

**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: September 25, 2011

Hearing Officer: Virginia A. Dietrich

2011 SEP 26 AM 9:11
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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of _____ year old Student, filed a due process complaint notice on June 12, 2011 alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

Petitioner alleged that DCPS had failed to conduct a Functional Behavioral Assessment ("FBA") during the 2010-2011 school year to address Student's behaviors of chronic avoidance of class work, that DCPS had failed to provide Student with sufficient behavioral support services that included more counseling services and a Behavior Intervention Plan ("BIP"), and that DCPS had failed to provide Student with an appropriate placement during the school year because the services provided were insufficient for Student to show academic growth and pass all of her classes.

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.").

¹ Personal identification information is provided in Appendix A.

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Procedural History

The due process complaint was filed on 07/12/11. This Hearing Officer was assigned to the case on 07/14/11. No resolution meeting took place in this case. The 30-day resolution period expired on 08/11/11, the 45-day timeline to issue a final decision began on 08/12/11, and the final decision was due on 09/25/11.

The due process hearing was a closed hearing that took place on 09/13/11. Petitioner was represented by Maria Mendoza, Esq. and DCPS was represented by Daniel McCall, Esq. Neither party objected to the testimony of witnesses via telephone. Petitioner participated in the hearing by telephone.

Petitioner presented three witnesses: Petitioner; Petitioner's educational advocate who qualified as an expert in developing and reviewing compensatory education plans for special education students; and an expert in clinical psychology. DCPS presented two witnesses: special education teacher ("SET") and case manager at _____ and social worker at _____.

Petitioner's Five-Day Disclosure was dated 08/30/11 and contained Exhibits P-1 through P-33. Petitioner's Exhibits P-2, P-4, and P-12 were not admitted into evidence; P-5, P-6, P-9, P-21, P-23, P-24 and P-26 were admitted into evidence over objection; Page 1 of P-15 was admitted into evidence over objection and the remainder of the exhibit was not admitted into evidence; and all other exhibits were admitted into evidence without objection.

DCPS' Disclosure Statement dated 08/29/11, containing Exhibits R-1 through R-9, was admitted into evidence without objection.

Both parties waived an opening statement due to time constraints imposed by the considerable amount of time spent trying to settle the case prior to the start of the hearing. Parties elected to present written closing arguments no later than 09/16/11. Petitioner's closing argument was filed on 09/16/11 and DCPS elected not to file one.

The issue of whether DCPS denied Student a FAPE by failing to evaluate Student by failing to conduct a neuropsychological evaluation during the 2010-2011 school year was withdrawn by Petitioner and was dismissed without prejudice.

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

Issue #1 – Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability; specifically, by failing to conduct a Functional Behavioral Assessment ("FBA") during the 2010-2011 school year.

Issue #2 – Whether DCPS denied Student a FAPE by failing to provide Student with an Individualized Education Plan ("IEP") with sufficient behavioral support services during the 2010-2011 school year; specifically, by failing to provide more than 30 minutes/month of behavioral support services and a Behavior Intervention Plan ("BIP").

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Issue #3 – Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate school placement during the 2010-2011 school year; specifically, by failing to provide sufficient services for Student to show academic growth and pass all of her classes.²

For relief,³ Petitioner requested a finding that Student was denied a FAPE on each of the issues presented, that DCPS convene a meeting within 20 calendar days of receipt of the independent FBA to review and revise Student's IEP based on the evaluation and discuss an appropriate placement, and that Student receive an award of compensatory education for the inappropriate IEP and placement and DCPS' failure to conduct a FBA and complete a BIP during the 2010-2011 school year.

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, age _____ attended _____ during the 2010-2011 school year.⁴ The IEP that Student began the school year with is not part of the record.

#2. On 01/18/11, the Multidisciplinary Team ("MDT") met and developed an IEP that prescribed 15 hours/week of specialized instruction outside of general education, 30 minutes/week of speech-language pathology services and 30 minutes/month of behavioral support services. Student's disability of Specific Learning Disability impacted her participation in the general education curriculum in the academic areas of reading, mathematics and written expression and in the related services areas of speech-language and emotional, social and behavioral development.⁵

#3. During the 2010-2011 school year, Student exhibited many behaviors that interfered with learning. Most notably, Student had a behavior pattern that was extensive and occurred multiple times per week that consisted of her complaining about physical ailments to avoid class work that was too difficult.⁶ Student would complain of a headache or stomachache, and have anxiety attacks and begin breathing deeply; however, Student did not have any physical disability causing the headaches or stomachaches. These behaviors always enabled Student to leave class and call her mother. On only one such occasion did Petitioner pick Student up from

² The specific allegations in the complaint pertained to the school that Student attended during the 2010-2011 school year even though Petitioner alleged that DCPS had denied Student a FAPE during the 2010-2011 and 2011-2012 school year. At the time of the prehearing conference, Student still attended that school. At the time of the due process hearing, Student had relocated to another public school and Petitioner sought to present evidence of the inappropriateness of the placement for the 2011-2012 school year. Since DCPS was not on notice of Petitioner's intent to introduce evidence of the inappropriateness of the placement at the new school, Petitioner's claim of the inappropriateness of the placement during the 2011-2012 school year was dismissed without prejudice. See 34 C.F.R. 300.511(d), which states that no new issues may be raised at the due process hearing.

