

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

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

OSSE
Student Hearing Office
February 18, 2014

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: February 17, 2014
Petitioner,)	
)	Hearing Officer: Virginia Dietrich
v.)	
)	
Achievement Preparatory Academy)	
Public Charter School)	
)	
Respondent.)	

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of Student, filed a due process complaint notice on December 5, 2013, alleging that Student had been denied a free appropriate public education (“FAPE”) by the Achievement Preparatory Academy Public Charter School (“APA”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Student was a child with a disability. Petitioner alleged that since Spring 2013, APA had failed to provide Student with an appropriate Individualized Education Program (“IEP”) in that the accommodations were insufficient to enable Student to access the general education curriculum in Math. Petitioner pointed to Student’s failing grades and school suspensions as proof. Petitioner also alleged that APA was tardy in conducting a Functional Behavioral Assessment (“FBA”) since Spring 2013 to gather data on the cause of Student’s failing grades and suspensions, and then using the data to develop a Behavioral Intervention Plan (“BIP”) to address the behaviors that adversely impacted Student’s educational achievement. Petitioner further alleged that despite APA finally agreeing in September 2013 to conduct a FBA and developing a BIP, APA’s failure to conduct the FBA until early December 2013 resulted in the denial of a FAPE.

¹ Personal identification information is provided in Appendix A.

APA argued that since Spring 2013 Student had received educational benefit from the IEPs in place; that Student was on grade level and proficient in reading and math; that Student was making progress towards his IEP goals; that Student's failing grades and suspensions were caused by external factors that were unrelated to the school environment and being addressed through counseling; that Student was capable of receiving passing grades if he completed his homework; that although APA did not agree that a FBA and BIP was necessary for Student to access the curriculum, it agreed to complete them because Petitioner had asked for it; and that it had conducted a FBA in a reasonable amount of time. APA denied that it had denied Student a FAPE.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the 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.

Procedural History

The due process complaint was filed on 12/05/13. This Hearing Officer was assigned to the case on 12/11/13. APA filed a response to the complaint on 12/16/13 and made no challenges to jurisdiction.

Neither Petitioner nor APA waived the resolution meeting. The resolution meeting took place on 12/19/13, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period ended on 01/04/14, the 45-day timeline to issue a final decision began on 01/05/14 and the final decision was due by 02/18/14.

A prehearing conference took place on 01/07/14. A Prehearing Order was issued on 01/10/14.

The due process hearing was a closed hearing that took place on 02/05/14. Petitioner was represented by Roberta Gambale, Esq. APA was represented by Erin Auerbach, Esq. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person. Parties declined to engage in settlement discussions at the beginning of the hearing.

Petitioner's Disclosure Statement, dated 01/28/14, consisted of a witness list of three (3) witnesses and documents P-1 through P-42. Petitioner's disclosures were admitted into evidence without objection.

APA's disclosures, dated 01/29/14, consisted of a witness list of six (6) witnesses and documents R-1 through R-25. APA's disclosures were admitted into evidence without objection.

Petitioner presented the following three (3) witnesses in her case in chief: (1) Petitioner; (2) Student; and (3) educational consultant who qualified as an expert in special education as it

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relates to IEP development, modifications, accommodations and supports (“educational consultant”). Petitioner testified as her sole rebuttal witness.

APA presented the following four (4) witnesses: (1) Founder and Head of School at APA/LEA representative (“LEA representative”); (2) Special education coordinator at APA who qualified as an expert in the creation and implementation of IEPs (“APA SEC”); (3) Psychologist who qualified as an expert in the administration of psychological assessments and providing counseling and psychological services to children grades Kindergarten through 12 (“APA’s expert psychologist”); and (4) Student’s special education teacher at APA (“special education teacher”).

The two (2) issues to be determined in this Hearing Officer Determination are as follows:

Issue #1 – Whether APA denied Student a FAPE by failing to provide Student with an IEP since Spring 2013, that (A) included the necessary accommodations and modifications to address Student’s failing grades and suspensions and enable Student to access the curriculum, as requested by Petitioner on 07/24/13 and 09/13/13, and (B) included an updated Behavioral Intervention Plan to address Student’s escalating behaviors that contributed to suspensions and failing grades.

