

**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
March 05, 2014

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: March 5, 2014
Petitioner,)	
)	Hearing Officer: Virginia Dietrich
v.)	
)	
DC Preparatory Public Charter School)	
(DC Prep))	
)	
Respondent.)	

HEARING OFFICER DETERMINATION

Background

Petitioner filed a due process complaint notice on January 24, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) by DC Preparatory Public Charter School (“DC Prep”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that DC Prep had failed to provide Student with a full time therapeutic services outside of general education Individualized Education Program (“IEP”) and appropriate location of services as well as an IEP with a disability classification of Emotional Disturbance, since the beginning of the 2013/14 school year. Petitioner also alleged that DC Prep incorrectly determined that Student’s behaviors that led to over 10 days of suspension were not a manifestation of his disability.

DC Prep argued that the manifestation determination review decision was appropriate based on Student’s behaviors and his disability classification; that DC Prep addressed Student’s behaviors appropriately over the 2012/13 school year with continuing assessments, monitoring and adjustments to Student’s IEP; and that because Student was able to access the curriculum with the services in his IEPs, he did not need a full time therapeutic educational placement outside of general education.

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; Title V, Chapter E-30, of the District of Columbia Municipal Regulations; and 38 D.C. Code 2561.02.

Procedural History

The due process complaint notice was filed on 01/24/14 by Petitioner, who is the mother of Student. DC Prep timely filed a response to the complaint on 02/03/14 and made no challenges to jurisdiction.

The resolution meeting was waived by parties via email correspondence dated 01/31/14. The complaint contained both disciplinary and non-disciplinary allegations. The disciplinary allegation, Issue #2 of the complaint, mandated an expedited hearing. Pursuant to 34 C.F.R. 300.532(c)(2), the expedited hearing must take place no later than 20 school days following the filing of the complaint. According to DC Prep PCS’ school calendar, the 20th school day was 02/25/14. The final decision was due no later than 10 school days following the hearing. The due process hearing took place on 02/20/14. The final decision was due on 03/06/14.

Issues #1 and #3 of the complaint did not warrant an expedited hearing. The timeline with respect to Issues #1 and #3 was that the 30-day resolution period ended on 02/23/14, the 45-day timeline to issue a decision began on 02/24/14 and the final decision was due on 04/09/14. The expedited and non-expedited issues were not bifurcated; all issues were heard together at the due process hearing.

A prehearing conference took place on 02/07/14. A Prehearing Order was issued on 02/07/14.

The due process hearing was a closed hearing that took place on 02/20/14. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person until her testimony was concluded. Thereafter, Petitioner was excused due to illness.

On 02/18/14, DC Prep filed Objections to Petitioner’s 5-Day Disclosure. Respondent’s objections were addressed at the due process hearing.

Petitioner’s Disclosure, undated, but filed and served on 02/12/14, consisted of a witness list of four (4) witnesses and documents P-1 through P-41. Petitioner’s Disclosure was incorrectly labeled as Case No. 2014-0072. DC Prep’s objection to witness Juan Fernandez was held in abeyance pending Petitioner’s presentation of Juan Fernandez as a witness. Juan Fernandez never testified. DC Prep’s objection was moot as a result. DC Prep’s objection to P-1 was overruled; P-1 was admitted into evidence over objection. DC Prep had no objection to a

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corrected copy of P-4. P-10-11 through P-10-13 were withdrawn by Petitioner. DC Prep did not object to P-11 through P-15 and P-17 and P-19 being admitted into evidence after the index of documents was amended to reflect the correct name of the documents. DC Prep did not object to P-15 after P-15-1 was withdrawn. DC Prep did not object to P-21 after P-21-4 was withdrawn. P-24 was withdrawn in its entirety. DC Prep did not object to P-34 after the index of documents was amended to reflect that P-34 consisted of two different documents; namely, Analysis of Existing Data and Prior Written Notice-Evaluation. DC Prep's objection to Petitioner pursuing a claim for compensatory education was moot after Petitioner withdrew her claim for compensatory education. Petitioner's witnesses and documents not addressed above were all admitted into evidence without objection. Petitioner was directed to submit a Corrected Petitioner's Disclosure no later than 5:00 p.m. on 02/23/14 and Petitioner did so.

DC Prep's Disclosure Statement, dated 02/12/14, consisting of a witness list of six (6) witnesses and documents R-1 through R-40, was admitted into evidence without objection.

Petitioner presented one witness: Petitioner.

DC Prep presented the following two (2) witnesses: (1) DC Prep special education teacher ("teacher"), and (2) DC Prep school psychologist ("psychologist").