³ Petitioner withdrew her request for an independent neuropsychological evaluation, and Petitioner withdrew her request for a FBA because DCPS had issued authorization for an independent FBA.

⁴ P-6, P-7.

⁵ P-7.

⁶ SET, social worker, Petitioner.

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school and then it was late in the afternoon.⁷ On all other occasions, Petitioner told Student to stay in school because Student had not been sick when she left home in the morning.⁸ Student also exhibited other behaviors in class that interfered with learning such as putting her head down on the desk and going to sleep to avoid class work that was too difficult. These behavior patterns were first noticed by the special education teacher in December 2010 and these behaviors never emerged when Student was having fun or during lunch or recess.⁹ These behaviors were always induced by class work that was too difficult or Student's concerns about her mother's health problems. Student also exhibited defiance about picking up her head off the desk and uniform adjustments, but infrequently.¹⁰ Student did have a high rate of unexcused absences that also likely interfered with her academic performance;¹¹ however, the main culprit for Student's behaviors was the difficulty of the schoolwork.¹²

#4. On 05/16/11, the MDT met and the school expressed concerns about Student giving up easily and having grades of "F" throughout the school year in her core academic courses.¹³ The level of services in Student's IEP was increased to 15 hours/week of specialized instruction outside of general education, 5 hours/week of specialized instruction within the general education setting, 60 minutes/week of speech and language services and 60 minutes/month of behavioral support services.¹⁴ _____ acknowledged that it was unable to provide the level of services prescribed in Student's 05/16/11 IEP; specifically, the school indicated that it could not provide the level of pull-out (outside of general education) services that Student required.¹⁵

#5. A Functional Behavioral Assessment ("FBA") is an evaluation that is conducted on children who experience difficulty with behavior in school. The FBA identifies behaviors that may interfere with the child accessing the curriculum such as talking out of turn, hyperactivity, leaving the classroom, withdrawal, or refusing to do academic work. The FBA is a useful evaluation tool because it identifies the antecedents of behavior, the consequences of the behavior that were noted and the demeanor of the individual when reprimanded or not reprimanded, cues on what to look out for, how to predict behaviors and how to curtail behaviors.¹⁶ The FBA is useful in determining patterns of behavior and useful in constructing a BIP.¹⁷ The evaluation consists of direct observations of the child in various school settings and it can be a formal evaluation or informal evaluation conducted by the staff at the school.¹⁸

⁷ SET, social worker.

⁸ Petitioner, social worker.

⁹ SET, P-19.

¹⁰ Social worker.

¹¹ P-20, R-9, SET.

¹² SET, social worker.

¹³ P-19, SET.

¹⁴ P-6.

¹⁵ SET.

¹⁶ SET, Clinical psychology expert.

¹⁷ Social worker.

¹⁸ Clinical psychology expert.

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#6. Student's 01/18/11 IEP prescribed 30 minutes/month of behavioral support services; however, Student's was seen much more frequently by the social worker at school; at least once every other week formally and many times throughout the school day.

#7. Although the school staff conducted informal assessments of Student's behaviors and were able to determine the patterns of behavior that resulted in Student leaving the classroom, the school did not conduct a formal FBA or develop a formal BIP to address Student's behaviors. The social worker did advise teachers on strategies on how to keep Student in class and encourage Student not to worry about issues occurring at home, but these strategies were not part of Student's IEP.¹⁹

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 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 evaluate Student in all areas of suspected disability; specifically, by failing to conduct a Functional Behavioral Assessment ("FBA") during the 2010-2011 school year.

Petitioner met her burden of proof on this issue. A FBA and BIP may be warranted 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. See 34 C.F.R. 300.324(a)(2).

¹⁹ SET.

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During the 2010-2011 school year, the school did not conduct a formal FBA or develop a formal BIP to address Student's chronic behaviors, although the school did conduct an informal FBA and the social worker discussed strategies with teachers on how to keep Student in class and encourage her not to worry about what was going on at home. These strategies were used by staff, but were not included as part of Student's IEP.²⁰

The significance of conducting a formal FBA as opposed to an informal FBA, is that the IEP Team would have convened and reviewed the FBA evaluation data pursuant to 34 C.F.R. 300.305(a), which undoubtedly would have resulted in an increase in the level of services well before May 2011. The gist of the credible testimony from DCPS' witnesses was that Student feigned illnesses multiple times per week to get out of class in order to avoid class work that was too difficult. The school social worker opined that the FBA and BIP would not have curtailed Student's behaviors, and that is probably accurate; however, the formal evaluation and review of the formal evaluation would have indicated a need for more intensive specialized instruction.