Issue #2 – Whether APA denied Student a FAPE by failing to conduct or timely conduct a Functional Behavioral Assessment and/or revise Student’s Behavioral Intervention Plan (A) as agreed to by the Multidisciplinary Team on 09/26/13, and (B) to address Student’s negative behaviors that resulted in suspension and failing grades, since the beginning of the 2013/14 school year.

Relief Requested by Petitioner²

- (1) A finding of a denial of a FAPE on the issues as stated in this Prehearing Order;
- (2) APA to amend Student’s IEP to provide for the requested accommodations, supports and Behavioral Intervention Plan;
- (3) APA to convene a Multidisciplinary Team meeting to review the Functional Behavioral Assessment and update Student’s Behavioral Intervention Plan; and
- (4) Compensatory education consisting of counseling and mentoring to address Student’s behavior and academics, to compensate for APA’s failure to provide an IEP with the necessary accommodations, modifications and appropriate Behavioral Intervention Plan since Spring 2013.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

Findings of Fact

² Petitioner withdrew her request for APA to fund an independent FBA. A FBA was completed by APA on 12/06/13. See R-16.

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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 resident of the District of Columbia. Petitioner is Student's mother.³

#2. Student began the 2012/13 school year at APA with an IEP dated 09/28/12, that classified Student with a disability of Other Health Impairment ("OHI") and prescribed 10 hours/week of specialized instruction within general education, 4 hours/week of specialized instruction outside of general education, and 1 hour/week of behavioral support services outside of general education. Classroom aids and services consisted of a check-list when learning multi-step consists.⁴ Behavioral supports at that time consisted of a school-wide weekly paycheck system that monitored behavior and rewarded positive behavior. Student worked with a psychologist in a small group setting to address coping mechanisms associated with ADHD. Student's IEP also generally provided for small group instruction in the general education setting and accommodations and modifications as needed for Math concepts while in the classroom.⁵ The IEP had goals in the area of Reading, Written Expression, Mathematics and Emotional/Social/Behavioral Development.⁶

#3. In January 2013, Student's IEP was amended to add 4 hours/week of specialized instruction outside of general education to address Student's deficits in math.⁷ Math was the most difficult subject for Student.⁸

#4. Towards the end of the 2012/13 school year, Student had problems with his peers with origins tied to his sexual identity. It did not become a school wide issue until Sep-Oct 2013 when Student announced his sexual orientation to the school. Except for Sep-Oct 2013, Student's negative behaviors were on par with his peers.⁹

#5. In June 2013, Student was suspended for two days for assault of a peer.¹⁰ Prior to that time, Student did not have a history of suspensions.¹¹

#6. During the 2012/13 school year, Student was able to meaningfully access the curriculum and receive educational benefit from the educational program he received at APA. Although Student received a grade of "F" in Reading for the first quarter and an "F" on the final exam, he received passing grades during the other quarters and ended the year with a final grade of "C." In Science, Student consistently received quarterly grades of "B" and finished the year with a final grade of "B." In Writing, Student's quarterly grades ranged from "A" – "C", and he ended the year with a final grade of "B." In Math Procedures, Student received an "F" for the 1st

³ Petitioner.

⁴ R-2-10.

⁵ R-2-11.

⁶ R-2-2.

⁷ P-6-1.

⁸ Petitioner.

⁹ APA expert psychologist, APA SEC.

¹⁰ P-3-1.

¹¹ Petitioner.

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quarter, “C” for the remaining three quarters, a final exam grade of “F,” and finished the year with a final grade of “F.” In History, Student received a grade of “B” for the first two quarters, an “F” for the 3rd quarter, an “F” for the 4th quarter, a “C” on the final exam, and a final grade of “C.” In Math Problem Solving, Student received an “F” for the 1st quarter and final exam, a grade of “C” for 3 quarters, and received a final grade of “F.”¹²

#7. At the end of the 2012/13 school year, according to standardized District of Columbia assessment criteria, i.e., DC-CAS, Student was proficient in Reading and Mathematics, which meant that he had mastered the content areas.¹³

#8. Student’s IEP did not require special education services over the summer of 2013.¹⁴ Although Student needed to attend summer school due to his failing grades in Math,¹⁵ he did not. Petitioner’s address had changed, she had not informed the school of her address change, and she had had minimal contact with the school during the 2012/13 school year. By the time Petitioner knew that Student had failed two classes and needed to attend summer school, summer school was over.¹⁶

