

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

OSSE
Student Hearing Office
October 11, 2013

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**¹

Student is an eighteen year-old young woman, who presently attends a DCPS senior high school. On August 13, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public Schools. On August 19, 2013, DCPS filed its Response to the Complaint.

The parties waived the resolution session in writing, effective August 27, 2013. Therefore, the 45-day timeline began on August 28, 2013 and will end on October 11, 2013, which is the HOD due date.

On July 26, 2013, the hearing officer conducted a prehearing conference and determined, in a September 16, 2013 Prehearing Order, that the claims to be adjudicated, defenses asserted, and relief requested were as follows: ***Petitioner's Claims:*** (i) Alleged failure to adhere to the 5/20/13 Hearing Officer Determination ("HOD") by not completing the FBA and BIP and not meeting to revise the IEP and determine an appropriate placement per the psychologist's report; (ii) Alleged denial of FAPE by failing to provide an appropriate placement even though the 5/20/13 HOD determined that a new placement that conforms to the psychologist's recommendations should be made; (iii) Alleged denial of FAPE by failing to provide an appropriate IEP as it has already been decided in the 5/20/13 HOD that the current IEP is inappropriate. ***DCPS Defenses:*** (i) The 18-year old Petitioner and DCPS reached a July 2013 agreement to alter the 5/20/13 HOD, but counsel for Petitioner, after full execution of the agreement, contended the client had been misinformed and demanded that the agreement be voided. Counsel charged DCPS with circumventing the attorney/client relationship. (ii) Even if the agreement is voided, DCPS reasonably relied on the agreement's extension of the HOD timelines and it would be grossly inequitable to allow Petitioner to reassert the old timelines from the HOD. (iii) Petitioner's issues must be dismissed as they cannot be entertained at the SHO and a hearing officer cannot order compliance with a previous HOD. ***Relief Requested:*** (i) Placement and funding at a private full-time therapeutic day program with a small student-teacher ratio, as recommended by the psychologist. (ii) DCPS to create the FBA ordered by the

¹ This section sets forth only the basic procedural history. Other events, including motions practice, may have taken place that are not listed here.

HOD within 10 days and complete the BIP or fund an independent FBA and BIP. (iii) An MDT meeting to review and revise the IEP to include the BIP and provide the recommended full-time services. (iv) At the prehearing conference, Petitioner also requested compensatory education and agreed to provide its compensatory education plan to DCPS by 9/16/13. The hearing officer issued a Prehearing Order on July 30, 2013.

By their respective letters dated September 27, 2013, Petitioner disclosed thirty-five documents (Petitioner's Exhibits 1-35) and DCPS disclosed eleven documents (Respondent's Exhibits 1-11).

The hearing officer convened the due process hearing on October 4, 2013, as scheduled.² All documents disclosed by DCPS were admitted into the record without objection. Petitioner's Exhibits 3-5 and 23-25 were excluded on DCPS's relevance objection; Petitioner's Exhibit 9 was conditionally admitted and the condition was later removed; Petitioner's Exhibits 10-14 were voluntarily withdrawn by Petitioner after objection by DCPS; Petitioner's remaining documents were admitted without objection.

The hearing officer allowed the parties to bypass opening statements so as to ensure the receipt of testimony from Petitioner's witnesses. Thereafter, the hearing officer received testimonial evidence from both parties, as well as closing statements, prior to concluding the hearing.

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

ISSUE(S)

1. Did DCPS fail to adhere to the 5/20/13 HOD by not completing the FBA and BIP and not meeting to revise the IEP and determine an appropriate placement per the psychologist's report?
2. Did DCPS's fail to provide an appropriate placement, even though the 5/20/13 HOD determined that a new placement that conforms to the psychologist's recommendations should be made?
3. Did DCPS fail to provide an appropriate IEP, as allegedly it has already been decided in the 5/20/13 HOD that the current IEP is inappropriate?

FINDINGS OF FACT³

1. Student is eighteen years old, and she is attending ninth grade for the fourth consecutive year at the same DCPS senior high school she has attended for the past four years.⁴

² Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

³ 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, then 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.

⁴ Testimony of Student.

