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STUDENT HEARING OFFICE

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

STUDENT,[1] through the Parent,	)	
	)	Date Issued: July 20, 2011
Petitioner,	)	
	)	Hearing Officer: Virginia A. Dietrich
v.	)	
	)	Case No:
District of Columbia Public Schools	)	
	)	
Respondent.	)	Hearing Dates: July 6, 2011 Room: 2009
	)	July 7, 2011 Room: 2009

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of year old Student, filed a due process complaint notice on May 9, 2011 alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

Petitioner alleged that Student's problem behaviors in school during the 2010-2011 school year were due to the District of Columbia Public Schools' ("DCPS") failure to implement Student's behavior intervention plan, that DCPS failed to provide Student with an Individualized Education Program ("IEP") in May 2011 with sufficient and appropriate specialized instruction and related services, and that DCPS failed to provide Student with an appropriate placement for the 2010-2011 and 2011-2012 school years. Petitioner sought a private placement for Student.

DCPS asserted that it had provided Student with an IEP reasonably calculated to provide Student with a FAPE and Student's IEP was being implemented at Student's public school. DCPS argued that Student's adjustment at his public placement was satisfactory and that he had been provided with the basic floor of opportunity that could provide educational benefit.

[1] Personal identification information is provided in Appendix A.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

This Hearing Officer was assigned to the case on 05/10/11. A resolution meeting took place on 05/23/11 and at that time, parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. Therefore, the 30-day resolution period expired on 06/08/11, the 45-day timeline to issue a final decision began on 06/09/11, and the final decision is due on 07/23/11.

The due process hearing was a closed hearing that took place on 07/06/11 and 07/07/11. Petitioner was represented by Roberta Gambale, Esq. and DCPS was represented by Harsharen Bhuller, Esq. Neither party objected to the testimony of witnesses via telephone. Petitioner participated in the hearing in person.

Petitioner presented five witnesses: Petitioner; Petitioner's educational advocate; Student's community support worker; Admissions Director; and Student's compensatory education services provider. DCPS presented one witness: Special education teacher ("SET").

Petitioner's disclosures dated 06/28/11, containing a witness list and Exhibits P-1 through P-35, were admitted into evidence without objection. DCPS' disclosures dated 06/28/11, containing a witness list and Exhibits R-1 through R-6, were admitted into evidence without objection. During the due process hearing, DCPS offered an additional Exhibit R-7, which was admitted into evidence without objection.

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

Whether DCPS denied Student a FAPE by failing to provide Student with an IEP on 05/04/11 that had an appropriate behavior intervention plan, sufficient counseling services and counseling goals, and 100% specialized instruction in a therapeutic setting.

Whether DCPS denied Student a FAPE by failing to implement Student's Behavior Intervention Plan ("BIP") during the 2010-2011 school year.

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement/location of services for the 2010-2011 school year.

Whether DCPS denied Student a FAPE by failing to identify an appropriate placement and/or location of services for the 2011-2012 school year.

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. In October 2009, psychological testing conducted by DCPS revealed that Student had a general cognitive ability in the Extremely Low range. His academic performance was significantly subpar and his social-emotional functioning was inconsistent. He was diagnosed with a Specific Learning Disability in the areas of Reading, Written Expression and Working Memory. He was viewed as no more likely than most children his age to break rules and have problems with authority. Teachers' reports at that time indicated that Student had considerable struggles with attaining basic skills, he seldom completed assignments independently, and he lacked motivation and displayed a poor attitude towards learning.[2] Additional psychological testing conducted in December 2009 yielded results that were consistent with the psychological testing results of October 2009. Testing revealed that Student had an Adjustment Disorder with Mixed Anxiety and Depressed Mood Disorder, with symptoms that included non-compliant behavior towards teachers, self-consciousness, extreme worry, poor coping skills and feelings of low self-concept that appeared to be adversely affecting Student's ability to perform at his optimal level in school.[3]