#9. On July 24, 2013, Petitioner’s advocate made APA aware through written correspondence that Petitioner was seeking the following modifications and accommodations to Student’s IEP, all with respect to helping Student access the curriculum in Mathematics: (1) computer, repeated instructions, manipulative for math, calculator, shortened assignments for homework; and (2) typed/verbal responses.¹⁷ Petitioner’s written request for a meeting did not reference the need to address Student’s behavior through a FBA, BIP or otherwise.¹⁸

#10. The 2013/14 school year began with Student once again attending APA. On September 4, 2013, the Woodcock Johnson III, a standardized academic achievement assessment, revealed that Student’s academic skills were in the average range for his age, both with respect to his fluency with academic tasks and his ability to apply academic skills. When compared to others his age, Student’s standard score was high average in brief writing, and average across the board in broad reading, basic reading skills, brief reading, broad mathematics, math calculation skills, brief mathematics, broad written language, and written expression.¹⁹

#11. The IEP team met on September 13, 2013 and conducted an annual review of Student’s IEP. Student’s achievement test scores were discussed. Student’s behavior was also discussed, as were the positive supports that had been put into place such as weekly paychecks, leadership roles and positive reinforcement.²⁰ Student’s behavior had mildly declined with adhering to rules.²¹ Student’s IEP behavior support services were changed from 1 hour/week

¹² R-4-1.

¹³ R-5-1, APA SEC.

¹⁴ R-2-13.

¹⁵ APA SEC.

¹⁶ Petitioner.

¹⁷ R-6-10, educational consultant.

¹⁸ R-6-10.

¹⁹ R-7-1.

²⁰ R-8-2.

²¹ R-8-4, APA’s expert psychologist.

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outside of general education to 30 minutes/week outside of general education and 30 minutes/week of social skills group. The social skills counseling was added to help Student navigate his relationship with his peers. Petitioner agreed with this services change that was made to help Student cope with negative social interactions and harassment that were occurring as a result of Student making his sexual identity known to the entire school in September 2013.²² Student's struggles and occasional inattentiveness and non-participation in class were not related to distractibility associated with ADHD; they were related to non-acceptance, being mocked in the classroom and Student's desire not to call attention to himself. The impact was emotionally draining for Student and detracted from his focus on academics.²³

#12. At the IEP meeting on September 13, 2013, Student's social emotional goals were discussed, updated and solidified in the IEP as follows: Increase pro-social skills and leadership in the classroom and in school as measured by paychecks, identify areas of personal strength and weakness regarding behavioral functioning, and participate weekly in social skills group led by the behavior support specialist.²⁴

#13. Student's 09/13/13 IEP reflected the following services: 3 hours/week each of specialized instruction in reading and written expression outside of general education, 4 hours/week of specialized instruction in math outside of general education, 4 hours/week of specialized instruction in math inside of general education, and 1 hour/week of behavioral support services outside of general education.²⁵ APA also agreed to the following classroom aids which was reflected in the IEP: continue with math assignments being broken up into manageable sections and a check-list when learning multi-steps, and water and bathroom breaks when needed.²⁶ The team, including Petitioner, agreed that Student did not need a calculator for math.²⁷

#14. At the 09/13/13 IEP meeting, Petitioner nor her advocate mentioned the need for a FBA or BIP.²⁸ The need for verbal/typed responses was not discussed.²⁹ By email dated 09/18/13, Petitioner first raised concerns about the appropriateness of a BIP.³⁰

#15. During the first quarter of the 2013/14 school year, Student received passing grades in all of his classes. He received a "C" in Pre-Algebra Procedures and a "B" in Pre-Algebra problem solving.³¹ Student's grades went down over the 2nd quarter. Student received a 2nd quarter grade of "A" in writing and "C" in Spanish; however, he received 2nd quarter grades of "F" in English, Science, Pre-Algebra and Pre-Algebra Problem Solving. Student's failure to turn

²² R-8-4, APA's expert psychologist, Petitioner.

²³ Special education teacher.

²⁴ R-8-5, R-9-7, APA SEC.

²⁵ R-9-9.

²⁶ R-8-6, R-9-9, SEC, special education teacher.

²⁷ R-8-6, Petitioner.

²⁸ APA SEC, R-8.

²⁹ APA SEC.

³⁰ P-14-1.

