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

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STUDENT HEARING OFFICE
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Parent, on behalf of	)	
	)	
Student,	)	Case Number: 2012-0485
Petitioner,		
		Hearing Officer: James McKeever
v.	)	
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS	)	Hearing Date: September 18, 2012
Respondent.		

HEARING OFFICER DETERMINATION

I. Introduction and Procedural Background

This is a due process proceeding brought in accordance with the Individuals with Disability Education Act 2004 ("IDEA"), and its implementing regulations codified at 20 U.S.C. Section 1400 et seq., against Respondent, District of Columbia Public Schools (DCPS).

Petitioner is the parent of the Student, a year-old boy classified as a Student with a disability who resides in the District of Columbia and currently attends a DCPS High School (High School). The Student is eligible for special education and related services as a student with a disability under the IDEA.

On July 12, 2012, Petitioner filed a Due Process Complaint ("DPC") against DCPS alleging that DCPS failed to offer the Student a free and appropriate public education (FAPE) by: (1) failing to timely and comprehensively evaluate the Student in all areas of his disability despite evidence of repeated and involuntary behavioral outbursts made by the Student during the 2010-2011 and 2011-2012 school years, and (2) by failing

to provide the Student with an appropriate educational placement that included a full-time IEP outside the general education setting for all classes throughout the school day during the 2010-2011 and 2011-2012 school years.

On July 26, 2012, DCPS filed its Response denying the allegations contained in the DPC and asserting that the Student was offered a FAPE for the subject school year and that Student's excessive absences resulted in his failures at school. DCPS also contends that they addressed the Student's excessive absences with telephone calls and letters to the Student's home.

A resolution session was held on July 25, 2012. The parties were unable to resolve the complaint, but continued the resolution period to August 11, 2012. The 45-day timeline began August 12, 2012.

The Prehearing Conference (PHC) was held on August 15, 2012. During the PHC, the parties discussed and clarified the issues and the requested relief. It was agreed that the Due Process Hearing (DPH) would be held on September 18, 2012 and that the five-day disclosures would be filed by September 11, 2012.

The Five-day disclosures were filed as directed on September 11, 2012 and the DPH was held on September 18, 2012. Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-53 were admitted into evidence. Respondent's Exhibits 1-10 were also admitted into evidence.[1]

The following witnesses testified on behalf of the Petitioner: Parent, Clinical Psychologist, Program Specialist (from the Non-Public school), and a court ordered Evaluator.

The following witnesses testified on behalf of the Respondent: School Psychologist, SEC at 1st DCPS High School and a Special Education Teacher at 2nd DCPS High School.

II JURISDICTION

The Due Process Hearing was held in accordance with the rights established under the Individuals with Disability Education Act 2004 ("IDEIA"), and its implementing regulations at 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25. This decision constitutes the Hearing

[1] A list of all Exhibits entered into evidence is annexed hereto at Appendix "B"

Officer's Determination (HOD) pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513. The HOD is due by September 25, 2012.

III. ISSUES PRESENTED

The following issues were certified for adjudication at the due process hearing:

1. Whether DCPS denied the Student a free and appropriate public education by failing to timely and comprehensively evaluate the Student in all areas of his disability despite evidence of repeated and involuntary behavioral outbursts made by the Student during the 2010-2011 and 2011-2012 school years.

2. Whether DCPS denied the Student a free and appropriate public education by failing to provide the Student with an appropriate educational placement that included a full-time IEP outside the general education setting for all classes throughout the school day during the 2010-2011 and 2011-2012 school years.

Petitioner requests an Order directing DCPS to place the Student in a non-public, full-time self contained school that can implement a full time IEP with transportation and compensatory education services.

IV. FINDINGS OF FACT

The Student is a year-old boy who resides in the District of Columbia. The Student is eligible for special education and related services under the IDEA as a child classified with a "other health impairment" (OHI) (Exhibit P-33-IEP dated 10/15/08).

The Student has a diagnosis of Attention-Deficit/Hyperactivity Disorder (ADHD), Anxiety Disorder NOS, Anxiety-Depressive Disorder, a reading Disorder, a mathematics Disorder and an Axis II diagnosis of "Mild Mental Retardation" (Exhibit P-30, page 13, Exhibit P-32, page 23).