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

Issue #1 – Whether DC Prep PCS denied Student a FAPE by failing to provide Student with an appropriate Individualized Education Program ("IEP"); specifically, (a) Student required an IEP and location of services that provided full-time therapeutic services outside of general education since the beginning of the 2013/14 school year, and (b) Student's IEP should have included a disability classification of Emotional Disturbance, from the beginning of the 2013/14 school year through 12/12/13.

Issue #2 – Whether DC Prep PCS denied Student a FAPE by incorrectly determining at the manifestation determination review ("MDR") on 01/23/13 that Student's behaviors that led to an excess of 10 days of suspension during the 2012/13 school year, were not a manifestation of his Specific Learning Disability.

² Petitioner withdrew the allegation of whether DC Prep PCS denied Student a FAPE since the beginning of the 2013/14 school year by failing to provide Student with an appropriate IEP that included a BIP; specifically, that a Functional Behavioral Assessment ("FBA"), review of the FBA in a meeting that included Petitioner, and development of a Behavioral Intervention Plan ("BIP") was not done to address Student's ongoing behavioral problems during the 2012/13 school year. Petitioner represented that this issue had been resolved. This allegation, Issue #3 of the complaint, was dismissed with prejudice without objection from Petitioner.

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Petitioner requested the following relief:³

- (1) A finding of a denial of a FAPE on the issues presented; and
- (2) The Hearing Officer to determine that Student requires an IEP that prescribes full-time therapeutic services outside of general education and an Order for DC Prep PCS to amend Student's IEP to reflect such and fund a school placement that can implement the amended IEP.

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

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 resident of the District of Columbia. Petitioner is Student's mother.⁴ At all relevant times, Student was a child with a disability as defined by the IDEA.

#2. On 01/23/13, a manifestation determination review ("MDR") meeting took place at DC Prep. After review of the incident that led to a recommendation for expulsion and after a review of whether or not DC Prep had implemented Student's IEP, the MDR team determined that Student's behaviors of assault on a staff member and failure to follow directions, were not a manifestation of his Specific Learning Disability. Petitioner was present at the meeting. Student's unconfirmed diagnosis of ADHD, related to the team by Petitioner, was considered.⁵

#3. On 01/08/13, DC Prep completed a psycho-educational re-evaluation of Student. At that time, Student had had 17 discipline incidents since the beginning of the school year, with six of those incidents resulting in suspension.⁶ Student struggled with accepting feedback, responding to redirection and consequences, following directions, and completing class work.⁷ At that time, Student received 4 hours/week of specialized instruction outside of general education, 4 hours/week of specialized instruction inside of general education, with IEP goals in Reading only, 45 minutes/week of speech-language therapy, and many accommodations and supports in the classroom.⁸ Psycho-educational testing revealed that Student's cognitive ability was in the Average range,⁹ that Student had a Learning Disability in Reading; and that Student

³ Petitioner withdrew her request for: (1) funding and transportation to the nonpublic school of Petitioner's choice; (2) funding for an independent comprehensive psychological assessment and Functional Behavioral Assessment, a review of the assessments and development of a Behavioral Intervention Plan; and (3) compensatory education consisting of tutoring and counseling. Petitioner's withdrawal of claims for relief, based on the issues in this complaint only, resulted in a dismissal of claims with prejudice that was not objected to by Petitioner.

⁴ Petitioner.

⁵ R-6-2, R-6-4.

⁶ R-1-3.

⁷ R-1-3.

⁸ R-1-3, R-5-6.

⁹ R-1-4.

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would benefit from a behavior plan and behavioral supports on his IEP to include counseling, a formalized functional behavioral assessment and behavioral intervention plan in order to address his behavioral difficulties and needs.¹⁰

#4. In January 2013, DC Prep completed a Functional Behavioral Assessment (“FBA”) based on classroom and hallway observations in Oct 2012, Dec 2012 and Jan 2013. This FBA was reviewed along with the 01/08/13 psycho-educational re-evaluation at an IEP meeting that occurred on 01/09/13.¹¹ Based on the results of the psycho-educational re-evaluation, Student met the IDEA criteria for a Specific Learning Disability.¹² The team updated Student’s IEP to include behavioral support in and outside of the classroom and behavioral goals.¹³

#5. DC Prep developed a Behavior Intervention Plan (“BIP”) on 01/31/13 that identified Student’s target behaviors, specified intervention strategies and positive behavior supports, and delineated rewards, reinforcements and consequences. Petitioner was present for development of the BIP.¹⁴ Behavior support services began on 02/28/13. Student responded tremendously to the behavior intervention plan.¹⁵