³¹ R-11-1.

in homework contributed significantly to his composite scores that resulted in failing grades..³² Prior to the 2nd quarter, Student had shown the capability of completing homework.³³

#16. The function of a Functional Behavioral Assessment (“FBA”) is to find out the reasons for behaviors. It is appropriate to conduct a FBA when there is a pervasive, very significant pattern of behaviors that interrupt a child’s learning significantly. A FBA was not necessary for Student. APA knew the cause of Student’s emotional struggles, i.e., announcing his sexual identity in school. Student had been discussing his sexual identity issues with the APA psychology expert as part of IEP counseling services since January 2013.³⁴ Student was on grade level in all academics and he had demonstrated the capability of receiving passing grades in Math without a FBA or BIP during the 2012/13 and the 2013/14 school years.

#17. A FBA and/or BIP were not necessary for Student to access the curriculum, but APA agreed to do both per the request of Petitioner at the IEP meeting in September 2013. On September 26, 2013, APA agreed to complete a FBA within 2 weeks. Completion of the assessment was due to delay on the part of APA; however, there was no educational harm because Student was accessing the curriculum with his existing IEP, the causes of his behavior were known, and Student was receiving counseling through his IEP.³⁵ Although Student made no progress on one of his emotional/social/behavioral IEP goals from the beginning of the 2013/14 school year through October 28, 2013, Student made progress on two of his other emotional/social/behavioral IEP goals.³⁶

#18. Student was suspended from school for two days beginning on 11/01/13 and for three days beginning on 11/19/13.³⁷ These out of school suspensions occurred as a result of events that occurred outside of school and were related to Student’s sexual identity issues.³⁸

#19. Student does not need the use of a computer to access the curriculum; he has no problem accessing the curriculum with a pencil and paper. The special education teacher walks around the math class and repeats the instructions continually for the special education students, so that Student receives repetition of instructions in Math. Student did not need any new manipulatives in Math that were not already on his IEP. He has a checklist to use for math. Student receives shortened assignments and Student shows the ability to complete those assignments.³⁹ Verbal/typed responses was not a necessary accommodation; Student had no problems writing answers and Student loved writing in a book that his special education teacher had given him to jot down his feelings. Student showed the ability all around to bring up his grades with the accommodations that were on his IEPs during the 2012/13 and 2013/14 school years.⁴⁰

³² P-33-1.

³³ Special education teacher.

³⁴ APA psychology expert.

³⁵ APA SEC, APA psychology expert.

³⁶ R-12-8.

³⁷ R-14-1, R-15-1.

³⁸ R-18-2, APA expert psychologist, APA SEC, Petitioner.

³⁹ Special education teacher, SEC.

⁴⁰ Special education teacher.

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 APA denied Student a FAPE by failing to provide Student with an IEP since Spring 2013, that (A) included the necessary accommodations and modifications to address Student's failing grades and suspensions and enable Student to access the curriculum, as requested by Petitioner on 07/24/13 and 09/13/13, and (B) included an updated Behavioral Intervention Plan to address Student's escalating behaviors that contributed to suspensions and failing grades.

The IEP must include a statement of special education and related services and supplementary aids that will be provided to enable the child to advance appropriately toward attaining annual IEP goals and participate in and make progress in the general education curriculum. 34 CFR 300.320(a)(4).

The IEP Team must consider the use of positive behavioral interventions and supports, to address behavior that impedes the child's learning or that of others. 34 CFR 300.324(a)(2)(i).

For an IEP to be appropriate, it must be “reasonably calculated to enable the child to receive educational benefits.” The Hearing Officer must determine whether the procedural requirements of the Act have been followed. Second, it must determine whether the IEP developed under those procedures is “reasonably calculated to enable the child to receive educational benefits.” If the Hearing Officer finds that both requirements are satisfied, then the government has complied with the obligations imposed by Congress and the courts can require

no more.” *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982).

Petitioner failed to meet her burden of proof on the totality of this issue. Although Student began to experience emotional difficulties since January 2013 that occurred as a result of struggles with his sexual identity, APA took appropriate steps to address Student’s emotional difficulties. Student’s struggles with Math were noted as early as January 2013 and APA added 4 hours/week of specialized instruction outside of general education to Student’s IEP to address it. Math was a difficult course for Student. By the end of the 2012/13 school year, Student had failed both of his Math classes, but he had received grades of “C” in three quarters in both of his Math classes and he had passed the rest of his classes. The evidence showed that Student was able to access the general education curriculum with the services, accommodations and behavioral supports that were in place and part of Student’s IEP.