On January 16, 2009, when the Student was years old and in the eight grade, DCPS administered a Woodcock-Johnson III Test of Achievement (WJ-III) (Exhibit P-29). The testing results showed that at that time the Student was performing at a 3.3 grade equivalent in reading (broad score) and a 4.1 grade equivalent in math (broad score). (Exhibit P-29, page 3).

During the 2009-2010 school year, the Student entered the 9th grade for the first time at a DCPS High School (1st DCPS High School). During this school year the Student was provided with 15 hours per week of special education services outside the general education setting, 60 minutes per week of speech and language services and 60 minutes per week of behavior support services (Exhibit P-34, IEP dated 2/2/09, page 7).

During the 2009-2010 school year, the Student failed all of his classes, with the exception of gym and "learning lab." The Student was also absent from school 109 days during the school year (Exhibit R-10, page 1).

During the 2010-2011 school year, the Student entered the 9th grade for the second time. The Student's IEP for this school year provided for 21 hours per week of special education services within the general education setting, 60 minutes per week of speech and language services and 60 minutes per week of behavior support services (Exhibit P-35, IEP dated 1/31/11, page 6).

The Student was absent from school 106 days during this school year (Exhibit R-10, page 1). The 1st DCPS High School addressed the Student's excessive absences by following the school's "truancy protocols" (Testimony of SEC from 1st DCPS Highs School). The Student failed all of his classes (Exhibit R-10).

During the 2011-2012 school year, the Student entered the 9th grade for the third time at a different DCPS High School (2nd DCPS High School). The Student entered the 2nd DCPS High School as a result of a safety transfer from the 1st DCPS High School (Testimony of parent). The Student's IEP for this school year[2]provided for 21 hours per week of special education services outside the general education setting, which was approximately 60 percent of the school day (Testimony of School Psychologist). The Student was placed in a general education class with no specialized instruction for the remaining 40 percent of the school day (Testimony of School Psychologist, Exhibit P-37, IEP dated 1/25/11, page 9). The Student was also provided with 60 minutes per month of speech and language services and 60 minutes per week of behavior support services and bus transportation was added to the Student's IEP (Exhibit P-37, IEP dated 1/25/12).

The Student was absent from school during 2011-2012 school for about half the time (Testimony of Special Education Teacher 2nd DCPS High School). The 2nd DCPS High School addressed the Student's absenteeism by calling and sending letters to the Student's home (Testimony of Special Education Teacher from 2nd DCPS High School).

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[2] This is also the Student's current IEP.

On January 4, 2012, DCPS sought the parent's permission to evaluate the Student for his "Triennial" and annual review (Exhibit R-1).

On January 13, 2012 the parent provided DCPS with written consent to evaluate the Student (Exhibit R-2).

The DCPS "meeting notes," dated January 27, 2012, refer to an "evaluation," but no report was offered into evidence (Exhibit R-3).

On May 29, 2012, the 2nd DCPS High School developed a Behavior Intervention Plan (BIP), which targeted the Student's behaviors in school, but did not address the issue of getting the Student to school (Exhibit P-45). DCPS did not conduct a Functional Behavioral Analysis (FBA) before developing the BIP (Testimony of Special Education Teacher at 2nd DCPS High School).

During the 2011-2012 school year, the Student failed all of his classes. (Exhibit R-10).

For the 2012-2013 school year, when the Student was entering the 9th grade for the 4th time, the Student was transferred back to the 1st DCPS High School. The 1st DCPS High School initially rejected the Student, although this school is the Student's neighborhood school (Testimony of parent). After the parent contacted DCPS' Central Office, the Student was provided with Prior Written notice to reenter the 1st DCPS High School (Exhibits P-27, P-28 and P-47).

A comprehensive court ordered psychological evaluation conducted on February 22, 2012, when the Student was 16 years old, indicated that the Student had a full scale IQ of 69, which placed him in the "extremely low range" of intellectual functioning and at the 2nd percentile with respect o his peers (Exhibit P-30, page 5). At this time the Student's academic achievement skills were at the mid-3rd grade level for reading and the mid-4th grade level for math, which is the same level of reading and math skills that the Student achieved on the educational evaluation conducted by DCPS in January 2009, three years earlier (Exhibit P-29, P-30). The Student's "Adaptive Functioning" as measured by the Adaptive Behavior Assessment System-Second Edition (ABASII), placed him in the "extremely low range of functioning with respect to "Communication, Functional Academics and Self Direction" skill areas (Exhibit P-30, page 10). Additionally, the Student's "Social Composite" on the ABAS-II placed him at less than the 1st percentile when compared to his peers. The low Social Composite score means the

Student struggles to "navigate most age and grade level social tasks" (Exhibit P-30, paged 10).

