADHD") for which he takes medication. P 15; P17; P 20; Testimony of Petitioner; Testimony of _____
3. Student has had behavior problems throughout his school enrollment. These behavior problems have escalated since his enrollment in middle school. Student leaves _____

⁸ By stipulation

class, roams the halls, threatens other students, uses disrespectful language with adults and disrupts his classes when he is in attendance. Student is aware he has behavior problems. Some of his disruptive behavior results from his inability to do the work assigned or from not receiving needed assistance with the work. At other times the behavior occurs without any causation other than Student's impulsivity and lack of self regulation. P 7; P15; P 17; P 18; P 19; P 20; P 21;P 23; P 24; P 25; P 28; P 31;

Testimony of Petitioner; Testimony of Testimony of Khanchalern.

4. Student is capable of learning. His general intellectual ability as measured by the Woodcock Johnson III⁹ is in the average range. His verbal abilities are less well developed with scores in the low average range. Student's achievement levels are two to three years behind his grade level in most academic areas. After showing some initial progress in the 2010-2011 school year, Student ended up failing his classes due to a combination of factors including poor attendance, disruptive behavior and failing to complete his assignments. His behavior in the 2011-2012 school year has not improved.

P 7; P 15; P 17; P 21; P 22; Testimony of Nelson; Testimony of Khanchalern.

5. At an IEP meeting held on June 16, 2011 pursuant to a Hearing Officer Determination of June 2, 2011, the multidisciplinary team ("MDT") reviewed Dr. Natasha Nelson's Comprehensive Psychological Evaluation with Addendum dated 5/17/11. This IEP includes some changes from the prior IEP of April 5, 2011, including changes in the sections labeled Present Levels of Performance and Needs. In addition, the hours of behavior support were increased from 90 minutes per month to 240 minutes per month and the social emotional goals were changed. P 9; P 10; P 12; P15; HO 10;

Testimony of Petitioner; Testimony of Khanchalern.

⁹ The brief version of this test was used to assess Student. I is a valid measure.

6. There was disagreement at the June 16, 2011 IEP meeting regarding Student's eligibility classification. The team suggested he might not meet the requirements to be classified as emotionally disturbed because there was no documentation from a psychiatrist or a psychologist, and they further questioned whether he met the qualifications for Other Health Impaired due to ADHD. The MDT asked Petitioner to provide medical records. They also suggested Student might be socially maladjusted. There was additional disagreement over whether Student would receive a dedicated aide. The team were supportive of the idea but indicated this was not within their purview. Central office had to authorize a dedicated aide. The team was to meet again to provide information on social maladjustment, discuss student's need for the dedicated aide and to review Petitioner's concerns with the IEP that had been drafted. P 3; P 10; R 13; Testimony of Petitioner; Testimony of Khanchalern.

7. At least three follow-up meetings were scheduled, one in June, another on July 21, 2011 and a third on August 19, 2011. Each was cancelled by DCPS. DCPS proposed another meeting date in September. No meeting occurred. P 4; P 6; R 13; Testimony of Petitioner; Testimony of Khanchalern.

8. The IEP developed on June 16, 2011 requires Student receive 10 hours of special instruction in the general education setting each week. This requirement has remained consistent on Student's IEPs since October 2009 when Student was in elementary school. P 9; P 12; P13; P 14.

9. Petitioner has not provided the requested medical records. Testimony of Petitioner.

10. Student requires small, structured classes with a low student –teacher ratio and minimal distractions to access his educational program. He also requires reinforcement of his efforts, significant one-on-one time with his teacher to assure his understanding of the material and that he is working at an appropriate pace. He requires extended time for testing. He also requires services to address his social/emotional needs, including helping him develop appropriate social skills. P15; P 17; Testmony of

11. Student has been accepted at _____ is a private school providing special education services to students with various disabilities including, among others, learning disabilities, emotional disabilities multiple disabilities and other health impairments. _____ is a full time, separate, special education school with students in elementary through high school. There are no general education students in the school. Testimony of

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find all witness testimony presented in this matter to be credible, some witnesses were more persuasive than others. Where these differences in persuasiveness are relevant to my determination, I so indicate.