#6. The IEP team met again on 03/13/13 to amend Student’s IEP to increase the amount of specialized instruction, change behavioral support to 30 minutes/week in class and 30 minutes/week outside of class, and obtain consent for a clinical evaluation.¹⁶

#7. A clinical psychological evaluation was completed on 04/23/13 in order to determine Student’s eligibility for special education services. The evaluation revealed that Student had a Reading Disorder and emotional lability at home and school, and that the BIP was being utilized at school to help bring Student’s behavior under better control.¹⁷

#8. The IEP team met again on 06/05/13, reviewed the clinical psychological evaluation and concluded that Student did not have a mental disorder.¹⁸ Student again qualified under the IDEA as a child with a Specific Learning Disability.¹⁹

#9. The IEP team met again on 09/25/13. At that time, Petitioner had no concerns about Student academically or behaviorally. In fact, Petitioner was proud of Student.²⁰ Student’s behavior in school was not a problem. Student was doing well in his math class, but struggling in Reading.²¹ Student’s special education services were changed to include 13 hours/week of specialized instruction inside of general education, 5 hours/week of specialized instruction

¹⁰ R-1-10.

¹¹ R-3.

¹² R-3-2, R-4-1.

¹³ R-3-2.

¹⁴ R-8-1.

¹⁵ Psychologist.

¹⁶ R-9-1, R-9-2, R-12-1.

¹⁷ R-13.

¹⁸ R-14.

¹⁹ R-16-1.

²⁰ R-17-3, Petitioner.

²¹ R-17-3, teacher.

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outside of general education, 240 minutes/month of counseling and 180 minutes/month of speech therapy.²² Petitioner expressed no concerns about the services in the IEP developed on 09/25/13.²³

#10. In October 2013, a psychology diagnostic interview was completed at Kennedy Krieger Institute Psychiatric Clinic.²⁴ The psychology diagnostic interview was initiated by Petitioner who had concerns about Student's behavior because bipolar disorder runs in her family. Historical data provided solely by Student's parents led to a clinical diagnosis of Mood Disorder, Not Otherwise Specified and Disruptive Behavior Disorder, Not Otherwise Specified. A clinical diagnosis of ADHD and Oppositional Defiant Disorder was not confirmed.²⁵

#11. On 12/12/13, Student's IEP was amended to reflect a disability classification change from Specific Learning Disability to Emotional Disturbance. Student's BIP was updated.²⁶ Petitioner's basis for the request in change of disability classification was the results of the psychology diagnostic interview completed by Kennedy Krieger Institute Psychiatric Clinic.²⁷ The IEP team agreed that Student met the IDEA criteria for a disability classification of Emotional Disturbance.²⁸

#12. From 08/26/13 through 11/01/13, Student made progress on his IEP goals in the areas of Reading, Communications/Speech-Language, and Emotional/Social/Behavioral Development.²⁹

#13. On 12/12/13, Student was still doing well in school, as reflected by his IEP progress reports. In December 2013, Student had As and Bs in all of his classes. Student had increased in his reading level since the beginning of the 2013/14 school year. At the December 2013 meeting, Petitioner still did not express any concerns about Student's performance in school or the services in the IEP. Student's behavior overall had improved. There were no concerns about his behavior. Unlike the previous year, Student was better at receiving feedback, better at communicating with teachers and peers, better at following verbal directions, able to stay in the classroom and do class work, and had very few tantrums. Student has been able to access the curriculum with the services in his IEPs since the beginning of the 2013/14 school year. Student does not need more special education services than he is currently receiving.³⁰ Student does not require a full time outside of general education therapeutic placement.

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:

²² R-17-4, R-18-8.

²³ Petitioner, teacher.

²⁴ P-20-1.

²⁵ R-20-9, R-20-10.

²⁶ R-25-1, R-26-1.

²⁷ R-26-1.

²⁸ R-42-2.

²⁹ R-33, teacher, psychologist.

³⁰ Teacher, psychologist.

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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 parent may file a complaint on any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. 34 C.F.R. 300.507(a).

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).

Free appropriate public education or FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate school and are provided in conformity with the IEP. 34 C.F.R. 300.17.

A “free appropriate public education” is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982).