On August 29, 2012 the Student was administered an independent Neuropsychological Evaluation (Exhibit P-32). The testing results from this evaluation were similar to the results from the court Ordered comprehensive psychological evaluation conducted in January 2012, except for the Student's Standard Score (SS) in reading (Exhibits P-30 and P-32). The academic achievement testing in January 2012 utilized the WJ-III. The academic achievement testing in August 2012 utilized the Wechsler Individual Achievement Test-Third Edition (WIAT-3). The Student's SS in reading on WJ-III was 65. The Student's SS in reading on the WIAT-3 was 45 (Exhibits' P-30 and P-32). The difference in the Student's SS is clinically significant. However, the reason for the discrepancy in the testing results is that the WJ-III does not contain the subtest for "Pseudoword Decoding" (Testimony of Clinical Psychologist). Pseudoword decoding requires phonemic awareness skills, which the Student does not have (Testimony of Clinical Psychologist). Hence, the Student's lower SS in reading on the WIAT than on the WJ-III (Testimony of Clinical Psychologist).

Although the Student's Special Teacher at the 2nd DCPS High School testified that the Student was on a 6th grade reading level during the 2011-2012 school year, the testing results of three educational evaluations in evidence demonstrate that the Student's current reading skills are on the mid-3rd grade level (Testimony of Special Education Teacher, Exhibits P-29, P-30 and P-32). As such, I find that the Student is reading at a mid-3rd grade level and not at the 6th grade level.

The Student's behaviors at school include cursing at his teachers, vandalizing school property and leaving class without permission (Testimony of parent, Exhibit P-32, P-42). The Student also engaged in "school avoidant" behaviors because Student cannot face his academic and social/emotional deficits and because the programming for the Student was inappropriate to meet his needs (Testimony of Clinical Psychologist who was qualified as an expert in Adolescent and School psychology). However, when the Student did attend class, he was "almost always disruptive and out of control" (Exhibit P-32, page 18). It is impossible for the Student to function within the general education setting, even with special education services (Testimony of Clinical Psychologist who was qualified as an expert in Adolescent and School psychology).

The Student has severe deficits in verbal memory, visual memory and attention (Exhibit P-32). The Student requires a small class with a high teacher to student ratio and full-time, special education services throughout

the entire school day to address his significant cognitive, academic and social/emotional deficits. The Student also requires a program that includes functional academics and vocational training (Testimony of Clinical Psychologist, Exhibit P-32).

The proposed Private School is a self-contained, non-public school that services students with multiple disabilities (Testimony of Program Specialist). If the Student were to attend this school, the Student would be placed in a self-contained class of 9 students with one certified teacher and two teaching assistants. The curriculum includes English and history for credit. However, at least initially, the Student would not be on a diploma track (Testimony of Program Specialist). The program is designed for career and independent living and includes functional academics, life skills and vocational opportunities. The Private School provides individual and group counseling as well as a full-time behavioral crisis specialist. The Private School will conduct an FBA upon the Student's arrival and then develop a BIP that will address attendance (Testimony of Program Specialist). The Private School is certified by the Office of the State Superintendant for the District of Columbia (OSSE) (Exhibit P-50).

DCPS did not identify any other school that could meet the Student's cognitive, social/emotional and/or behavioral needs.

V. BURDEN OF PROOF

The burden of proof in a special education due process hearing lies with the party seeking relief. DCMR 5-3030.3; see, Schaffer v. Weast, 546 U.S. 49 (2005).

VI. SUMMARY

The Hearing Officer concludes that Petitioner has met her burden of proof with respect to issues 1 and 2 listed above.

VII CREDIBILITY DETERMINATIONS

I find that all of the witnesses at the due process hearing provided credible testimony. However, I do not credit the testimony of the DCPS Special Education Teacher who testified that the Student was performing at 6-grade level in reading because the three educational evaluations entered into the record show that the Student's reading skills are currently at a mid-3rd grade level (Exhibit P-29, P-30 and P-32). Additionally, I do not credit the Special Education Teacher's testimony that the "Student was a good student when he came to school and focused," because the evidence shows that the

Special Education Teacher reported to the Student's evaluator that the "Student was almost always disruptive and out of control in the classroom" (Exhibit P-32, page 18).