Petitioner argues that under the preponderance of the evidence standard BCPS must lose in this matter because it has not put on any evidence. This is not correct. As stated in the Prehearing Conference Order, Petitioner, as the party challenging the IEP, has the burden of persuasion here. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005) Petitioner must meet this burden in order to prevail on the claims herein. This is

distinctly different from DCPS not putting on evidence. Carrying the burden of persuasion means that Petitioner must persuade me by a preponderance of evidence that he should prevail. In saying this I recognize DCPS did not put on any witnesses. However, DCPS did introduce several documents into evidence and many of the documents introduced by Petitioner had been proposed as exhibits by DCPS. In any event, it is Petitioner who must meet the burden and persuade me to find in his favor.

Issue 1: Whether DCPS denied Student a FAPE by failing to comply with the Hearing Officer Determination dated June 2, 2011

A parent or school district may initiate a due process hearing on matters relating to the identification, evaluation or educational placement of, or the provision of FAPE to, a child with a disability. 34 CFR § 300.507(a); *See also* D.C. Code § 3029.1. Hearing officers have the authority to hear matters alleging the failure to comply with the terms of a settlement agreement insofar as the matter involves an alleged failure to supply a child with FAPE. *See, for example, Dukes v. Enterprise City Board of Education*, 273 F.Supp.2d 1252 (M.D. Ala. 2003). As noted above, the failure to provide FAPE is a basis for bringing a due process hearing. It is logical that a hearing officer who has the authority to hear matters alleging the failure to comply with the terms of a settlement agreement insofar as the matter involves an alleged failure to supply a child with FAPE also has the authority to hear matters involving the failure to comply with a hearing officer determination to the extent this failure results in a denial of FAPE, and I am doing so in this matter.

In the instant matter, Petitioner specifically pleads a denial of FAPE. Petitioner asked that I determine there was a denial of FAPE because DCPS failed to comply with the HOD dated June 2, 2011. That HOD required DCPS to hold an MDT/IEP meeting “to review and revise the

student's IEP . . . no later than June 17, 2011. The MDT will consider the independent comprehensive psychological evaluation. . . and discuss and determine the hours of specialized instruction and counseling services and whether the specialized instruction will be provided outside of general education." While acknowledging an IEP meeting was held on June 16, 2011, Petitioner argues the IEP developed did not meet the terms of the HOD because 1) the IEP was not finalized, and there was to be a follow-up meeting to finalize some aspects of the IEP; and 2) the content of the IEP did not reflect the independent comprehensive psychological evaluation. DCPS argues that the meeting occurred, the IEP was developed and it is now being implemented. I agree.

I recognize Petitioner and her advocate left the IEP meeting with some confusion regarding Student's classification, concerns about whether student was to have a dedicated aide and some additional concerns about the content of the IEP. However, these concerns and confusion do not mean there was no IEP in place. An IEP was developed at the meeting and is currently being implemented. The confusion and disagreement regarding Student's classification, his need for an aide and the content of the IEP can be addressed at another IEP meeting. It is apparent there was an intent to hold a subsequent meeting to resolve some or all of these issues and concerns as at least three subsequent meetings were scheduled. Unfortunately they were all then cancelled by DCPS.¹⁰ Petitioner argues this means DCPS denied Student a FAPE because there were additional issues to resolve, I disagree. The IEP as written could be and is now being implemented. It is important to recognize that there is always an opportunity under IDEA to ask for and have an IEP meeting. IDEA establishes a minimum number of meetings that must be

¹⁰ I note this is not good practice. IEP meetings are intended to be a method of including parents in the educational planning process for their children. Scheduling and cancelling meetings on a repeated basis does not include parents either by practice nor by message. It creates an impression, whether intended or not, of exclusion which is contra the spirit of IDEA.

held within a twelve month period. It does not set a maximum. Therefore, I find by a preponderance of the evidence that an IEP was developed at the June 16, 2011 MDT meeting.

Petitioner's argument also confuses compliance with the HOD with Petitioner agreeing with IEP as written. The minutes of the June 16, 2011 IEP meeting specifically identify the requirements of the HOD and discuss how they were addressed at the meeting. The meeting notes identify four provisions of the HOD that were addressed at the meeting: review of the independent comprehensive psychological evaluation and functional behavioral assessment, review/revision of the IEP, discussion and determination of hours of specialized instruction and counseling services and discussion and determination of whether specialized instruction was to be provided outside of general education. These four provisions cover the requirements of the HOD. There was extensive discussion and review of the independent psychological evaluation and functional behavioral assessment. The IEP was revised, though I note there were minimal revisions to the goals and no revision to the number of hours of specialized instruction. Counseling services, however, were increased from 90 minutes to 240 minutes per month. Finally, there was some discussion of whether special instruction was to be provided outside general education and the MDT determined such services could continue in general education. Thus all aspects of the HOD were addressed, and there can be no denial of FAPE resulting from the failure to comply with the HOD. Rather, Petitioner raises issues and concerns regarding the content of the IEP which are better addressed in Issue 2, below, regarding whether DCPS denied Student a FAPE by failing to develop an appropriate IEP at the June 16, 2011 meeting.

