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

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

STUDENT,¹)
through the Parent,)
)
Petitioner,)
)
v.)
)
District of Columbia Public Schools)
)
Respondent.)

Date Issued: August 31, 2011
Hearing Officer: Virginia A. Dietrich

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of _____ year old Student, filed a due process complaint notice on June 17, 2011 alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”). At the time of the alleged violations, Student was a child with a Specific Learning Disability who was receiving seven hours/week of specialized instruction in reading and writing in the general education setting.

Petitioner alleged that Student had missed 7 days of school due to a _____ and during that time, DCPS had failed to provide Student with an appropriate interim alternative educational setting (“IAES”). Petitioner also alleged that Student’s two suspensions in March 2011 and May 2011 were sufficient indicia of behavioral problems to warrant that a Functional Behavioral Assessment (“FBA”) be completed and a BIP (“Behavioral Intervention Plan”) be developed to address the behaviors that led to the suspensions.

DCPS asserted that any missed instruction due to Student’s suspension in May 2011 had no negative impact on Student’s academic performance and achievement, as Student had completed the school year with grades of A’s and B’s, and one grade of C+ in a subject area in which Student did not require specialized instruction. DCPS also asserted that Student was not a behavior problem in school and that the two incidents that led to suspension were not related to

¹ Personal identification information is provided in Appendix A.

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his disability and represented isolated behavioral incidents that did not warrant a FBA and BIP. DCPS denied that Student had been denied a FAPE and that Student was entitled to compensatory education.

Subject Matter Jurisdiction

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

Procedural History

The due process complaint was filed on 06/17/11. This Hearing Officer was assigned to the case on 06/20/11. A resolution meeting took place on 07/05/11 at which time the parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period expired on 07/17/11, the 45-day timeline to issue a final decision began on 07/18/11, and the final decision is due on 08/31/11 for issues of a non-disciplinary nature (first issue). With respect to the issues in the complaint of a disciplinary nature (second issue), the final decision is due on the 10th school day following the 20th school day, which is 10/04/11.

The due process hearing was a closed hearing that took place on 08/16/11. Petitioner was represented by Roberta Gambale, Esq. and DCPS was represented by Linda Smalls, Esq. Neither party objected to the testimony of witnesses via telephone. Petitioner participated in the hearing in person.

Petitioner presented two witnesses: Petitioner; and Petitioner's educational advocate. DCPS elected not to present any witnesses.

Petitioner's disclosures dated 08/09/11, containing a witness list and Exhibits P-1 through P-40, were admitted into evidence without objection. DCPS' disclosures dated 08/09/11, containing a witness list and Exhibits R-01 through R-13, were admitted into evidence without objection.

The issue of whether DCPS denied Student a FAPE by failing to discuss or provide a change in the location of services in response to safety concerns raised by Petitioner at the 05/13/11 meeting, was withdrawn by Petitioner and dismissed with prejudice.

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

Whether DCPS denied Student a FAPE by failing to provide an appropriate interim alternative educational setting ("IAES") after Student's 10th day of suspension in May 2011.

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Whether DCPS denied Student a FAPE by failing to conduct a FBA and develop a BIP in response to Student's increasing problem behaviors that resulted in suspensions in March 2011 and May 2011.

For relief, Petitioner requested a finding that Student was denied a FAPE on each of the issues presented, that an Order be issued for DCPS to review the independent FBA that will be completed pursuant to an authorization for funding issued by DCPS on 07/05/11, and an award of compensatory education in the amount of 10.5 hours of tutoring to compensate Student for missed specialized instruction when he was _____ l for 7 days in May 2011 and 7 hours of counseling services to help Student cope with the problems that led to the suspensions.