DCPS' failure to develop a formal FBA and review it as a team resulted in Student being denied a FAPE. Student suffered educational harm. The patterns of behavior that interfered with Student remaining in the classroom in order to access learning were identified by school staff as early as December 2010.²¹ Student's services were not increased until May 2011 and when Student's services were increased, the school was no longer appropriate for her because the school could not provide the level of services that Student needed.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an IEP with sufficient behavioral support services during the 2010-2011 school year; specifically, more than 30 minutes/month of behavioral support services and a Behavior Intervention Plan ("BIP").

Petitioner met her burden of proof on this issue. Student's behavior problems that took her out of the classroom and made her unavailable for learning were chronic; occurring multiple times per week. And, although there was credible testimony that Student received much more behavioral support services than was indicated on her IEPs, "the IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988) and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

The Hearing Officer determines that 30 minutes/month behavioral support services on the 01/18/11 IEP and 60 minutes/month of behavioral support services on the 05/16/11 IEP were insufficient to meet address Student's emotional needs. Student's emotional response to stress over difficult class work and issues at home was to feign illness and leave the classroom multiple times per week. On one occasion when tornadoes were being discussed in class, Student raised her hand and said she had a headache.²² This incident underscored the severity and magnitude of Student's fright and flight responses to stress induced in the classroom. Emotionally, Student

²⁰ Finding #7.

²¹ Finding #3.

²² SET.

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needed more intensive behavior support services than was indicated in either IEP during the 2010-2011 school year. Student was denied a FAPE. She suffered educational harm because she was not available for learning due to her inappropriate behavioral responses induced by ever-present academic or emotional distress.

Likewise, the Hearing Officer determines that Student could have benefitted from a formal BIP early on in the academic year. Student's pattern of behavior of avoiding the class work by feigning illness to leave the class, was identified by school staff in December 2010. A formal BIP would have been appropriate to develop strategies that could be used consistently to curtail Student's behaviors and help make her more available for learning. DCPS' failure to develop a BIP resulted in Student being denied a FAPE.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate school placement during the 2010-2011 school year; specifically, by failing to provide sufficient services for Student to show academic growth and pass all of her classes.

Petitioner also met her burden of proof on this issue. The evidence was clear that Student struggled mightily with the academic curriculum with an IEP that prescribed 15 hours/week of specialized instruction outside of general education. Multiple times during the week Student would feign illness in order to leave class or put her head down on her desk and go to sleep in order to avoid class work that was too difficult for her. Student's grade report for the school year reflected many quarterly grades of "F."²³

When Student's specialized instruction service hours were finally increased in May 2011, the school acknowledged that it was unable to provide the level of services required by Student's 05/16/11 IEP. DCPS should have convened an IEP Team meeting and increased the level of services long before May 2011. There was credible evidence in the record that Student's pattern of avoiding class when the work was too difficult was identified by school staff as early as December 2010. And, if Student's services had been increased earlier in the year, DCPS would have known that _____ was an inappropriate placement for Student because the level of services that Student needed in order for her to access the curriculum could not be provided at that school.

The evidence was clear that Student could not access the curriculum without more intensive services. Small group settings helped abate Student's problem behaviors, but did not eradicate it.²⁴ It is more likely than not that the level of services and placement both were insufficient and inappropriate for the entire 2010-2011 school year. There was credible evidence in the record that the school could only provide a maximum of 5 hours/week of specialized instruction outside of general education and it is more likely than not that Student did not receive the 15 hours/week of specialized instruction outside of general education throughout the school year that her IEPs called.²⁵ The school acknowledged that it could not provide the level of pull-out services in Student's 05/16/11 IEP; however, this was the same level of pull-out services

²³ Findings #3, #4.

²⁴ SET.

²⁵ Finding #4.

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required by Student's previous IEP dated 01/18/11, i.e., 15 hours/week of specialized instruction outside of general education. Student was denied a FAPE and the harm was that Student was unavailable for learning due to the insufficiency of the services, which undoubtedly heavily contributed to the quarterly grades of "F" that populated her report card for the academic year.²⁶

Student suffered educational harm due to the inappropriate placement and not receiving sufficient special education services during the 2010-2011 school year. "When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place." *Reid v. District of Columbia*, 43 IDELR 32 (2005).

An expert on compensatory education plans for special education students, after review of Student's records and upon belief that Student did not receive sufficient special education services for the 2010-2011 school year, opined that approximately 100 hours of tutoring would help Student make academic gains and this calculation was based on the amount of services that Student had missed.

ORDER

(1) DCPS shall convene a meeting within 20 calendar days of receipt of the independent FBA to review and revise Student's IEP based on the evaluation, and discuss an appropriate placement; and

(2) DCPS shall fund 100 hours of independent tutoring and provide authorization for the tutoring no later than 10 business days following the date of this Order.

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: September 25, 2011

/s/ Virginia A. Dietrich
Hearing Officer

²⁶ Finding #4.