I therefore find by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to comply with the June 2, 2011 HOD.

Issue 2: Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP at the June 16, 2011 IEP meeting. DCPS did not review all information provided at the meeting. Student's eligibility classification was changed without proper justification. The IEP does not include sufficient services. The IEP drafted on June 16, 2011 was not finalized, but DCPS has not held a follow-up meeting to finalize the IEP. The IEP does not include the provision of a dedicated aide to Student

Under the IDEA each local education agency is required to provide a FAPE to each student found eligible for special education and related services. A FAPE is:

Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . . [a]re provided in conformity with an . . . IEP that meets the requirements of [the IDEA regulations]. 34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id.* An IEP

that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

The content of an IEP is a team decision 34 C.F.R. §§ 300.320 – 300.323. *See also*, D.C. Code §§ 30.3007.1 & 3008.1. Teams are required to consider all the relevant information before them. *Id.* In reviewing whether an IEP provides a student a FAPE as required by IDEA, a hearing officer must consider whether the district complied with IDEA's procedural requirements and determine whether the program was reasonably calculated to enable the student to receive educational benefit. *Rowley*, 458 U.S. at 207. In the instant matter Petitioner has not raised questions regarding the district's compliance with IDEA procedural requirements¹¹ in developing the June 16, 2011 IEP. The issues raised are focused on whether the IEP to be implemented in the 2011-2012 school year, the June 16, 2011 IEP, is calculated to enable the student to receive educational benefit.

In the instant matter Student has a history of behavioral problems. These problems are increasing as he ages. He is disruptive and aggressive. He acts out with both adults and his peers. Student is impulsive and has difficulty managing his own behavior. He has emotional disabilities and ADHD. Student's academic performance is also affected by his poor attendance and failure to complete assignments both in class and at home. Student's multiple disabilities affect his ability to access his education. His disabilities lead to his becoming frustrated in class and acting out impulsively. The frustration and impulsivity often results in his missing class, disrupting class or not completing his work. Petitioner argues that the failure to develop an IEP for Student that meets these identified needs has denied him a FAPE and with this I agree.

¹¹ Of course, Petitioner has raised a procedural issue regarding DCPS denying Student a FAPE by failing to comply with the HOD of June 2, 2011. This issues is addressed above in Issue 1of this HOD and will not be addressed further here.

Student's IEPs have remained fairly consistent over the last three school years, and over these last three years there have been few changes in Student's academic performance. Moreover, there have been increased behavioral concerns. The evidence shows the MDT has made little effort to construct an IEP designed to address Student's individual needs as required by IDEA. Instead, the same program has been repeated and repeated again. Even when provided with an extensive and well developed comprehensive psychological and functional behavior assessment, the MDT made few changes in Student's IEP to address the recommendations in the report.

Petitioner raises specific claims about the IEP as follows:

DCPS did not review all information provided at the meeting.

Petitioner, in this argument, is again referring to her view that the MDT did not review the comprehensive psychological and functional behavioral assessment. As stated above, in my discussion of Issue 1 herein, I disagree. The MDT did review these documents, and there are extensive notes in the meeting minutes reflecting this review. This claim, as I have all ready stated, is one of disagreement with the results of the teams' review not a failure to review.

Student's eligibility classification was changed without proper justification.

Petitioner has provided no evidence showing the MDT changed Student's eligibility classification. Instead, Petitioner has established that there was a discussion of Student's eligibility classification that was not resolved. However, it is as Respondent's counsel stated during the prehearing conference, the IEP developed at the June 16, 2011 MDT meeting continues to identify Student as a student with emotional disabilities just as his previous IEPs have identified him.

The IEP does not include sufficient services.