#2. At the beginning of the 2010-2011 school year, Student had an IEP dated 08/24/10 that classified Student with a Specific Learning Disability and prescribed 10 hours/week of specialized instruction in mathematics outside of general education, 7.5 hours/week of specialized instruction in reading outside of general education, 7.5 hours/week of specialized instruction in written expression outside of general education, 1 hour/week of behavioral support services outside of general education, and 1 hour/week of speech-language pathology services outside general education.[4]

#3. At the beginning of the 2010-2011 school year, Student had a BIP dated 04/21/10 that provided for positive intervention strategies to target Student's behaviors of lacking the ability to stay focused and on task in the classroom, displaying disruptive classroom behaviors, lacking academic motivation, ease of frustration and refusing to complete assignments once frustrated. The intervention strategies indicated on the BIP consisted of a behavior and academic skills contract, assistance to Student within the classroom to utilize coping and conflict resolution skills, positive reinforcement for compliant behavior, informing Student of consequences of negative behavior, rewards for accepting consequences and accepting responsibility for actions, redirection for undesired behavior, free time once assignments have been completed, standing and moving around the class when necessary, and a structured environment to promote appropriate behavior and reduce opportunities to be disruptive. The BIP also recommended the use of a behavior monitoring chart and prescribed data collection to help monitor Student's progress towards attainment of IEP goals.[5]

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[2] R-7.
[3] P-22.
[4] P-26.
[5] P-10.

#4. On 01/07/11, a new BIP was developed that mirrored the BIP developed on 04/21/10. The BIP remained the same because Student still needed to work towards improvement in the areas the BIP was designed to address. Both BIPs were to be utilized by all special education teachers.[6]

#5. On 04/08/11, the IEP Team met and developed an IEP that classified Student with a Specific Learning Disability and prescribed 10 hours/week of specialized instruction in mathematics outside of general education, 7.5 hours/week of specialized instruction in reading outside of general education, 7.5 hours/week of specialized instruction in written expression outside of general education, 1 hour/week of behavioral support services outside of general education, and 1 hour/month of speech-language pathology consultation services. DCPS did not develop a new BIP on 04/08/11.[7] At the Multidisciplinary Team ("MDT") meeting on 05/04/11, the amount and type of specialized instruction and related services was not changed, but the team did change some of the IEP goals and the team did discuss the BIP and behavioral goals.[8]

#6. During the 2010-2011 school year, Student's lack of maturity negatively affected his behavior as did the fact that having his three good friends with him in the same classroom was very distracting for Student. Student engaged in acting out behavior on a daily basis in English class and quarterly progress reports indicated that Student had poor behavior in math, English and history.[9]

#7. Student received two in-school disciplinary actions in November 2010 and seven disciplinary referrals from teachers between November 2010 and March 2011 for behaviors that included inappropriate or disruptive physical contact with students, talking disrespectfully to adults and constantly refusing to follow rules. Strategies used by teachers to address these behaviors included verbal warnings and redirection, incentives such as no homework, loss of points, student-teacher conferences in the hallways, lunch party incentives for better behavior, calling Petitioner, sending Student to the Respect Center, utilizing social worker services, letting Student use the computer, using positive reinforcement such as pizza parties, free time, and a point system, and these strategies helped to resolve conflicts.[10]

#8. Although Student made some progress towards attaining his emotional, social and behavioral IEP goals for the first three advisories of the 2010-2011 school year, Student continued to need behavioral support through the use of behavior interventions because Student still had negative peer interaction, inappropriate responses to various situations that distracted him from academic instruction, and he needed continued assistance with utilizing appropriate coping skills when frustrated.[11] Over the course of the 2010-2011 school year, Student did not make much overall behavioral progress in his English classroom; towards the end of the school year, he was still receiving consequences and getting referral forms. Most of Student's frustration came from his inability to grasp concepts.[12]

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[6] P-8; P-10.
[7] R-4.
[8] P-2; P-4.
[9] P-17; SET.
[10] P-15; SET.
[11] P-19.
[12] SET.