2. Student's current IEP is dated January 15, 2013. The IEP identifies Student's primary disability as Other Health Impairment ("OHI") and requires Student to receive 13 hours per week of specialized instruction in general education, 6.5 hours per week of specialized instruction outside of general education, and 45 minutes per week of behavioral support services outside general education.⁵
3. Student has been diagnosed with Mathematics Disorder, Disorder of Written Expression, and Oppositional Defiant Disorder. Her overall cognitive functioning is in the Borderline range, her overall academic skills are in the Borderline range, and she presents with maladjusted social functioning, such that her emotional and behavioral issues severely impact her academic performance, interpersonal relationships and home life.⁶
4. At the due process hearing in this case, Student exhibited very limited communication skills in that she had difficulty understanding and answering basic questions, and she answered all questions with extremely short answers.
5. On May 20, 2013, a previous hearing officer issued an HOD, in which the hearing officer concluded, *inter alia*, that Student's January 15, 2013 IEP is not reasonably calculated to provide educational benefit to Student because it does not adequately address Student's lack of expected progress under her prior IEPs and the findings of a 2012 comprehensive psychological evaluation. As a result, the hearing officer ordered DCPS to, *inter alia*, initiate an FBA within 10 days of the issuance of the Order, subject to obtaining Student's consent; and convene Student's IEP team within 15 calendar days of completion of the FBA to revise and update Student's IEP, giving full consideration to the findings and recommendations in the 2012 comprehensive psychological, offer Student a public or private placement that offers a small class size, low student to teacher ratio, and individualized teaching support by staff trained to work with students with attentional and social/emotional behavior disorders, and develop a BIP based upon the FBA.⁷
6. On May 21, 2013, one day after the issuance of the 5/20/13 HOD, DCPS sent an initial packet, offer of assistance and request for consent to evaluate to Petitioner's counsel. On June 3, 2013, having received no response to the initial packet, DCPS sent out another request for consent to evaluate and offer of assistance to Petitioner's counsel. By reply email dated June 3, 2013, Petitioner's counsel advised DCPS to have Student sign the consent form at school. DCPS attempted to do so, but asked counsel to continue to attempt to have Student sign the document as well. On June 25, 2013, DCPS spoke with Petitioner's counsel about having the FBA done independently pursuant to a provision waiver that would have altered the timeline under the 5/20/13 HOD. Thereafter, DCPS sent the provision waiver to Petitioner's attorney, but counsel indicated Student would not sign the waiver. DCPS then continued to attempt to obtain Student's signature by reaching out to Parent, making multiple appointments for Student to go to DCPS's central office, and attempting to visit Student's home (but no one was there). Ultimately, on July 19, 2013, DCPS visited Student at her place of employment and obtained her signature on

⁵ Petitioner's Exhibit 15.

⁶ Petitioner's Exhibit 19 at 8; Respondent's Exhibit 3 at 9; testimony of licensed clinical psychologist.

⁷ Petitioner's Exhibit 33 at 25; Respondent's Exhibit 5 at 25.

the provision waiver. DCPS also issued authorization letters for Parent to obtain an independent FBA and independent compensatory education services for Student.⁸

7. On August 12, 2013, Petitioner's counsel advised DCPS of counsel's opinion that the provision waiver was obtained illegally and unethically without counsel's involvement, and counsel insisted that DCPS consider the waiver null and void. By email dated August 15, 2013, DCPS offered to rescind the waiver and conduct a planning meeting on August 20, 2013 to determine the best way to proceed to assist Student. DCPS noted that it had discussed the meeting directly with Parent after calling Petitioner's counsel and getting a voicemail account that was full. By reply email, Petitioner's counsel admonished DCPS for contacting her client directly and instructed DCPS not to make direct contact with the client without counsel's prior knowledge. Counsel also advised that the meeting was null and void, and that the parties could discuss the Complaint at the resolution session meeting.⁹
8. The instant Complaint charging DCPS with failing to implement the 5/20/13 HOD in various respects was filed on August 13, 2013.
9. On August 30, 2013, DCPS unilaterally amended Student's IEP to increase the time, frequency and setting of the specialized instruction provided, so that Student would be entitled to receive 26.5 hours of specialized instruction outside general education and 45 minutes per week of behavioral support services outside general education.¹⁰
10. Petitioner's counsel and Petitioner did not learn of the August 30th Amended IEP until the disclosures were filed for the instant case.
11. In September 2013, DCPS conducted an FBA and developed a BIP for Student.¹¹
12. At the start of the current school year, SY 2013/14, DCPS provided Student with a class schedule that included all general education classes and no special education classes at all. However, on the third day of the school year, DCPS provided Student with a revised class schedule that included all special education classes and no general education classes.¹²
13. For the current school year, DCPS proposes to offer Student placement in a self-contained program at the current school that is located in a separate wing of the building and services only special education students. There are 47 students in the program. The class sizes range from 7 to 9 students, students rotate from class to class in the separate wing, and each classroom contains a teacher dually certified in special education and the relevant content area, an aide, and a behavior technician. Gym and other specials are also provided in the wing with three adults in each classroom. Two social workers are housed in the wing, the students have access to two school psychologists who work at the school on a full-time basis, and students may also receive speech and occupational therapy services if necessary. The program implements individual BIPs and also uses a program-wide positive behavioral system with tiers that include discipline and incentives based on the number of points students acquire. Students in the program use the same school

