

DC Office of the State Superintendent of Education

Office of Compliance & Review

State Enforcement & Investigation Division

STUDENT HEARING OFFICE

Van Ness Elementary School

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Impartial Due Process Hearing Officer

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STUDENT HEARING OFFICE
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<u>In Re the Matter of:</u>)	
)	CASE NO. 2009-1071
Parent on behalf of Student *)	
)	
Petitioner,)	Complaint Date: 07/22/09
)	Hearing Date: 09/25/09
vs.)	
)	Hearing Site:
The District of Columbia Public Schools)	Van Ness Elementary School
)	1150 5 th Street, S.E., 1 st Floor
Respondent.)	Washington, D.C. 20003

HEARING OFFICER DETERMINATION

Petitioner's Attorney:	Miguel Hull, Esq. James E. Brown & Associates, PLLC 1220 L Street, N.W., Suite 700 Washington, D.C. 20005
Respondent's Attorney:	Daniel Kim, Esq. Assistant Attorney General Office of the Attorney General as Counsel for D.C. Public Schools 825 North Capitol Street, N.E., 9 th Floor Washington, D.C. 20002

*Personally identifiable information is attached as an Index to this decision and must be removed prior to public distribution.

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JURISDICTION

The due process hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 Code of Federal Regulation ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

INTRODUCTION

On 07/22/09, a Due Process Complaint Notice ("Complaint") was filed by the legal guardian ("Parent" or "Petitioner") on behalf of the [REDACTED] student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a free appropriate public education ("FAPE") in violation of IDEIA when DCPS failed to properly implement Student's Individualized Education Program ("IEP"), when DCPS failed to place Student in an appropriate school, and when DCPS failed to adequately address Student's behavioral problems in the classroom. Petitioner asserts that Student is entitled to compensatory education due to the denials of a FAPE.

THE DUE PROCESS HEARING

The due process hearing convened and concluded on 09/25/09 at the Van Ness Elementary School located at 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003.

Petitioner was represented by Miguel Hull, Esq. ("Petitioner's Attorney") and DCPS was represented by Daniel Kim, Esq. ("DCPS' Attorney"). Petitioner participated in the due process hearing by telephone.

Both parties declined to discuss settlement prior to the commencement of the due process hearing.

Disclosures:

Petitioner's Five-Day Disclosure letter dated 08/29/09, with a corrected date of 08/21/09, contained Petitioner's Exhibits #1-17. Petitioner withdrew the last page of Exhibit #10 because that page pertained to another student. Petitioner also withdrew Exhibits #14-17. Petitioner's Exhibits #1-13 were admitted into evidence without objection.

DCPS' Disclosure Statement dated 08/21/09 contained DCPS' Exhibits #1-15. DCPS' Exhibits #1-15 were admitted into evidence without objection.

Witnesses: There were no objections to telephone testimony by either party.

Petitioner presented the following witnesses: (1) [REDACTED] educational advocate; and (2) Petitioner.

DCPS presented the following witness: (1) Dr. [REDACTED] Special Education Coordinator ("SEC") at [REDACTED] (via telephone).

Issues For Litigation:*

Issue #1 – Whether DCPS failed to properly implement Student's IEP, thereby denying Student a FAPE?

Issue #2 – Whether DCPS failed to adequately address Student's behavior problems in the classroom, thereby denying Student a FAPE?

Issue #3 – Whether Student is entitled to compensatory education for missed occupational therapy ("OT") services during the 2008-2009 school year?

* At the due process hearing, Petitioner withdrew the issue of an inappropriate placement for [REDACTED] during the 2008-2009 school year.

Admissions:

By DCPS:

- (1) Student attends [REDACTED] and
- (2) There was a break in the provision of OT services to Student from November 28, 2008 through February 12, 2009 due to the unavailability of an occupational therapist.

Relief Requested by Petitioner:

- (1) A finding of a denial of a FAPE on Issues #1 and #2;
- (2) DCPS to fund an independent functional behavioral assessment ("FBA") to address Student's problem behaviors in the classroom, specifically, Student leaving the classroom without permission and thereby missing instruction; and DCPS to convene a follow-up meeting with Petitioner to review the FBA and develop a Behavior Intervention Plan ("BIP") within 10 days of receiving the independent FBA;
- (3) An award of reasonable compensatory education; and
- (4) Any other relief deemed appropriate.