#9. Student made progress towards attaining his IEP goals for the first through third reporting periods of the 2010-2011 school year in the areas of mathematics, reading and written expression.[13] By the end of the third advisory, Student had achieved average grades of "B" in Math and English, "C" in Science and "D" in U.S. History. Student's behavior affected his grades in his History class.[14] Student experienced 60% growth in achieving his English IEP objectives and goals by the end of the 2010-2011 school year, but Student hadn't mastered them. Student made 0.8 years growth in reading, as measured by the administration of the Fountas-Pinnell Reading Assessment administered at six different times over the course of the 2010-2011 school year.[15] Student tested at the Basic level in Mathematics on the DC-BAS test in March 2011.[16] Occasionally, Student struggled to complete his work in English class, but all of his classmates struggled as well.[17]

#10. Student's English teacher did not have a copy of Student's BIP until November or December 2010. Student's other teachers did not receive a copy of the BIP until March 2011. At the 05/04/11 IEP Team meeting, Student's teachers were following the BIP and using their own behavior intervention strategies.[18] No behavior intervention plan data was collected for the 2010-2011 school year.[19]

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

[13] P-19.
[14] P-3; P-16.
[15] SET.
[16] P-2.
[17] SET.
[18] P-4; SET.
[19] Advocate.

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 DCPS denied Student a FAPE by failing to provide Student with an IEP on 05/04/11 that had an appropriate behavior intervention plan, sufficient counseling services and counseling goals, and 100% specialized instruction in a therapeutic setting.

Pursuant to 34 C.F.R. 300.320(a)(2)(i), the IEP must contain academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and meet the child's other educational needs that result from the child's disability. And, pursuant to 34 C.F.R.300.324(a)(2)(i), the IEP Team must, in the case of a child whose behavior impedes that child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

There was evidence in the record that the MDT met on 05/04/11 to discuss the BIP and behavioral goals, and review and revise Student's IEP. It should have been clear to the MDT at that time that Student's BIP required modification to include a more concrete consequence and reward system. Throughout the year, Student continued to have daily behavioral incidents and the reasons for the behavior incidents were varied. Student was immature, he was in a class with several close friends, and he experienced frustration due to his difficulty with grasping concepts that resulted from his low cognitive ability. Student continued to require assistance within the classroom to utilize coping and conflict resolution skills.

The BIPs in existence for the 2010-2011 school year were loosely structured to give flexibility to the teachers to address Student's behavior problems in the way seen fit by them. And, teachers did employ their own behavior intervention techniques which is consistent with the overall tenet of the IDEA, which is to provide special education services tailored to the unique needs of the child. 34 C.F.R. 300.39. However, by the end of the 2010-2011 school year, Student's behavior in English class had not really improved. He was still getting incident referrals. Student received grades of "D" for three advisories in his history class due to his behavior. The BIP suggested intervention strategies; however, it was not specific enough to provide a concrete system of consistent rewards and consequences that could be readily recognized by Student and consistently used by all teachers to modify Student's behavior. In this case, as in the case of *Neosho R-V School District v. Clark,* 38 IDELR 61 (2003), the goals and strategies for dealing with Student's behavior problems were insufficient to qualify as a cohesive behavior management plan. Petitioner met her burden of proof that at the MDT meeting on 05/04/11, DCPS failed to provide Student with an appropriate BIP.

Petitioner failed to present any evidence with respect to the insufficiency of the counseling services and goals contained in the 05/04/11 IEP. The evidence in the record was that DCPS was providing Student with counseling services and Student was making some progress towards meeting the IEP goals in that area.[20] Petitioner failed to meet her burden of proof with respect to the insufficiency of counseling services and goals.

[20] P-20; Finding #8.

