

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,) Date Issued: September 11, 2011
)
) Hearing Officer: Virginia A. Dietrich
v.)
)
District of Columbia Public Schools)
)
Respondent.)
)
)
)

HEARING OFFICER DETERMINATION

Background

Petitioner, the grandmother of _____ year old Student, filed a due process complaint notice on June 28, 2011, alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

Petitioner alleged that the District of Columbia Public Schools ("DCPS") had failed to provide Student with an Individualized Education Program ("IEP") on June 23, 2011 with 100% specialized instruction outside of general education in a special education school with a small teacher to student ratio and an IEP with an adequate transition statement; and that DCPS had failed to convene a Manifestation Determination Review ("MDR") meeting in May 2011 after Student had been _____ from school for more than 10 days during the school year. Petitioner sought a full-time (100% specialized instruction) IEP and placement in a private school as well as compensatory education for missed educational services while Student was suspended.

DCPS asserted that Student's educational needs did not warrant a full-time 100% specialized instruction IEP and setting, that Petitioner waived revision of the transition statement on Student's June 23, 2011 IEP by agreeing to conduct the IEP meeting without the benefit of a completed independent vocational assessment, and that DCPS was not required to hold a MDR

¹ Personal identification information is provided in Appendix A.

Hearing Officer Determination

meeting in May 2011 because Student had not been suspended for more than 10 days during the school year. DCPS asserted that Petitioner was not entitled to any of the relief requested.

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 06/28/11. This Hearing Officer was assigned to the case on 06/29/11. A resolution meeting took place on 07/11/11 at which time the parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The issues being litigated were both disciplinary and non-disciplinary in nature. The 30-day resolution period for the non-disciplinary allegation expired on 07/28/11, the 45-day timeline to issue a final decision began on 07/29/11, and the final decision was due on 09/11/11. With respect to the disciplinary issue, the final decision was due on the 10th school day following the 20th school day, i.e., 10/03/11.

The due process hearing was a closed hearing that took place on 08/23/11 and 09/06/11. At the hearing on 08/23/11, Petitioner was represented by Roberta Gambale, Esq. and DCPS was represented by Kendra Berner, Esq. At the hearing on 09/06/11, Petitioner was represented by Roberta Gambale, Esq. and DCPS was represented by Tanya Chor, Esq. Neither party objected to the testimony of witnesses via telephone. Petitioner participated in the hearing in person on 08/23/11 and by telephone on 09/06/11.

Petitioner presented four witnesses: Petitioner; Petitioner's educational advocate; Psychologist; and Director of the School. DCPS presented five witnesses: DCPS school psychologist; Special Education Coordinator ("SEC") at School; Dean of Students at Public Charter School PCS"); Teacher at and SEC at PCS.

Petitioner's disclosures dated 08/16/11, containing a witness list and Exhibits P-1 through P-16, were admitted into evidence without objection. DCPS' disclosures dated 08/16/11, containing a witness list and Exhibits R-01 through R-11, were admitted into evidence without objection.

Parties agreed to the following stipulation of facts:

- 1) DCPS is the local education agency for PCS; and
- 2) June 22, 2011 was the last day of the 2010-2011 school year.

Hearing Officer Determination

The issue of whether DCPS denied Student a FAPE by failing to award Student compensatory education when on 06/23/11, DCPS determined that Student was not entitled to compensatory education as a result of DCPS' failure to timely conduct evaluations, was withdrawn by Petitioner. DCPS issued authorization for 40 hours of compensatory education, which made this issue moot.

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

Whether DCPS denied Student a FAPE when the Multidisciplinary Team ("MDT") met on 06/23/11 and failed to provide Student with an IEP with 100% specialized instruction in a special education school with a small student to teacher ratio and an IEP with an adequate transition statement.

Whether DCPS denied Student a FAPE by failing to convene a MDR meeting and provide Student with educational services for a period of 10 days following Student's 10th day of suspension from school in May 2011.

For relief,² Petitioner requested a finding that Student was denied a FAPE on each of the issues presented, a finding that Student requires an IEP with 100% specialized instruction outside of general education with placement at a private school, and an award of compensatory education for DCPS' failure to conduct a MDR meeting and provide Student with 10 days of services while Student was suspended.