FINDINGS OF FACT

1. [REDACTED] is a special education center for grades 3-8 for students with a primary disability of Emotional Disability; however, the school also

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services students with Multiple Disabilities. Each class contains a teacher, an aide, and no more than 8 students per class. Each class also has the services of a social worker for 2-3 days/week. Other behavioral supports consist of speech and language and OT service providers, music and art therapists and social workers that function as behavior support personnel. (*Testimony of [REDACTED]*)

#2. On 01/28/08, Student attended [REDACTED] as a student with a disability classification of Multiple Disabilities, Emotionally Disturbed and Other Health Impaired, and had an IEP that prescribed special education services that included .5 hours/week of OT services. (*Petitioner's Exhibit #5, IEP dated 01/28/08*). On 01/28/09, Student attended [REDACTED] and had an IEP that prescribed special education services that included .5 hours/week of OT services. (*Petitioner's Exhibit #4, IEP dated 01/28/09*).

#3. DCPS failed to provide Student with OT services on 10/10/08 and weekly OT services from the week of 12/12/08 through the week of 02/23/09 while school was in session, due to the lack of an OT therapist. (*Admission of DCPS; Petitioner's Exhibit #4, IEP dated 01/28/09; Testimony of Dr. [REDACTED]*) The school let parents and students know that the school would make up the missed OT services when a replacement occupational therapist came on board. (*Testimony of Dr. [REDACTED]*)

#4. At a Multidisciplinary Team ("MDT") meeting on 01/28/09, the SEC at [REDACTED] acknowledged that Student would be given compensatory education services for OT services missed since 12/12/08, and that DCPS would complete a missed services form for OT services when a replacement OT provider came on board at the school. (*Testimony of [REDACTED]*) Student's 01/28/09 IEP indicated that Student should receive compensatory education for missed OT services since 12/12/08. (*Petitioner's Exhibit #4, IEP dated 01/28/09*).

#5. In February 2009, a missed services plan was developed by the SEC and the replacement OT service provider to provide Student with missed OT services (*Testimony of Dr. [REDACTED]*) and on 02/18/09, the replacement OT service provider provided observation of Student in the classroom. (*Petitioner's Exhibit #12, Service Tracker form dated 05/13/09; Testimony of Dr. [REDACTED]*)

#6. Beginning on 03/03/09, Student was offered weekly OT services until the end of the 2008-2009 school year, but Student refused the services to such an extent that the OT provider consulted with the SEC about it. (*Testimony of Dr. [REDACTED]*) (*Testimony of Petitioner*). From 03/03/09 until 04/21/09, Student received direct OT services once and did not receive OT services on seven occasions because Student was either absent or unavailable. (*Petitioner's Exhibit #12, Service Tracker form dated 05/13/09*).

#7. In July 2009, at the end of 2009 Extended School Year ("ESY") services, Student was making progress towards achieving occupational therapy goals; and it was noted that Student was working hard to improve visual perceptual skills, that Student completed visual discrimination with 70% accuracy, and that Student completed visual

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sequential memory with 50% accuracy. (DCPS' Exhibit #10, Student Report of Progress dated 07/23/09). The OT goals stated in the 2009 ESY progress report were the same goals specified in Student's 01/28/09 IEP. (Petitioner's Exhibit #5, 01/28/08 IEP; Petitioner's Exhibit #4, 01/28/09 IEP).

#8. At the beginning of the 2008-2009 school year, Student demonstrated poor impulse control and angry outbursts when Student became frustrated and overwhelmed when made to do much academic work. Student often became combative, argumentative and refused to listen to anyone. (Petitioner's Exhibit #4, IEP dated 01/28/09). Additionally, at the beginning of the 2008-2009 school year, Student indicated that Student did not like the teacher. (Testimony of Petitioner). Student had difficulty adjusting at the beginning of the 2008-2009 school year due to the presence of a new aide and a new school setting, but towards the end of the school year, Student's behavior had improved such that Student was not walking out of class as much, calls to Petitioner had decreased in frequency, Student was engaging in conversations with staff, and Student was more cooperative in completing classwork. (Testimony of Dr. [REDACTED] Petitioner's Exhibit #6, MDT Meeting Notes dated 05/13/09).