Petitioner also failed to show by a preponderance of the evidence that Student required an IEP with 100% specialized instruction in a therapeutic setting in order to receive educational benefit. The evidence in the record revealed that Student was making progress towards attaining his academic IEP goals during the 2010-2011 school year and although he occasionally struggled with the class work, his struggle was no different from that of his classmates. Student did have behavior problems in English class, but he did not demonstrate the severe misbehaviors generally exhibited by students with an emotional disturbance.[21] Student experienced some academic growth as evidenced by his 0.8% growth in reading over the course of the 2010-2011 school year. Student tested at the Basic level in Mathematics on the DC-BAS test in March 2011. Student was not failing any of his academic courses, and Student's behavior never rose to a level that resulted in suspension.

The evidence in the record showed that Student's IEP on 04/08/11 and 05/04/11 consisted of 100% specialized instruction and related services. What Petitioner failed to show was that Student required these services to be provided in a therapeutic setting in order for Student to receive educational benefit. The record was clear that Student was receiving some educational benefit and that is all that is required in order to provide Student with a FAPE. DCPS provided the "basic floor of opportunity" that consisted of access to specialized instruction and related services which was individually designed to provide educational benefit to Student. *See Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley,* 458 U.S. 176 (1982).

The second issue to be determined is whether DCPS denied Student a FAPE by failing to implement Student's BIP during the 2010-2011 school year. Petitioner alleged that DCPS' failure to implement Student's BIP resulted in the loss of classroom time due to Student's acting out and this interfered with Student's progress towards attaining IEP goals and accessing the general education curriculum. Petitioner failed to specifically prove that Student's behavior negatively affected his progress towards achieving IEP goals, but nonetheless, DCPS failed to implement Student's BIP and as a result, Student was denied a FAPE.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch .Dist. of the City of Newark,* 336 F.3d 260, 264 (3d Cir. 2003). At a minimum, the IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Chambers v. Philadelphia Bd. of Educ.,* 587 F.3d 176, 182 (3d Cir. 2009).

A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing the IEP, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful

[21] SET.

educational benefit. *Houston Independent School District v. Bobby R.,* 200 F.3d 341, 349 (5th Cir. 2000). *See Catalan ex rel E.C. v. District of Columbia,* 478 F. Supp 2d 73, 75 (D.C.C. 2007).

In the present case, this Hearing Officer must determine whether the deviations from the IEP's stated requirements are material. The IDEA is violated when a school district deviates materially from a student's IEP. And, the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail on a failure-to-implement claim. Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811 (2007).

Petitioner met her burden of proof on this issue. The testimony of the witnesses made it clear that the BIP was not utilized as a roadmap for behavior modification reforms that could improve Student's ability to participate in his educational program during the majority of the 2010-2011 school year. However, testimony also revealed that throughout the 2010-2011 school year, Student's teachers were using behavior intervention techniques that were consistent with the overall strategies and interventions that were identified in Student's BIP. Generally, there was no failure by DCPS to implement the objectives of the BIP. The failure to implement the BIP occurred in DCPS' failure to develop a standardized system of collecting data and using the data to measure Student's behavioral progress. Although there was evidence that Student made progress towards achieving his social emotional IEP goals, there was also evidence that Student had not made much behavioral progress over the course of the academic year in his English class. The totality of the circumstances leads to the conclusion that the failure to develop a more concrete consequence and reward system that could be applied by all teachers in all classrooms and the failure to collect behavioral intervention data defeated the whole purpose of the BIP. These failures constituted a material failure to implement the IEP because Student's behaviors affected his participation in class on a daily basis. Student's behavior negatively affected his grades in his history class.

The third issue to be addressed is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement/location of services for the 2010-2011 school year. Petitioner failed to meet her burden of proof on this issue.

Petitioner alleged that as a result of Student's inability to make progress towards IEP goals due to acting out behaviors that reduced his availability for learning, Student required a full-time therapeutic placement with an intensive behavioral management program that could implement an IEP with 100% specialized instruction and that this type of educational program could not be provided at the public middle school that Student attended. Petitioner proposed that Student be placed at a special education school solely for disabled peers.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature 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 C.F.R. 300.114(a)(2).