Findings of Fact

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

#1. Student, now age _____ began the 2010-2011 school year at a public high school in the District of Columbia with an Individualized Education Program ("IEP") dated 12/08/09 that is not in the record. Student's IEP was revised on 10/01/10. The 10/01/10 IEP classified Student with a Specific Learning Disability and prescribed 3.5 hours/week of specialized instruction inside of general education and 3.5 hours/week of specialized instruction outside of general education. The IEP contained IEP goals in the areas of reading and written expression, but did not contain IEP goals in mathematics and the IEP did contain any behavioral support services. Petitioner signed the IEP, indicating her agreement with its contents.²

#2. Student's IEP was revised again on 04/29/11. The 04/29/11 IEP again classified Student with a Specific Learning Disability, and prescribed 7.5 hours/week of specialized instruction inside general education with IEP goals in the areas of reading and written expression only. The IEP did not contain any behavioral support services and Petitioner signed the IEP, indicating her agreement with the contents of the IEP.³ At the IEP meeting on 04/29/11, no one mentioned the need for a FBA even though Student's behaviors were discussed.⁴

#3. Student was _____ from school for 6 school days in March 2011 as a result of his participation in a cafeteria brawl between rival neighborhood boys.⁵ On 05/02/11, Student was able to exercise his discretion and walk away from a confrontation with a rival neighborhood boy that occurred at school. On 05/03/11, Student elected to confront a boy who verbally approached him and a _____ erupted.⁶ That altercation, also in the cafeteria and over neighborhood rivalry, caused Student to be _____ from school for 11 days, from 05/04/11 – 05/19/11. The _____ behavior that led to the May 2011 _____ was not a manifestation of Student's disability.⁷

² P-20.

³ P-3.

⁴ Advocate.

⁵ P-14, Petitioner.

⁶ P-1, Judicial notice of DCPS 2010-2011 school calendar.

⁷ R-2.

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#4. While on _____ from school in May 2011, DCPS provided Petitioner with educational packets from Student's teachers so that Student could complete class work at home during the _____ term.⁸

#5. Other than the two _____ that Student incurred due to _____ with neighborhood rivals at school in 2011, Student had no other behavioral incidents of mention and was generally described as able to get along with staff and students. Student only had one conflict with a special education teacher and that was resolved early in the year.⁹ Prior behavioral support services for Student had been terminated in Sep 2010 because Student was no longer interested in receiving the services and Petitioner agreed with the discontinuation of behavioral support services because Student had shown that he had a handle on his emotions.¹⁰

#6. The first discussion about DCPS conducting a FBA occurred at the resolution meeting on 07/01/11, which was a date after the complaint was filed. As a result of Petitioner's request for a FBA on 07/01/11, DCPS issued a letter authorizing funding for an independent FBA on that same day and agreed to convene a Multidisciplinary Team to review the assessment results and determine if a BIP is necessary.¹¹

#7. Student's final grades for the 2010-2011 school year consisted of "A" in Spanish, Learning Lab and Phys Ed II; "A-" in English II-A, World History Parts I and II, Algebra II-A; "B+" in English III-B, Chemistry I-A, Chemistry I-B; "B" in Health Education; and "C+" in Algebra II-B.¹² Student's ability to understand and perform Algebra II level math was so superior in April 2011 that he could have been in an Honors class.¹³ Student's grade in Algebra II-B dropped because he received an "F" on the final exam, but when allowed to take the final exam again, Student received a grade of "C."¹⁴

Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide

⁸ Petitioner.

⁹ R-8, P-23, Advocate.

¹⁰ P-21, Petitioner.

¹¹ R-11, P-11.

¹² R-10.

¹³ R-7.

¹⁴ Petitioner.

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

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

The first issue to be determined is whether DCPS denied Student a FAPE by failing to provide an interim alternative educational setting (“IAES”) after Student’s 10th day of suspension in May 2011.

Petitioner alleges that Student was suspended for 5 school days in March 2011 and then again for 12 school days in May 2011 and that for a period of 7 school days, Student was not provided with an appropriate interim alternative educational setting as is required by 34 C.F.R. 530(b)(2).

Pursuant to 34 C.F.R. 300.536, when a child with a disability is removed from school for more than 10 consecutive school days or 10 cumulative 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, a change of placement occurs. However, for disciplinary changes of placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child’s disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities except that a child with a disability who is removed from his current placement must continue to receive educational services so as to enable the child to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the child’s IEP, although in an interim alternative educational setting; and receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavioral violation so that it does not recur. 34 C.F.R. 300.530(2)(c), 300.530(d). And, if the child’s removal is a change of placement under 34 C.F.R. 300.536, the child’s IEP team determines appropriate services. 34 C.F.R. 300.530(d)(5).