Student's June 16, 2011 IEP increases Student's behavioral intervention services from 90 minutes to 240 minutes per month. The number of hours of special instruction remained constant at 10 hours per month. Petitioner's claim that there are insufficient services on the IEP appears to be based on the recommendations in the comprehensive psychological and functional behavioral assessment and the related testimony indicating Student requires a full time program. In making this claim Petitioner has provided evidence by Dr. Nelson, a clinical psychologist who provided the independent comprehensive psychological and independent functional behavioral assessment authorized by DCPS, and by Ms. Khnaechalern, Petitioner's educational advocate. In reviewing this evidence I find there are some issues with the witnesses' opinion testimony. While both witnesses are clearly knowledgeable and adept within their fields of knowledge they each demonstrated some defensiveness and self-justification which limited the persuasiveness of their testimony, at least to some extent. While I recognize each witness was testifying to what she believed would be beneficial to Student, they each appeared intent on supporting Petitioner's desire to have Student receive more services in a different educational setting. I was not persuaded. I, therefore, find by a preponderance of the evidence that Student needs 240 minutes of behavioral support services per month and 10 hours of specialized instruction per month are sufficient services as written in his current IEP.

On the other hand, there are extensive recommendations in both the comprehensive psychological and functional behavior assessment reports that are not reflected in the June 16, 2011 IEP. These reports and the related testimony provide the only current, expert evidence regarding Student's needs, and I find these reports to be persuasive. For example, the reports recommend, among other things, that Student's teachers provide reinforcement of his on-task behaviors, that his tasks be presented in a short and varied manner and that the teacher monitors

Student closely for understanding and pacing of his assigned tasks. These items, as well as the other recommendations in the reports, are not addressed in student's IEP. In these findings, I recognize that Student is not in an educational environment conducive to the implementation of these recommendations, and I will address the educational environment issue further below under Issue 3. The MDT's failure to address these recommendations reflects the lack of focus on this student's individualized needs. They had no other current evaluations. Yet the team wrote an IEP that appears to be designed to allow it to be implemented in Student's current setting rather than developing an IEP designed to address his needs as established in the independent psychological evaluation and functional behavioral assessment authorized by DCPS. I, therefore, find by a preponderance of the evidence that Student is not receiving sufficient services under the current IEP. Additional accommodations, modifications and classroom behavioral interventions are necessary to allow Student to access his education and receive educational benefit as required by *Rowley, supra*.

The IEP drafted on June 16, 2011 was not finalized, but DCPS has not held a follow-up meeting to finalize the IEP.

This concern was addressed, *supra*, under Issue 1 and need not be addressed again here.

The IEP does not include the provision of a dedicated aide to Student

Because I find below, under Issue 3, that Student is not in an appropriate placement and require his placement to be changed, there is no basis to include a dedicated aide on Student's IEP at this time. In so stating I recognize there have been on-going discussions of the need to provide student such an aide, and he currently has such an aide, in his current placement. As I am finding the placement must change this issue becomes moot.

Issue 3: Whether DCPS denied Student a FAPE by failing to provide Student an appropriate placement in a full time, special education, therapeutic environment.

After a school district develops an IEP that meets all of a student's educational needs, it must identify a placement in which to implement the IEP. The placement is to be in the least restrictive environment in which the IEP can be implemented. 34 C.F.R. §§ 300.114 – 300.118. *See also*, D.C. Code §§ 30.3011 – 30.3013. The removal of a student with disabilities from the regular education environment is to occur “only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2)(ii). Each local education agency must have a continuum of alternative placements, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, available. 34 C.F.R. § 300.115. The placement decision is to be made by a group of individuals, including the parents. 34 C.F.R. § 300.116(a)(1); 34 C.F.R. § 300.327; 34 C.F.R. § 300.501(b) and (c). Moreover, the placement decision must conform with the LRE provisions cited above. 34 C.F.R. § 300.116(a)(2).

The regulations make clear that placement decisions involve more than the determination of the number of hours of service a student is to receive under his/her IEP. That is, the number of hours of service does not address where along the continuum of services as identified under IDEA a student's program will be implemented. *See* 34 C.F.R. § 300.115. Here, DCPS has proposed Student continue in general education classes in his neighborhood middle school, a program and placement in which student has not met with success. While it is true that IDEA provides a clear preference for placement in a student's neighborhood school with his/her age appropriate, non-disabled peers, 34 C.F.R. §§ 300.114 & 300.116, this is not the only placement

available. IDEA includes a continuum of placements ranging from the general education classroom to residential or hospital placements. 34 C.F.R. § 300.115.