There was insufficient evidence in the record for this Hearing Officer to conclude that Student had not received an appropriate placement or location of services for the 2010-2011 school year. Although Student had behavior problems during the 2010-2011 school year, the behavior problems were consistent with those identified in psychological evaluations conducted in October and December 2009, and these behavior problems existed prior to the development of either BIP.

In this case, failure to implement Student's BIP did not render the entire placement inappropriate. The record revealed that Student had made measurable academic progress at his public middle school during the 2010-2011 school year with the IEP dated 04/21/10 and 04/08/11. Student's slow academic progress was consistent with his cognitive ability. Student made progress towards achieving his academic and social emotional IEP goals. Student's grades were negatively affected by his behavior; however, he did not fail any classes and his behavior problems were not severe enough to warrant a suspension and were not severe enough to rival the misbehaviors commonly associated with children with an emotional disturbance. Therefore, the appropriate remedy would not be to remove Student from his public school setting, but to provide modifications and accommodations to the existing environment. This approach is consistent with determining the least restrictive environment in which Student can receive educational benefit. In this case, a Functional Behavioral Assessment and a BIP would be the first step in addressing Student's behavior problems that affect learning.

The last issue to be addressed is whether DCPS denied Student a FAPE by failing to identify an appropriate placement and/or location of services for the 2011-2012 school year.

Petitioner failed to meet her burden of proof on this issue. Firstly, Petitioner failed to provide any concrete evidence on the placement or location of services proposed by DCPS for the 2011-2012 school year. The only evidence of Student's proposed placement for the upcoming year was provided in the testimony of the advocate and the advocate was unsure of the neighborhood school that Student would matriculate to. No other evidence on this issue was presented. Moreover, the 2011-2012 school year has not yet begun. Petitioner's allegation is premature because the placement and/or location of services could very well be in place prior to the beginning of the upcoming school year.

Conclusion

Petitioner met her burden of proof that Student had been denied a FAPE as a result of DCPS' failure to implement Student's BIP throughout the 2010-2011 school year and DCPS' failure to provide Student with an appropriate BIP on 05/04/11. An IDEA claim is only viable if those procedural violations affected the student's substantive rights." *Id.* In the absence of a showing that the child's education was substantively affected, no relief may be awarded. *Id.* Quoted from *O.O. v. District of Columbia*, et.al., Defendants, Civil Action No. 07-1783 (JBD) (2008).

"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, Student is entitled to compensatory education because Petitioner proved by a preponderance of the evidence that Student had been denied a FAPE.

Student can benefit from a formal assessment of his behavior during the upcoming school year and a BIP specifically tailored to address identified target behaviors. The behavior modifications that the prior and current BIP sought to bring about can be addressed through the use of an independent counselor/tutor who can help Student develop coping skills and appropriate responses to stress within the classroom.

ORDER

(1) DCPS shall conduct a Functional Behavioral Assessment ("FBA") and develop a Behavior Intervention Plan ("BIP") based on the results of the FBA. The BIP shall include a measurable consequence and reward system. The BIP shall include a provision for data collection and a provision for periodic review of the data collection at least bi-annually. The FBA shall be conducted and the BIP developed within a reasonable time after the beginning of the 2011-2012 school year and no sooner than 30 calendar days after the beginning of the 2011-2012 school year; and

(2) DCPS shall fund 20 hours of independent counseling services, with counseling services to begin after the BIP has been developed. The role of the independent counselor will be to provide assistance to Student in the classroom, using the BIP as a guide, to reinforce more socially acceptable and appropriate behaviors in the classroom.

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 20, 2011

/s/ Virginia A. Dietrich
Hearing Officer

Hearing Officer Determination

Copies to:

Petitioner's Attorney: Roberta Gambale, Esq. (electronically)
DCPS' Attorney: Harsharen Bhuller, Esq. (electronically)
DCPS (electronically)
SHO (electronically)