#9. Petitioner first requested an updated FBA and BIP at the 05/13/09 MDT meeting, and DCPS refused on the basis that Student was not exhibiting any new behaviors and the school staff was able to manage Student's behavior through the use of a dedicated aide and allowing Student to leave the class and walk around until Student could exhibit acceptable classroom behavior. Moreover, Student's behavior had improved by 05/13/09. (Petitioner's Exhibit #6, MDT Meeting Notes dated 05/13/09; Testimony of Dr. [REDACTED]).

#10. There have been no reports of any out of the ordinary behavior problems for Student at [REDACTED] during the current 2009-2010 school year, and Student's behavior is reported as good. (Testimony of [REDACTED] testimony of Dr. [REDACTED] Testimony of Petitioner).

#11. FBAs lead to the development of BIPs to be used by teachers to manage the behaviors of students and to implement a behavior plan to deescalate negative behaviors. FBAs and BIPs are used purely to remedy a deficiency or problem and to get a student back on track and available for instruction. There is no need for a FBA and a BIP for Student at the present time because there have been no reports of negative behaviors for Student for this school year. (Testimony of [REDACTED]).

#12. During the 1st Advisory of the 2008-2009 school year, Student received the following grades: Literacy, C-; Mathematics, C-; Science, C; Social Studies, C. During the 2nd Advisory of the 2008-2009 school year, Student received the following grades: Literacy, D; Mathematics, D; Science, D; Social Studies, C; Art, B; Music, B; Physical Education, B. During the 3rd Advisory of the 2008-2009 school year, Student received the following grades: Literacy, D; Mathematics, C; Science, D; Social Studies, C; Art, D; Music, B; Physical Education, A. (Petitioner's Exhibit #8, [REDACTED] School Year 2008-2009 grade reports). Student made slight academic progress during

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the 2008-2009 school year. (*Petitioner's Exhibit #6, MDT Meeting Notes dated 05/13/09*).

DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. Weast, 44 IDELR 150 (2005)*. "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. 3030.3.

DCPS, as a local education agency, is required 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, 300.2(b)(1)(ii); 38 D.C. Code 2561.01(2).

Free appropriate public education or FAPE means special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the State Education Agency, (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with an IEP. 34 C.F.R. 300.17.

Issue #1 – Whether DCPS failed to properly implement Student's IEP, thereby denying Student a FAPE? Petitioner specifically alleges that DCPS failed to provide Student with a substantial amount of OT for the entire 2008-2009 school year, as prescribed by Student's 01/28/08 IEP and 01/28/09 IEP, both of which provided for .5 hours/week of OT services.

At the beginning of the 2008-2009 school year, Student, a student with a disability classification of Multiple Disabilities, Emotional Disturbance and Other Health Impaired, attended [REDACTED] Academy, a special education center exclusively for students with a primary disability classification of Emotional Disturbance. (*Finding of Fact #1, #2*).

During the 2008-2009 school year, Student should have received OT services of .5 hours/week as prescribed by Student's 01/28/08 IEP and 01/28/09 IEP. (*Finding of Fact #2*).

There is no dispute from DCPS that Student did not receive OT services from the end of December 2008 through February 2009 due to the lack of an OT provider. However, it is clear from the record that DCPS informed parents that DCPS would make up the services when a replacement OT services provider was on board. (*Finding of Fact #3*). DCPS readily acknowledged orally at the 01/28/09 IEP Team meeting and in writing on Student's 01/28/09 IEP, that Student was entitled to compensatory OT

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services for services missed since 12/12/08. (*Finding of Fact #4*). In February 2009, DCPS developed a missed services plan for OT services (*Finding of Fact #5*); however, after February 2009, Student was either absent, unavailable or refused OT services on most occasions when OT services were offered. (*Finding of Fact #6*).