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 is a special education student who attended the _____ grade during the 2009-2010 school year and for the _____ grade during the 2010-2011 school year.³ DCPS is the local education agency for _____ PCS.⁴ The school provides services to students in the 9-12th grades.⁵

#2. Pursuant to a Hearing Officer Determination dated 06/07/11, it was the responsibility of Petitioner to provide a copy of several independent evaluations to DCPS so that DCPS could convene a meeting to review the independent evaluations and revise Student's IEP based on the results of the independent evaluations.⁶ DCPS convened this meeting on the mutually agreeable date of 06/23/11 to review the completed independent evaluations and revise Student's IEP based on the results of the evaluations. Prior to the scheduling of a meeting, DCPS asked Petitioner for a copy of the independent vocational assessment so that it could be reviewed at the

² Petitioner withdrew her request for relief that DCPS develop a Behavior Intervention Plan ("BIP") because DCPS had completed a BIP and the relief was moot.

³ Petitioner, SEC at current school.

⁴ Stipulation #2.

⁵ Math teacher at current school.

⁶ P-14.

Hearing Officer Determination

meeting. Petitioner informed DCPS that the independent vocational evaluation had not been completed and Petitioner elected to hold the meeting on 06/23/11, thereby waiving review of the independent vocational evaluation and revision of the IEP based on the results of the independent vocational evaluation.⁷

#3. An independent comprehensive psychological evaluation dated 05/27/11, indicated that Student's overall cognitive ability was in the Average range of functioning. Student's Verbal Comprehension Index ("VCI"), i.e., the ability to access information stored in long-term memory, process verbal information and apply verbal skills to solve new problems, was in the Average range. Student's Perceptual Reasoning Index ("PRI"), i.e., one's visual, perceptual, and spatial capability and the ability to form abstract concepts and relationships without the use of words, was in the Average range. Student's Working Memory Index ("WMI"), i.e., an estimate of one's short-term auditory memory, attention, concentration, and rote memorization abilities, was in the Average range. Student's Processing Speed Index ("PSI"), which measures one's fine motor abilities, visual-motor coordination, and dexterity, and visual-discriminative abilities within a set period of time, was in the Below Average range.⁸ An appropriate educational accommodation for below average PSI is permitting extra time to complete tests and class assignments.⁹

#4. The independent comprehensive psychological evaluation dated 05/27/11, revealed that Student's academic functioning was Average in Oral Language, Average in Basic Reading, Average in Written Expression, Below Average in Mathematics, and Below Average in Math Fluency, and Student's ability to integrate visual and motor skills was in the Below Average range.¹⁰ This evaluation was used in the development of Student's 06/23/11 IEP, as was an independent Functional Behavior Assessment conducted in May 2011.¹¹

#5. As of 06/23/11, Discovery Education Assessments conducted by the school indicated that Student had made progress in all subjects except math. Student's reading comprehension was at the 12th grade level while he was in the 10th grade.¹² Student's BASC scores indicated that he had made progress in every subject and reached a level of Proficient in reading and that he had made progress in math consistently during the 2010-2011 school year and ended at a Basic level of performance.¹³ Math was the only academic area that Student struggled with.¹⁴

#6. During the 2010-2011 school year, Student had the potential to complete math assignments, but he was easily distracted and required redirection on a daily basis. Student received special education instruction in his math class (geometry and SAT math prep), and if Student studied, he did well. When motivated, Student was able to adequately complete the mathematics academic course work. For example, in math class during the 2010-2011 school year, Student's grades were poor during the first three quarters because Student did not do

⁷ R-2, R-5, P-6.

⁸ P-4-7.

⁹ Psychologist for Petitioner.

¹⁰ P-4.

¹¹ R-3.

¹² P-4-20, Psychologist for Petitioner.

¹³ R-2.

¹⁴ SEC at current school.

Hearing Officer Determination

homework or class work and he did not make up missed tests. When Student realized that he might not pass the course, his work improved tremendously during the 4th quarter and he passed the course with a grade of "D."¹⁵

#7. At the MDT meeting on 06/23/11, 60 minutes/week of behavioral support services were added to student's IEP, pursuant to a Hearing Officer Determination.¹⁶ Five hours/week of specialized instruction outside of general education was also added to the existing 11 hours/week of specialized instruction inside general education.¹⁷

#8. During the 2010-2011 school year, Student had more problems staying on task and had altercations with other students.¹⁸ Student's behaviors in class depended on the composition of his classmates. Student's grades were lower during the 2010-2011 school year than during the preceding year because Student became more distracted in school as a result of the enrollment of his younger sister for whom he adopted a protective role.¹⁹

#9. In September 2010, Student was suspended for 10 days.²⁰ In May 2011, Student was sent home from school for fighting pending a meeting to determine whether or not Student's behavior was a manifestation of his disability. Despite scheduling attempts and follow-up phone calls by DCPS to schedule a meeting that included Petitioner, the meeting never occurred because Petitioner's grandfather had forgotten to follow through with relaying messages to Petitioner.²¹ By the time that Petitioner became aware that the school had been attempting to set up a MDR meeting, Student had missed 10 days of school, and Petitioner was then advised by DCPS to send Student back to school.²² Student did not receive educational services during his 10 days of suspension in May 2011.²³

#10. The independent Functional Behavioral Assessment ("FBA") that was completed on 05/18/11 stated that Student would benefit from a small classroom setting where he could receive on-on-one instruction.²⁴ The FBA was reviewed at the MDT meeting on 06/23/11 and a BIP had been drafted at that time.²⁵

#11. Student's 06/23/11 IEP can be implemented at
provide Student with educational benefit, and placement at
appropriate.²⁶

PCS and can
PCS is

¹⁵ Mathematics teacher at current school.