The accommodations and supports that Petitioner sought after Student failed his math classes either weren’t necessary or were already being provided to Student although not a part of his IEP. The requested accommodations and supports were not necessary for Student to access the general education curriculum. By the end of the 2012/13 school year, Student had mastered the 6th grade curriculum content and was proficient in both Reading and Mathematics. And, despite Student having failed both Math classes and not attending summer school over the summer of 2013, Student still had academic achievement in the average range in Mathematics, per a standardized testing assessment administered in early September 2013. During the 1st quarter of the 2013/14 school year, Student had passing grades in all of his classes. He had a grade of “B” in both of his Math classes, which was evidence that Student was not only able to access the curriculum with the existing IEP and without a FBA or BIP or additional accommodations, Student was able to perform well.

Prior to June 2013, Student did not have a history of suspensions. During the 2012/13 school year, he was suspended once for two days in June 2013. That two-day suspension was insufficient data for the Hearing Officer to conclude that Student needed a formal behavioral intervention plan to address negative behaviors that resulted in suspension. His behaviors during the 2012/13 school year were not severe and persistent and did not interfere with learning. His behaviors were related to emotionality stemming from his sexual orientation.

At the IEP meeting on 09/13/13, Petitioner never mentioned the need for a FBA or a BIP. In fact, the focus of the 09/13/13 meeting was Student’s prior failing grades in Math. It wasn’t until after the meeting occurred that Petitioner requested a FBA and BIP. A FBA and a BIP were not necessary to address Student’s difficulties. APA knew the reasons that Student was beginning to have behavior problems in school and it was not due to inattentiveness associated with ADHD. It was due to Student’s emotional struggles over his sexual orientation. APA added social skills counseling to Student’s IEP to address Student’s difficulties and Student had been receiving 1:1 counseling to address his emotional difficulties. The services that APA provided were sufficient. Student did not suffer any academic harm due to any alleged services or accommodations that APA failed to provide. A FBA wasn’t necessary to determine the origin of Student’s problems; APA already knew what the problem was and took appropriate measures to address it. Student was making sufficient progress without a BIP.

The second issue to be determined is whether APA denied Student a FAPE by failing to conduct or timely conduct a Functional Behavioral Assessment and/or revise Student's Behavioral Intervention Plan (A) as agreed to by the Multidisciplinary Team on 09/26/13, and (B) to address Student's negative behaviors that resulted in suspension and failing grades, since the beginning of the 2013/14 school year.

The public agency must conduct a reevaluation if the public agency determines that the educational needs of the child, including improved academic achievement and functional performance warrant a reevaluation; or if the child's parent or teacher requests it. 34 CFR 300.303(a). The public agency must ensure that the child is assessed in all areas related to the suspected disability. 34 C.F.R. 300.304(c)(4).

It wasn't necessary for APA to conduct a FBA. APA knew the origins of the behaviors that were leading to Student's emotional difficulties in school. Moreover, Student had not been suspended for behaviors that had occurred in school.

A Functional Behavioral Assessment is appropriate when there is a pervasive, very significant pattern of behaviors that interrupt a child's learning significantly. A FBA was not necessary for Student. APA knew the onset and specific cause of Student's emotional struggles and took appropriate behavioral interventions to address it. Student was able to achieve passing grades in Math if he applied himself and completed his homework.

Petitioner failed to meet her burden of proof on this issue. The Hearing Officer determined that a FBA and BIP were not necessary for Student to access the general education curriculum and receive educational benefit from the IEPs. The cause of Student's emotional problems was already known by APA. APA readily agreed to conduct a FBA and develop a BIP as soon as Petitioner requested it. There was a delay in APA conducting the FBA. The delay was one month longer than industry standards for timely completion; however, the delay was of no consequence because neither the FBA nor BIP were necessary for Student to access the curriculum or receive educational benefit from the services in place. Conducting the FBA and completing the BIP were gratuitous acts by APA.

ORDER

Petitioner failed to meet her burden of proof on all of the issues presented.

This complaint is **DISMISSED WITH PREJUDICE.**

All requested relief 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: February 17, 2014

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner: (U.S. mail)

Petitioner's Attorney: Roberta Gambale, Esq. (electronically)

APA's Attorney: Erin Auerbach, Esq. (electronically)

SHO (electronically)