“The touchstone of ‘educational placement’ is not the location to which the student is assigned but rather the environment in which educational services are provided. To the extent that a new setting replicates the educational program contemplated by the student’s original assignment and is consistent with the principles of mainstreaming and affording access to a FAPE, the goal of protecting the student’s educational placement served by the stay-put provision appears to be met. Likewise, where a change in location results in a dilution of the quality of a student’s education or a departure from the student’s least restrictive-compliance

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setting, a change in educational placement occurs.” *AW v. Fairfax County School Board*, 41 IDELR 119 (2004).

In the present case, the IAES provided to Student after Student’s 10th cumulative day of suspension in May 2011, was home. There was no evidence in the record that the at home after 05/09/11 was not a team decision; i.e., that Petitioner did not agree that home was the location where services could or should be provided.

Since Student’s behavior that led to the May 2011 suspension was determined not to be a manifestation of his disability, DCPS was required to provide Student with educational services that would enable him to participate in the general education curriculum and progress towards IEP goals, although in another setting. For Student, that meant receiving 7.5 hours/week of specialized instruction in reading and written expression in the general education setting. In the present case, DCPS provided Student with class work during his suspension. Petitioner failed to show that the educational packets sent home to Student had not been modified by the special education teachers to enable Student to access the general education curriculum. And even if Petitioner had shown that the educational materials had not been modified, Petitioner failed to prove a nexus between the lack of approximately 10 hours of specialized instruction in reading and written expression in general education and the alleged harm of Student’s second semester mathematics grade dropping from “A” to “C.” Firstly, Student didn’t even have specialized instruction in mathematics; therefore, it was impossible to prove even a remote nexus between the lack of specialized instruction and the lower grade. Secondly, a grade of “C” is an average grade, not a failing grade. Thirdly, Student’s level of performance in mathematics was so superior in April 2011 that he could have participated in an Honors program. Petitioner’s argument lacked merit. Petitioner failed to meet her burden of proof.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to conduct a FBA and develop/update Student’s BIP as a result of Student’s increasing problem behaviors that resulted in suspensions in March 2011 and May 2011.

The absolute right to a FBA and BIP attaches under the disciplinary provisions of the IDEA when a behavior has been determined to be a manifestation of a child’s disability. 34 C.F.R. 300.530(f). This right did not attach to Student because his behavior that led to his in May 2011 was determined not to be a manifestation of his disability.

There are two other instances when a FBA and BIP *could* be warranted, i.e., (a) when a student has been removed from his current placement and it is “appropriate” for the assessments to be done to prevent the behavior from occurring again, pursuant to 34 C.F.R. 300.530(f), 300.530(d); and (b) where the IEP Team must, in the case of a child whose behavior impedes that child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior, pursuant to 34 C.F.R. 300.324(a)(2).

The Hearing Officer determines that it was not a denial of a FAPE for DCPS not to have conducted a FBA and develop a BIP following Student’s suspension in May 2011 for the following reasons: (1) Student’s IEP did not require behavioral support services; in fact, behavioral support services had been discontinued in Sep 2010 at the behest of Student and

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Petitioner; (2) Student was able to walk away from an encounter with an adversary over the same subject matter that led to his just the day before the suspension in May 2011, which indicated his ability to make proper and conscious choices; (3) at no time prior to 07/01/11 (the resolution meeting) did Petitioner ever request that a FBA be conducted and when it was requested on 07/01/11, DCPS promptly complied by providing authorization for an independent FBA and agreeing to convene a meeting to review it and develop a BIP if necessary; and (4) Student's grades were outstanding for the 2010-2011 school year and it was evident that the two altercations that Student had in school over neighborhood rivalry did absolutely nothing to negatively affect his grades or impede his learning. Petitioner failed to meet her burden of proof on this issue.

ORDER

The complaint is **DISMISSED** with prejudice. Petitioner failed to meet her burden of proof on any of the issues presented.

All relief requested by Petitioner is **DENIED**.

IT IS SO ORDERED.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: August 31, 2011

/s/ Virginia A. Dietrich
Hearing Officer