The parties have provided me with two options that reflect all or nothing choices. Respondent proposes Student remain in a program and placement of full time inclusion with behavioral support in his neighborhood middle school, and Petitioner proposes a placement in a full time, self-contained, separate, private, special education school with no nondisabled peers. I do not believe either of these choices meet the requirements of IDEA. As stated above, under IDEA the placement is intended to be the least restrictive environment in which a student's IEP can be implemented. In the instant matter, I have found Student's IEP does not provide sufficient services in terms of supplementary aids, accommodations and supports. I also have found that 10 hours of specialized instruction per week and 240 minutes of behavioral support per month appear to be appropriate. With these two findings I am able to conclude that the current placement is not appropriate and that the proposed full time placement is not appropriate. Student requires a placement that will be able to implement a newly drafted IEP including more supports, services and structure. However, Petitioner has not met the burden of persuasion in demonstrating that Student requires a full time, separate private school placement. The evidence for a full time private placement is less persuasive for the reasons noted above than the evidence regarding student's programmatic needs.

I note Respondent provided substantial legal authority to support DCPS' position that the current placement is appropriate. However, as I found the IEP was not appropriate there can be no basis for finding Student's placement appropriate. The placement must be the least restrictive environment in which the IEP can be implemented. 34 C.F.R. §§ 300.114 – 300.118. *See also,*

D.C. Code §§ 30.3011 – 30.3013. As I am requiring the IEP be amended to include some significant changes the current placement by definition will not be able to implement the IEP.¹²

Based on a preponderance of the evidence I find, Student has not been denied a FAPE by DCPS failure to provide him a full time placement in a full time therapeutic setting. I further find Student has been denied a FAPE by DCPS failure to provide him an appropriate placement.¹³

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. DCPS did not deny Student a FAPE by failing to comply with the Hearing Officer Determination dated June 2, 2011.
2. DCPS denied Student a FAPE by failing to develop an appropriate IEP at the June 16, 2011 IEP meeting.
3. DCPS denied Student a FAPE by failing to provide Student an appropriate placement. However, DCPS did not deny student a FAPE by failing to provide him a placement in a full time, special education, therapeutic environment.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

1. Within 10 school days of receipt of this HOD, DCPS is to convene an MDT meeting including Petitioner and her educational advocate, if she chooses to have her in

¹² In making this statement I am distinguishing between placement which includes both hours of service and the continuum of placements required to be available under IDEA and location of service wherein a multiple locations may be able to provide the hours in he program on the continuum.. I am not suggesting that Student cannot attend a DCPS public school and the particular school would be a matter of location as long as the school has the ability to provide the services in the configuration described in my Order, below. 34 C.F.R. §§ 300.114 & 300.116.

¹³ This last determination is mandates, as described above, by my finding that Student's IEP is not appropriate.

attendance, to review and amend Student's IEP. It is required that all personnel required to approve particular services or programs attend this meeting to assure the IEP is completed at this meeting. If, despite the participants efforts, the IEP cannot be completed at this meeting, there may be one follow-up meeting scheduled IEP. The follow-up meeting must be scheduled while all required participants are in attendance at the meeting described at the beginning of this paragraph. Again, all needed personnel must attend this second meeting if it is scheduled. The IEP must be completed no later than 20 school days following the receipt of this HOD.

2. The IEP is to reflect the Comprehensive Psychological Evaluation (with Addendum) and Functional Behavior Assessment discussed herein. The IEP, therefore, shall include, among other items, at least 10 hours of specialized instruction in a highly structured classroom with a small teacher –student ration and a minimum of distractions. This instruction is to occur in a setting outside general education and is to include instruction in reading, mathematics and written language. Other classes may be provided in the general education setting. In all classes, Student is to have close teacher supervision, reinforcement for on task behavior and monitoring to assure he understands assignments, his questions are answered and he is working at a reasonable pace. In addition to the 240 minutes of behavior support per month, Student is to have a behavioral plan that provides immediate response and support to remediate inappropriate behavior in both the general and special education classrooms. IEP Goals are to be reviewed, amended, and/or added or deleted to assure Student's strengths and needs identified in the Comprehensive Psychological Evaluation (with Addendum) dated 5/17/11 are addressed. Other changes may be

made to the IEP to address Student's needs as long as the changes do not change the IEP in contradiction to this Order.

3. Once the IEP is drafted the team, including Petitioner and her educational advocate if she chooses to include her in the meeting, is to select a placement that is able to implement the IEP. This placement must be determined and a prior notice of placement to the selected school issued no later than 10 school days following completion of the IEP.

IT IS SO ORDERED:

October 1, 2011

Date



Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

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 from the date of the Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).