VIII. ANALYSIS AND CONCLUSIONS OF LAW

The first issue is whether DCPS denied the Student a free and appropriate public education by failing to timely and comprehensively evaluate the Student in all areas of his disability despite evidence of repeated and involuntary behavioral outbursts made by the Student during the 2010-2011 and 2011-2012 school years.

A free appropriate and public education "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Bd. Of Education v. Rowley, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982). Under Rowley, a child is deprived of a free and appropriate public education: (a) If the LEA violated the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free and appropriate public education, or (b) if the IEP is not reasonably calculated to enable a child to receive educational benefits.

Under the IDEA, the federal government provides funding to states and local educational agencies, including those of the District of Columbia, see 20 U.S.C. § 1401(31), for the education of disabled children. As a condition of receiving that funding, an educational agency must maintain policies and procedures ensuring that a "free appropriate public education is available to all children with disabilities residing in the [jurisdiction] between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "central component of a disabled student's special education under the IDEA" is the individualized education program ("IEP"), which is a written statement setting out the student's "individually tailored goals and the means of achieving them." *District of Columbia v. Doe,* 611 F.3d 888, 892 n.5 (D.C. Cir. 2010) (citing 20 U.S.C. § 1414(d)).

Pursuant to 34 C.F.R. Section 300.304(c)(4),(6) and (7):a child must be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities; .. . In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified....the assessment tools and strategies must provide

relevant information that directly assists persons in determining that the educational needs of the child are provided (Authority: 20 U.S.C. 1414(b)(1)-(3), 1412(a)(6)(B))

Here, the evidence shows that DPCS was aware that the Student had significant academic, behavioral and social/emotional issues during the 2010-2011 and 2011-2012 school years, which were evident by the Student's failing grades, disruptive behavior and excessive absences (Exhibits P-30, P-32, R-10). Significantly, the evidence shows that by the end of the 2011-2012 school year, DCPS was aware that the Student was scheduled to repeat the 9th grade for the 4th time (Exhibit R-10), yet no cognitive and/or achievement testing had been conducted since January of 2009, and at that time DCPS had only administered a WJ-III test of achievement. The evidence shows that had DCPS conducted an appropriate evaluation, DCPS would have learned that the Student had a very low IQ that placed him in the "mildly mentally retarded" range and that the Student's academic achievement skills were on the 3rd and 4th grade level when he should have been a senior in high school (Exhibits P-30 and P-32). Additionally, although the evidence shows that the Student was often absent from school, the evidence also shows that the Student engaged in "school avoidant" behaviors because Student could not face his academic and social/emotional deficits and because DCPS' programming for the Student, which included an inclusion class during the 2010-2011 school and a general education class for 40 percent of the day during the 2011-2012 school year, was inappropriate to meet his needs (Testimony of Clinical Psychologist). Finally, although DCPS contends that an evaluation was conducted in January 2012, no evaluation was offered into evidence. Accordingly, based on these facts, I find that DCPS' failure to conduct an evaluation during the 2010-2011 and 2011-2012 school years resulted in a substantive denial of FAPE for the Student because "[I]n the absence of necessary and appropriate evaluations [DCPS] cannot develop a program that is tailored to the student's unique needs and reasonably calculated to enable him to receive educational benefits. Long v. District of Columbia, 780 F. Supp 2d 49 (D.D.C. 2011).

The second issue is whether DCPS denied the Student a free and appropriate public education by failing to provide the Student with an appropriate educational placement that included a full-time IEP outside the general education setting for all classes throughout the school day during the 2010-2011 and 2011-2012 school years.