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. O.O. v. District of Columbia, et.al.*, Defendants, Civil Action No. 07-1783 (JBD) (2008).

In this case, the record showed that at the end of July 2009, at the conclusion of Student receiving ESY services, Student had made progress towards achieving occupational therapy goals, and the occupational therapy goals that Student had made progress towards were the very same goals specified in Student’s 01/28/09 IEP. (*Finding of Fact #7*). On this record, Petitioner was unable to show that DCPS’ failure to provide OT services to Student on a weekly basis for a two months period caused educational harm to Student. Beginning in March 2009, DCPS attempted to make up the deficiencies of DCPS’ prior non-delivery of OT services to Student, but Student was not receptive to receiving OT services. Despite Student missing many services from February 2009 until the end of the 2008-2009 school year, Student was still able to demonstrate progress towards meeting occupational therapy goals by the time ESY services concluded in July 2009. Therefore, the Hearing Officer concludes that DCPS did not deny Student a FAPE by failing to provide OT services during the 2008-2009 school year because there was no negative academic impact on Student.

Petitioner failed to meet its burden of proof on Issue #1.

Issue #2 – Whether DCPS failed to adequately address Student’s behavior problems in the classroom, thereby denying Student a FAPE? Petitioner alleges that Student’s behavior problems at school included leaving the classroom at will, and DCPS did not adequately address this behavior problem by conducting or updating the existing FBA and BIP. Additionally, Petitioner alleges that Petitioner’s request to conduct or update the FBA and BIP was rejected by DCPS at the MDT meeting on 05/13/09. Petitioner further alleges that DCPS’ failure to update these evaluations contributed to Student’s lack of academic progress.

Student did have a serious behavior problem at the beginning of the 2008-2009 school year; however, by the time Petitioner asked for an updated FBA and BIP at the 05/13/09 MDT meeting, Student’s behavior had improved to the extent that DCPS did not feel that a new FBA or BIP was warranted. (*Findings of Fact #8, #9*). The record made clear that Student was slow to adjust to a new environment that included a new

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dedicated aide, a new school setting, and a teacher Student didn't particularly like, but favorable adjustment did occur towards the end of the 2008-2009 school year. Student's improvement in behavior was evidence enough that a new or updated FBA and BIP were not necessary. This conclusion is bolstered by the fact that the Student is doing quite well behaviorally at [REDACTED] this current 2009-2010 school year. (*Finding of Fact #10*). As such, there is no need for an updated FBA or BIP at this time because Student is not exhibiting the types of negative behaviors that a FBA or BIP is designed to address. (*Finding of Fact #11*).

DCPS did effectively address Student's behavior problems in the classroom by providing Student with an aide and letting Student walk around until Student's behavior was acceptable. (*Finding of Fact #8*). Adjustment was slow for Student because of Student's disabilities, and not because DCPS failed to have an effective behavior assessment or an effective behavior management plan in place.

The Hearing Officer concludes that the existing FBA and BIP were sufficient to enable Student to benefit educationally. DCPS offered Student the "basic floor of opportunity" provided by IDEIA that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley, 458 U.S. 176 (1982)*. Although Student's grades did fluctuate up and down over the 2008-2009 school year, there was no record of any grades of "F," and Student did make slight academic progress during the 2008-2009 school year. (*Finding of Fact #12*).

Petitioner failed to meet its burden of proof on Issue #2.

Issue #3 – Whether Student is entitled to compensatory education?

Petitioner specifically alleges that Student is entitled to compensatory education for missed OT services during the 2008-2009 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)*.

In this case, Petitioner failed to demonstrate that Student had been denied a FAPE by DCPS due to missed OT services. (See discussion under Issue #1). Therefore, Student is not entitled to compensatory education.

Petitioner failed to meet its burden of proof on Issue #3.

ORDER

WHEREFORE, this Complaint having been fully litigated and there being no basis in fact and law to support Petitioner's allegations that DCPS denied Student a FAPE, it is

ORDERED that this Complaint be and hereby is **DISMISSED** with prejudice.

IT IS SO ORDERED.

This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).

Virginia A. Dietrich /s/
Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

10/02/09
Date

Issued: October 2, 2009