¹⁶ P-1, P-14, R-2.

¹⁷ P-1, P-7, P-8, R-2.

¹⁸ Petitioner, Advocate, SEC at current school.

¹⁹ SEC at current school.

²⁰ R-7.

²¹ Dean of Students at current school.

²² Petitioner, Dean of Students at current school.

²³ Petitioner.

²⁴ P-5.

²⁵ R-2.

²⁶ Psychologist at current school.

Hearing Officer Determination

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).

The first issue to be determined, which is non-disciplinary in nature, is whether DCPS denied Student a FAPE when the Multidisciplinary Team ("MDT") met on 06/23/11 and failed to provide Student with an IEP with 100% specialized instruction in a special education school with a small student to teacher ratio and an IEP with an adequate transition statement. On this entire issue, Petitioner failed to meet her burden of proof.

The IEP services decision is a decision to be made by the parents, special education and/or general education teachers, persons who can interpret evaluation results, persons knowledgeable about the general education and special education curriculum, and persons knowledgeable about the availability of public education resources. 34 C.F.R. 300.320, 300.321. The placement decision is a decision to be made by a team consisting of the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement option. 34 C.F.R. 300.116.

The evidence revealed that Student's cognitive abilities did not prevent him from accessing the general education because his overall level of cognitive functioning was in the Average range. Student's only cognitive deficiency that could possibly affect his performance was his ability to perform timed tasks because his PSI functioning was Below Average. And, Student's only identified area of Below Average achievement was in mathematics; he was reading on a 12th grade level while in the 10th grade.²⁷ The evidence revealed that Student was able to adequately complete mathematics assignments and receive good grades when he was motivated and not distracted,²⁸ and indeed, Student had had better grades and no notable behavior problems during the preceding academic year at the same school with an IEP of 11 hours/week of specialized instruction inside the general education setting.²⁹

²⁷ Findings #3, #4, #5.

²⁸ Finding #6, #8.

²⁹ Finding #8.

Hearing Officer Determination

Student's only identified Below Average achievement was in the area of mathematics. Five hours/week of resource room services was added to Student's IEP on 06/23/11³⁰ and the Hearing Officer determines that this amount of services was sufficient to provide Student with the extra support he might have needed because the evidence was clear that when adequately motivated, Student could complete the required mathematics assignments and tests and receive a passing grade. Student's increasing behavior problems, which were really the crux of the problem, had been identified by the completion of an independent Functional Behavior Assessment and addressed by the completion of a BIP and the addition of 60 minutes/week of behavioral support services to Student's 06/23/11 IEP. Since the IEP was developed the day after the end of the school year, the effectiveness of the new services could not be measured because the IEP had not been implemented by the time the due process complaint was filed only five days later.

In accordance with the least restrictive environment provisions of the IDEA, i.e., DCPS must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature and 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.

The Hearing Officer determines that at the 06/23/11 IEP meeting, when the MDT was developing an IEP for Student, they took all of the relevant and most current information into account and appropriately came up with services that could provide Student with educational benefit in the least restrictive environment. If the team felt that Student needed additional time to complete tasks or tests due to his Below Average PSI functioning, the solution would be to provide extra time as an accommodation on Student's IEP. Under the IDEA, DCPS had an obligation to exhaust the implementation of services and accommodations in the regular school setting before removing Student to a school for all non-disabled peers. Pursuant to the mandates of the IDEA, DCPS provided Student with resource room services to give him the extra support the team felt he needed. DCPS' approach to increasing services on Student's IEP on 06/23/11 by adding resource room services was appropriate. The Hearing Officer determines that Student's 06/23/11 IEP was appropriate and designed to confer educational benefit, that Student's 06/23/11 IEP could be implemented at PCS and that the placement there was appropriate.³¹ DCPS' failure to provide Student with a full-time IEP and placement on 06/23/11 did not deprive Student of a FAPE.