A free appropriate and public education "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Bd. Of Education v. Rowley, 458

U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982). Under Rowley, a child is deprived of a free and appropriate public education: (a) If the LEA violated the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free and appropriate public education, or (b) if the IEP is not reasonably calculated to enable a child to receive educational benefits. *Id*

Here, the evidence shows that the Student has severe cognitive, academic and social/emotional deficits and that he has deficits in verbal memory, visual memory and attention (Exhibit P-32). The Student's diagnoses include ADHD, Anxiety Disorder NOS, Anxiety-Depressive Disorder, a reading Disorder, a mathematics Disorder and an Axis II diagnosis of "Mild Mental Retardation" (Exhibit P-30, page 13, Exhibit P-32, page 23). The evidence shows that Student requires a small class with a high teacher to student ratio and full-time special education services, in a segregated setting, throughout the entire school day in order to address his global deficits. DCPS' programming for the Student included an inclusion class during the 2010-2011 school and a general education class for 40 percent of the day during the 2011-2012 school year that did not include any specialized instruction. The evidence shows that the Student's placement during these two school year was inappropriate to meet the Student's needs and resulted in the Student engaging in school avoidant behavior in order not to face his deficits and resulted in the Student repeating the 9th three times (Testimony of Clinical Psychologist). As such, I find that DCPS' recommended placement for the Student during the 2010-2011 and 2011-2012 school was inappropriate for the Student because Student required a full-time IEP outside the general education setting for all classes throughout entire the school day. Accordingly, I find that DPCS' recommended placement during the subject school years did not enable the Student to obtain an educational benefit. Bd. Of Education v. Rowley, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982).

Private School Placement:

The evidence shows that the Student requires a full-time IEP with specialized instruction for all classes outside the general education setting for the entire school day in order to address his academic, behavioral and social/emotional needs. The evidence also shows that the Student requires specialized program that can provide him with functional academics, vocational skills and life skills training (Exhibit P-30, page 1).

The Private School is a self-contained, non-public school that services students with multiple disabilities (Testimony of Program Specialist). The Private School employs teachers who are certified in special education and students are placed in classes with a high teacher to student ratio. The

program is designed for career and independent living and includes functional academics, life skills and vocational opportunities. The Private School will conduct an FBA upon the Student's arrival and then develop a BIP that will address the Student's behavioral issues and attendance issues (Testimony of Program Specialist). The Private School also provides individual and group counseling as well as a full-time behavioral crisis specialist. The Private School is certified by the Office of the State Superintendant for the District of Columbia (OSSE) (Exhibit P-50). Based on these facts, I find that the program and services offered at the Private School are appropriate to meet the Student's needs. Additionally, there was no showing that the Student's needs could be met at a DCPS school or any other school. Finally, the Private School is approved by OSSE.

Further, I find that the Private School is the Student's least restrictive environment (LRE) because the evidence shows that the Student requires a self contained class and that his LRE is a placement outside the general education setting (Testimony of Clinical Psychologist). Accordingly, Petitioner's request for funding for the Student's placement at the Private School for the 2012-2013 school year is granted. Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005).

Equities:

I find that the equities support an award of prospective funding for the Student's placement at the Private School for the 2012-2013 school year because the evidence shows that Petitioner cooperated with the IEP process and no evidence was presented to warrant a denial of prospective funding for the Private School.

Compensatory Education:

Where a school system fails to provide special education or related services to a disabled Student, the Student is entitled to compensatory education, which is the replacement of educational services that the child should have received in the first place. Reid v. District of Columbia, 401 F 3d. 516 (D.C. Cir. 2005).

Petitioner's requests compensatory educational services that include placement at the Private School; funding for a 30 day intensive behavioral transitions program to assist in the Student's transition to the Private School at a cost of and funding for one hour per week of behavioral support, mentoring and tutoring for three months at a cost of As indicated above, upon admission, the Private School will conduct an FBA and then develop a BIP that will address the Student's behavioral issues as well as his

attendance issues. The Private School also provides individual and group counseling as well as a full-time behavioral crisis specialist. As such, I find that the Private School's program, which also includes vocational and life skills training would address the compensatory educational services owed to the Student based on DCPS' denial of FAPE during the 2010-2011 and 2011-2012 school years. As such, Petitioner's request that any compensatory educational services owed to the Student based on DCPS' denial of FAPE be addressed by the Student's placement at the proposed Private School is granted.

Transportation:

DCPS shall provide the Student with appropriate transportation to and from the Private School during the 2012-2013 school year.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 23rd day of September 2012, it is hereby

ORDERED that DCPS shall fund the Student's placement at the Private School for the 2012-2013 school year and provide transportation to and from school.

Dated September 23, 2012

By: /s/ James McKeever
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer's Determination shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. Section 1415(i)(2).

Distributed to:

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