

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
July 9, 2015

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: July 8, 2015
Petitioner,)	
)	Hearing Officer: John Straus
v.)	
)	Case No: 2015-0150
District of Columbia Public Schools)	
)	Hearing Date: June 10, 2015
Respondent.)	Room: 2004
)	

HEARING OFFICER DETERMINATION

Background

The Petitioner, the Student’s mother, filed a due process complaint notice on April 24, 2015, alleging that the Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”). The Petitioner alleged that the District of Columbia Public Schools (“DCPS”) failed to develop an appropriate IEP on February 24, 2015 with goals in Math and sufficient hours of specialized instruction outside the general education setting and failed to conduct a Functional Behavioral Assessment (“FBA”). The Petitioner requested the Hearing Officer order DCPS to conduct a FBA and convene an IEP team meeting to revise the Student’s Individualized Education Program (“IEP”), provide 10 hours of specialized instruction inside the general education setting and 10 hours of specialized instruction outside the general education setting and develop a Behavior Intervention Plan. The Petitioner also requested the Hearing Officer to order compensatory services to redress the lack of special education as a result of DCPS failure to provide specialized instruction outside the general education setting from February 24, 2015.

DCPS asserted the February 24, 2015 IEP was appropriate at the time that it was developed. The IEP team did not determine that a FBA was warranted and the parent never requested a FBA before filing the Due Process Complaint. The Student’s attendance problem was not discussed by the IEP team with respect to the need for an FBA.

¹ Personal identification information is provided in Appendix A.

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 (“D.C.M.R.”); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on April 24, 2015. Neither Petitioner nor Respondent waived the resolution meeting. The resolution meeting took place on May 5, 2015, at which time, the parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on May 24, 2015. The 45-day timeline to issue a final decision began on May 25, 2015 and the final decision is due by July 8, 2015. *See* 34 C.F.R. §§ 300.510 and .515.

The due process hearing was held on June 10, 2015. The due process hearing was a closed hearing. The Petitioner was represented by Kiran Hassan, Esq. and DCPS was represented by Maya Washington, Esq. Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in person.

The Petitioner presented three witnesses: School Psychologist, Advocate and the Petitioner. The School Psychologist was certified as an expert in conducting psychological assessments and providing IEP program recommendations based on the results of assessment. DCPS presented one witness: Special Education Teacher (“SET”).

The Petitioner’s Disclosure Statement, filed and served on June 4, 2015, consisted of a witness list of five witnesses and documents P-01 through P-32. DCPS objected to exhibits P-1 through P-4 and P-31. The Petitioner withdrew exhibits P-1 through P-4 and DCPS’ objection to P-31 was overruled. The Respondent’s Disclosure Statement, filed and served on June 4, 2015, consisted of a witness list of four witnesses and documents R-1 through R-8 and were admitted into evidence without objection.

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

1. Whether DCPS denied the Student a FAPE by failing to develop an IEP on February 24, 2015 that provides educational benefit; specifically, the IEP does not have goals in Mathematics and 10 hours of specialized instruction inside the general education setting and 10 hours of specialized instruction outside the general education setting.
2. Whether DCPS denied the Student a FAPE by failing to evaluate the Student to determine the Student’s special education needs; specifically, DCPS failed to conduct a FBA and develop a Behavior Intervention Plan (“BIP”) to address the Student’s truancy, inattention behaviors, and executive functioning behaviors.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact² are as follows:

1. The Student is a ■ year-old student who resides in the District of Columbia with the Petitioner. (Petitioner's testimony)
2. The Student attended previous Middle School during the 2013-2014 school year. The Student's grades include Fs in Mathematics and Music and Cs in his other classes. The Student had a total of 9 absences during the 2013-2014 school year. (Exhibit P-20)
3. A comprehensive psychological assessment was conducted on February 10, 2014. The assessment yielded average nonverbal intelligence scores and relatively high scores in mathematics; average scores in reading, spelling, and oral language; and reading comprehension, problem solving, and written language in the low average range. The assessment yielded significantly elevated scores on the Connors-3 and BRIEF in indicating poor executive functioning as a result of the Student's Attention Deficit Disorder ("ADHD"). (Exhibits P-13 and R-6, School Psychologist's testimony)
4. On February 28, 2014, the student's IEP team reviewed the comprehensive psychological assessment and determined the Student was a student with an Other Health Impairment under the IDEA as a result of the Student's ADHD. The team provided 5 hours of specialized instruction per week in an inside the general education setting. The team developed Reading and Written Expression goals. (Exhibits P-8, P-9, P-12, R-2, SET's testimony)
5. The Student enrolled in Middle School at the beginning of the 2014-2015 school year. (Petitioner's testimony)
6. The i-Ready is an informal measure of student progress in the curriculum which is not proctored by the teacher. As of September 10, 2014, January 13, 2015, and May 28, 2015, the Student scored below his grade level; however, he made academic progress as measured by the i-Ready. (Exhibits P-18, R-5, Advocate's and SET's testimony)
7. As of February 10, 2015, the Student was receiving an A in Physical Education, a C in Pre-Algebra, and Ds and Fs in English, Spanish, Science and U.S. History and Geography. (Exhibit P-17)

² Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

Hearing Officer Determination

8. On February 24, 2015, the IEP team convened without the Petitioner and determined the Student continues to require 5 hours of specialized instruction per week in an inside the general education setting, and goals in reading and writing. The Student was given 2 goals in reading and 1 goal in written expression. The team determined the Student did not need goals in Mathematics. (Exhibit P-7)
9. In March of 2015, the school contacted the parent and requested a retention meeting. (Exhibit P-28, Petitioner's testimony)
10. The IEP team reconvened with the Petitioner on March 2, 2015. The Petitioner stated she was concerned with the Student's failing grades and requested 10 hours per week of inclusion and 10 hours per week of special education in a resource setting for the Student. DCPS offered the Petitioner 7 hours per week of special education in inclusion and 7 hours per week of special education in a resource room because 10 hours outside the general education setting would have prevented the Student from taking a core class. The IEP team did not revise the IEP at the meeting. At this meeting the team stated that the Student would not be retained but would be able to complete the classes he failed in summer school. (Exhibit R-3, Educational Advocate's, Petitioner's and SET's testimony)
11. On May 5, 2015, at the resolution session meeting, the IEP team increased the Student's hours of services to 7 hours of specialized instruction per week outside the general education setting and 7 hours per week of specialized instruction in the general education setting. (Exhibit P-6, P-22, R-7, SET's testimony)
12. The Student was absent a total of two full days during the 2014-2015 school year as a result of a suspension for videotaping a fight. Additionally, the Student was late to his first period advisory class on 34 occasions, Spanish on 2 occasions, Science on 3 occasions, and Pre-Algebra on 4 occasions during the 2014-2015 school year. (Exhibit R-4, Petitioner's and SET's testimony)

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:

“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*, 546 U.S. 49 (2005).

DCPS did not deny the Student a FAPE by failing to provide an IEP on February 24, 2015 with goals in Mathematics and 10 hours of specialized instruction inside the general education setting and 10 hours of specialized instruction outside the general education setting.

The primary vehicle for implementing the goals of the IDEA is the IEP, which the IDEA mandates for each child. *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). To be sufficient to confer a FAPE upon a given child, an IEP must be "reasonably calculated to enable the child to receive educational benefits." *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982). Pursuant to 34 C.F.R. § 300.320(a)(2), an IEP must include a statement of measurable annual goals designed to meet the student's needs that result from student's disability and make progress in the general education curriculum. The Student's February 24, 2015 IEP has goals in Reading and Written Expression but no goals in Mathematics. According to the February 10, 2014 psychological assessment, the Student's relative strength is in Mathematics. The IEP Team must consider the strengths of the student. 34 C.F.R. § 300.324(a)(i). Therefore, the IEP is reasonably calculated to provide educational benefit to the Student even with lack of goals in Mathematics.