⁸ Respondent's Exhibits 6-10; Petitioner's Exhibits 27-29; testimony of compliance case manager.

⁹ Petitioner's Exhibits 29 and 30.

¹⁰ Respondent's Exhibit 4.

¹¹ Respondent's Exhibits 1-2; Petitioner's Exhibits 34-35.

¹² Testimony of Parent; testimony of Student.

entrance as the general education population, and they eat in the cafeteria with the general education population but the behavior technicians and aides accompany the students to lunch.¹³

14. Parent was not aware that DCPS proposed to place Student in the self-contained program for the current school year, and Petitioner's counsel did not learn of the program until the due process hearing for this case was well underway.¹⁴
15. DCPS did not convene any MDT meeting that included Parent and/or Student in connection with its amendment of Student's IEP, its development of a BIP for Student, and its determination to place Student in the self-contained program at her current DCPS senior high school.
16. Student has been accepted to attend a nonpublic, full-time therapeutic special education day program that services students in the District of Columbia and surrounding areas. The school is located outside of the District, it specializes in behavior management, and it services students with disabilities ranging from emotional disturbance to high functioning autism. The school offers maximum class sizes of 9 students, with a student to teacher ratio of 3 to 1. The school has clinical psychologists on staff, behavior counselors, social workers, and speech/language therapists. The daily rate for Student to attend would be \$301.88 per day with a total of 182 days in a school year, for an annual tuition of \$54,942.16.¹⁵
17. In addition to requesting a private school placement, Petitioner is also requesting compensatory education consisting of 300 hours of 1-on-1 academic tutoring outside of the school building with an independent provider of Parent's choice and 20 hours of mentoring. The amount of hours requested was determined by using as a baseline the number of hours of specialized instruction and counseling services Student missed as a result of not being provided with a full-time IEP.¹⁶

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 burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*,

¹³ Testimony of SEC.

¹⁴ **NOTE:** DCPS testimonial evidence actually indicated that Student is already attending the self-contained program. However, because Parent was not aware of this fact, it appeared that Student did not realize she was in a new program due to her cognitive limitations (Student and Parent left the hearing before the relevant DCPS witness testified, so Petitioner's counsel was unable to recall Student), Respondent never mentioned this circumstance in its Response, at the prehearing conference or at any point prior to the hearing, and Petitioner's counsel did not learn of this circumstance until she had concluded her case and DCPS was presenting its case at the hearing, the hearing officer determined to receive the evidence over Petitioner's objections of unfair surprise and prejudice, but to consider the evidence only as proof of a proposed educational placement for Student and not as proof of Student's current educational placement.

¹⁵ Testimony of private school's director of admissions.

¹⁶ Testimony of licensed clinical psychologist.

435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner's claims, which will be considered together because they overlap significantly and are highly interrelated.

In the instant case, all of Petitioner's claims concern an alleged failure by DCPS to comply with the 5/20/13 HOD issued by a previous hearing officer. Hence, Petitioner contends that DCPS failed to comply with the 5/20/13 HOD by failing to timely complete an FBA and BIP, and then meet to revise the IEP and determine an appropriate placement per the psychologist's report. Petitioner further contends that DCPS failed to provide an appropriate placement, even though the 5/20/13 HOD determined that a new placement that conforms to the psychologist's recommendations should be made, and that DCPS failed to provide an appropriate IEP, because the 5/20/13 HOD allegedly determined that the current IEP is inappropriate.