The first issue to be determined is whether DC Prep PCS denied Student a FAPE by failing to provide Student with an appropriate Individualized Education Program (“IEP”); specifically, (a) Student required an IEP and location of services that provided full-time therapeutic services outside of general education since the beginning of the 2013/14 school year, and (b) Student’s IEP should have included a disability classification of Emotional Disturbance, from the beginning of the 2013/14 school year through 12/12/13.

Special education means specially designed instruction to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the disability; and ensure access of the child to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency. 34 C.F.R. 300.39.

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IEP means a written statement for each child with a disability that meets the child's needs the result from the child's disability to enable the child to be involved in and make progress in the general education curriculum. 34 C.F.R. 300.320(a). For an IEP to be appropriate, it must be "reasonably calculated to enable the child to receive educational benefits." *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176, 206-207 (1982).

Each public agency must ensure that (1) to the maximum extent appropriate, children with disabilities are to be educated with children who are nondisabled, and (2) special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114.

(a) Petitioner failed to meet her burden of proof that Student required a full time therapeutic IEP and location of services since the beginning of the 2013/14 school year. During the previous 2012/13 school year, Student had behavior problems that interfered with learning. However, DC Prep took many and immediate steps to address Student's behavior problems and provide appropriate programming for Student. Those steps included: conducting a psycho-educational re-evaluation in January 2013, conducting a clinical psychological assessment in April 2013; completing a Functional Behavioral Assessment in January 2013; developing a BIP in January 2013 and implementing it; convening IEP team meetings in January, March, June, September and December 2013; and adjusting and/or increasing Student's special education services in January, March, and September 2013. The BIP was updated in December 2013. DC Prep continually adjusted Student's services to address Student's academic and behavioral services to assure that Student could access the curriculum and make academic progress.

Student began the 2013/14 school year with an IEP that prescribed 13 hours/week of specialized instruction outside of general education and 5 hours/week of specialized instruction outside of general education, and speech-language and behavioral support services. During the 2013/14 school year, Student's behavior and academics were not a problem. Student performed well in his math class. Student increased his level in Reading. Student made progress towards all of his IEP goals. During the 2013/14 school year, Student was able to access the curriculum and receive educational benefit. The Hearing Officer determines that Student did not require more services than what was reflected in the September 2013 IEP and the December 2013 IEP in order to be successful in school and derive meaningful educational benefit.

Moreover, during the meetings that Petitioner attended during the 2013/14 school year, Petitioner never expressed any dissatisfaction with the IEP or with the school.

(b) Petitioner also failed to meet her burden of proof that Student's IEP should have had a disability classification of Emotional Disturbance since the beginning of the 2013/14 school year.

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When the team met on September 25, 2013, the information before the team at that time, which included a January 2013 psycho-educational re-evaluation and an April 2013 clinical psychological evaluation, revealed that Student had a Specific Learning Disability only. There was no objective data before the team in September 2013 that Student met the IDEA disability classification criteria for Emotional Disturbance. Student's behaviors since the beginning of the 2013/14 school year had not been a problem. The independent psychology diagnostic interview results that swung the balance to a classification of Emotional Disturbance was not completed until October 2013. That assessment did not exist in September 2013. There was no objective or subjective data available to the team in September 2013 that suggested or indicated that Student's disability classification should have been Emotional Disturbance.

At the IEP Team meeting in December 2013, Student's disability classification was changed from Specific Learning Disability to Emotional Disturbance upon the request of Petitioner. The Mood Disorder and Disruptive Behavior diagnosis of the psychology diagnostic interview served as the basis for the disability classification change by the IEP team. That data was somewhat subjective in that it was derived solely from historical data provided by Student's parents; nevertheless, it was sufficient for the team to change Student's disability classification.

The disability classification is irrelevant. Nothing in the IDEA requires that children be classified by their disability so long as each child who has disability and who, by reason of that disability, needs special education and related services is regarded as a child with a disability. 34 C.F.R. 300.111(d). Student was a child with a Specific Learning Disability since the beginning of the 2013/14 school year and was receiving special education services as a result thereof.

The second issue to be determined is whether DC Prep PCS denied Student a FAPE by incorrectly determining at the manifestation determination review ("MDR") on 01/23/13 that Student's behaviors that led to an excess of 10 days of suspension during the 2012/13 school year, were not a manifestation of his Specific Learning Disability.

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local education agency ("LEA"), the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine, (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or (2) if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 C.F.R. 300.530(e).

Petitioner failed to meet her burden of proof on Issue #2. Petitioner failed to offer any evidence that the manifestation determination review decision on 01/23/13, i.e., that Student's behaviors were not a manifestation of his Specific Learning Disability, was incorrect.

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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: March 5, 2014

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

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