A district's obligation to provide FAPE to a student with a disability is satisfied when the district provides the student with the personalized educational program necessary to allow the child to derive an educational benefit from that instruction. The FAPE requirement of the IDEA demands access to educational opportunity only, not the specific achievement of educational results. See *Rowley*, 553 IDELR 656 (U.S. 1982). The Petitioner argues that the Student requires ten hours of specialized instruction per week in the general education setting and ten hours of specialized instruction per week outside the general education setting. The IEP team must consider the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a)(iv). The Petitioner argues that the Student's failing grades should have compelled the February 10, 2015 IEP team to increase the hours of specialized instruction. However, the IDEA does not require the Student to achieve a certain grade level; only to receive educational benefit.

The IEP team must consider the results of the most recent evaluation of the student. 34 C.F.R. § 300.324(a)(iii). The Petitioner points out that the i-Ready assessment indicated that the Student was performing below grade level which should have indicated to the IEP team that the Student required more hours of service. However, the SET credibly testified that the i-Ready merely tests the Student's progress in the curriculum and does not indicate the academic level of performance. The Educational Advocate testified that the academic achievement scores from the February 10, 2014 psychological assessment are a better measure of the Student's academic level. The academic achievement assessment yielded average to low average scores in all academic areas except for Mathematics which yielded high scores.

In developing each student's IEP, the IEP team must consider the concerns of the parents for enhancing the education of their child. 34 C.F.R. § 300.324(a)(ii). The IEP team did increase the hours of service on May 5, 2015 from 5 hours of specialized instruction per week outside the general education setting to 7 hours per week outside the general education setting and 7 hours per week in the general education setting. The Petitioner argues the Student requires 6 more hours per week of specialized instruction than what was provided by the IEP team; however, the Petitioner did not provide a justification as to why the hours of services provided by the IEP team was not adequate. In fact, providing the Student with 10 hours per week would keep the Student out of a core class need to graduate. Based upon the foregoing the Hearing Officer concludes that the student was not denied FAPE by not providing an IEP with goals in Mathematics and 10 hours of

specialized instruction in the general setting and 10 hours of specialized instruction outside the general education setting.

DCPS did not deny the Student a FAPE by failing to evaluate the Student to determine the Student's special education needs; specifically, DCPS failed to conduct a FBA and develop a BIP to address the Student's truancy, inattention behaviors and executive functioning behaviors.

Pursuant to D.C. MUN. REGS. Tit. 30, § 3005.7, DCPS shall ensure that “the child is assessed in all areas related to the suspected disability [and] in evaluating each child with a disability...the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs...” The Petitioner alleges that DCPS should have conducted a FBA to address the Student's alleged truancy issues. However, the evidence supports that the Student does not have any truancy problems. The only class excessive absences is the first period advisory which is not an academic class. Therefore, the hearing office finds DCPS did not deny the student a FAPE by failing to conduct a FBA to address truancy issues.

Next, the Petitioner argues that DCPS should have conducted a FBA to address the Student's inattention behaviors and executive functioning behaviors. This argument is also not convincing. The IDEA does not provide a definition of a FBA; however, the IDEA explicitly mandates that a FBA be conducted and a BIP be developed if a student is subjected to a disciplinary change of placement, and the conduct is found to be a manifestation of a disability unless a BIP has already has been developed. In that case, the IEP team must review the BIP, and modify it, as necessary, to address the behavior. 34 C.F.R. § 300.530(f). The Student was suspended only two days. The Student's February 10, 2014 comprehensive psychological assessment states the Student's poor executive functioning as a result of the Student's ADHD. The fact that the Student's disability is the direct reason for the Student's possible inattention behaviors obviates the need to conduct a FBA in this area. Consequently, the Hearing Officer finds that DCPS did not deny the Student a FAPE by failing to conduct a FBA.

ORDER

The Petitioner's Complaint is dismissed with prejudice.

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: July 8, 2015

/s/ John Straus

John Straus
Independent Hearing Officer

2015-0150
Hearing Officer Determination

Copies to:

Petitioner (U.S. mail)

Petitioner's Attorney: Kiran Hassan, Esq. (electronically)

DCPS' Attorney: Maya Washington, Esq. (electronically)

DCPS (electronically)

ODR (electronically)