A review of the evidence in this case reveals that all of DCPS's obligations under the 5/20/13 HOD were contingent upon DCPS conducting an FBA for Student within ten days of the issuance of the HOD, which, in turn, was contingent upon DCPS obtaining Student's consent for the FBA. *See* Finding of Fact ("FOF") 4, *supra*. The evidence in this case further reveals that on May 21, 2013, the very day after the 5/20/13 HOD was issued, DCPS initiated contact with Petitioner's counsel in an attempt to obtain Student's consent for the FBA, but Petitioner's counsel failed to respond. DCPS continued to attempt to obtain Student's consent for the FBA through Petitioner's counsel. DCPS also reached out to Parent directly and even made a visit to Student's home in an attempt to connect with Student. All of these efforts on DCPS's part unsuccessful, and in the meantime, the 10 day-period established in the 5/20/13 HOD for DCPS to conduct the FBA had elapsed.

Ultimately, DCPS issued an IEE for an independent FBA for Student. When that proved unsatisfactory to Petitioner's counsel, DCPS conducted the FBA itself. This FBA was not conducted until September of 2013, which was well after the 10-day deadline established by the 5/20/13. However, under the circumstances outlined here, where DCPS made reasonable and repeated efforts to obtain Student's consent to the FBA but was unable to do so because Petitioner's counsel, Parent and Student failed to cooperate, it would be inequitable to charge DCPS with denying Student a FAPE by failing to conduct the FBA within the time period established by the 5/20/13 HOD. *See, e.g., J.J. et al. v. District of Columbia*, 768 F.Supp.2d 214 (D.D.C. 2011) (school district was not held liable for failing to timely convene a meeting to determine student's eligibility and placement where behavior of parent and/or her representative was responsible for the delay); *Scot S. ex rel. Scot S. Jr. v. Department of Educ., State of Hawaii*, 112 LRP 10103 (D. Hawaii 02/27/12) (department of education could not be faulted for basing IEP on existing evaluation data where parents repeatedly failed to provide records of student's progress).

Pursuant to the 5/20/13 HOD, once DCPS completed the FBA, it had 15 calendar days to reconvene Student's IEP team to revise and update Student's IEP, offer Student an appropriate public or private placement, and develop a BIP based upon the FBA. Hence, all of DCPS's remaining obligations under the 5/20/13 HOD were to be fulfilled by DCPS at an IEP meeting for Student. A review of the evidence in this case reveals that although DCPS finally completed the FBA in September 2013, it did not thereafter conduct an IEP meeting to revise and update Student's IEP, offer Student an appropriate public or private placement, and develop a BIP based upon the FBA. Instead, DCPS unilaterally amended the IEP, developed a BIP, and decided on a different educational program for Student, all without a meeting and without Parent's involvement. Under these circumstances, the hearing officer concludes that DCPS failed to comply with the 5/20/13 HOD by failing to convene the required meeting after conducting the FBA, thereby denying Student a FAPE. To remedy this denial of FAPE, the hearing officer will

order DCPS to promptly convene an IEP meeting and comply with its remaining obligations under the 5/20/13 IEP.

Based on the evidence and rulings set forth above, the hearing officer further concludes that an award of compensatory education would be inappropriate at this time, because until Student's IEP has been reviewed and revised by the entire IEP team, including Parent, it is impossible to determine exactly what services Student has missed and what will be required to compensate Student for those services and return her to the position she would have occupied but for DCPS's denial of FAPE. Therefore, the hearing officer will dismiss Petitioner's request for compensatory education without prejudice to Petitioner's right to reassert the claim once an appropriate award of compensatory education can be determined.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Within 15 calendar days of the issuance of this Order, DCPS shall convene an IEP meeting for Student to revise and update Student's IEP, giving full consideration to the findings and recommendations in Student's 2012 comprehensive psychological assessment; offer Student a public or private placement that offers a small class size, low student to teacher ratio, and individualized teaching support by staff trained to work with students with attentional and social/emotional behavior disorders; and develop a BIP based upon the FBA.
2. DCPS shall schedule the meeting ordered in Paragraph 1 above by offering Petitioner and her representative(s) at least three alternative dates for the meeting, and Petitioner and her representative(s) shall cooperate with DCPS's scheduling efforts by making themselves available for at least one of the alternative dates offered.
3. Petitioner's request for compensatory education is dismissed without prejudice to Petitioner's right to reassert the claim once an appropriate award of compensatory education can be determined as explained above in this Decision.
4. All remaining claims and requests for relief in Petitioner's August 13, 2013 Complaint are **DENIED AND DISMISSED WITH PREJUDICE**.

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: 10/11/2013