Petitioner's contention that the 06/23/11 IEP was inappropriate because it failed to contain an adequate transition plan is entirely without merit. Petitioner, through her representative, expressly waived the right to craft an appropriate transition plan at the 06/23/11 IEP meeting. Petitioner elected to proceed with the meeting fully aware that she had not provided DCPS with a copy of the independent vocational assessment and knowing that the IEP couldn't possibly reflect an appropriate transition plan because the assessment had not yet been

³⁰ Finding #7.

³¹ Finding #11.

Hearing Officer Determination

completed and reviewed by the MDT.³² Petitioner failed to meet her burden of proof that DCPS denied Student a FAPE by failing to develop an adequate transition plan as part of Student's 06/23/11 IEP.

The second issue to be determined, which is disciplinary in nature, is whether DCPS denied Student a FAPE by failing to convene a Manifestation Determination Review ("MDR") meeting and provide Student with educational services for a period of 10 days following Student's 10th day of suspension in May 2011.

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).

Petitioner proved that Student was suspended for 10 days in May 2011 and that the suspension in May followed a previous 10-day suspension period during that same school year.³³ Petitioner also proved that DCPS did not provide educational services during the suspension period or conduct a MDR, as is required by 300.530(d) and 34 C.F.R. 300.530(e). If the MDR had convened and Student's behavior had been determined to be a manifestation of his disability, DCPS would have been required to conduct a FBA and complete a BIP, pursuant to 34 C.F.R. 300.530(f). Despite the lack of a MDR meeting, an independent FBA had been completed in May 2011 and a BIP had been drafted by the time the team met on 06/23/11. Petitioner withdrew her request for relief that DCPS develop a BIP. Despite DCPS' violation of the IDEA, there was no harm in this regard. The FBA was reviewed at the team meeting on 06/23/11 and was used in development of the IEP and the BIP.³⁴

In this case, Student was effectively suspended and his placement was changed when he was sent home from school in May 2011 pending a meeting to determine whether or not his behavior was a manifestation of his disability. He had had a prior suspension of 10 days during that same school year. Within 10 days of the May 2011 suspension, DCPS should have conducted a MDR meeting either with or without Petitioner, but failed to do so. Part of the reason that DCPS did not conduct a MDR meeting was because DCPS was trying to schedule the meeting that included Petitioner. DCPS made attempts and follow-up efforts to schedule the meeting, but Student's grandfather failed to relay telephone messages to Petitioner.³⁵ The Hearing Officer determines that DCPS' efforts to schedule a MDR meeting that included Petitioner were sufficient, and that it was Student's grandfather who appeared to be integrally involved in the care of Student in that he attended the due process hearing and picked up Student from school in May when he was suspended, who was the culprit in forgetting to relay vital information to Petitioner. If Petitioner had responded to DCPS' request to conduct a meeting in a timely manner, the meeting could have taken place, as is required by statute. Petitioner's right

³² Finding #2.

³³ Finding #9.

³⁴ Finding #10.

³⁵ Finding #9.

Hearing Officer Determination

to participate in a MDR meeting was not compromised by the actions or inactions of DCPS and Student was not denied a FAPE in this regard.

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).

In this case, DCPS did violate the IDEA because Student did not receive any educational services during his 10 days of suspension in May 2011³⁶ and educational services were required regardless of whether or not Student's behavior was a manifestation of his disability. A procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-526, 127 S.Ct. 1994, 2001 (2007); *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010). A procedural violation of the IDEA "can itself constitute the denial of a free appropriate education." *Blackman v. Dist. of Columbia*, 277 F.Supp.2d 71, 79 (D.D.C.2003). But it is important to note that, in this circuit, a procedural violation does not, standing alone, establish a failure to provide a FAPE. See *Lesesne v. Dist. Of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006)." An IDEA claim is only viable if those procedural violations affected the student's substantive rights." *Id.* In the absence of a showing that the child's education was substantively affected, no relief may be awarded. *Id.* Quoted from *O.O. v. District of Columbia*, et.al., Defendants, Civil Action No. 07-1783 (JBD) (2008).

In this case, Petitioner failed to show any specific educable harm resulting from the absence of 11 hours/week of specialized instruction inside of general education for a period of 10 days when Student was suspended in May 2011. Student's grades were not stellar during the 2010-2011 school year; however, his poor grades began well before the suspension in May 2011 and his poor grades were attributed to lack of motivation and distractions by his peers and younger sister who attended the same school. Student was able to pass his mathematics course, albeit with a grade of "D" because he had already failed each preceding quarter, simply by

³⁶ Finding #9.

Hearing Officer Determination

putting his mind on doing what was required to pass the course. Petitioner failed to prove that Student was denied a FAPE as a result of missed educational services while on suspension in May 2011.

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

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: September 11, 2011

/s/ Virginia A. Dietrich
Hearing Officer