

**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
February 2, 2015

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: February 2, 2015
Petitioner,)	
)	Hearing Officer: John Straus
v.)	
)	
District of Columbia Public Schools (“DCPS”))	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

The Petitioner, who is the mother of the student, filed a due process complaint notice on November 19, 2014, alleging that the student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged DCPS denied the Student a FAPE by failing to propose or provide an IEP that was reasonably calculated to enable the student to make progress in the general education curriculum because DCPS inappropriately reduced the hours outside the general education setting and failed to place the student in a separate day school on September 22, 2014. The Petitioner also alleged DCPS denied the Student a FAPE by failing to conduct a Functional Behavioral Assessment (“FBA”).

DCPS asserted the Student has a full time IEP and is in a self-contained program. As such, the student receives all of his services outside the general education setting and the Student’s current program is able to address the Student’s academic and social emotional needs. DCPS also stated they developed a Behavior Intervention Plan (“BIP”) to address the Student’s behavioral issues.

Subject Matter Jurisdiction

¹ Personal identification information is provided in Appendix A.

Hearing Officer Determination

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.”); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on November 19, 2014. This Hearing Officer was assigned to the case on November 20, 2014. Neither Petitioner nor Respondent waived the resolution meeting. The resolution meeting took place on December 4, 2014. At the resolution meeting, parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on December 19, 2014, the 45-day timeline to issue a final decision began on December 20, 2014. The hearing took place on January 15, 2015. A final decision is due by February 2, 2015.

The Petitioner presented four witnesses: the Petitioner, Non-Public School representative (“Non-Public”), School Psychologist (“Psychologist”), who was certified as an expert in School Psychology and Development of IEPs over objection and Wrap Care Coordinator (“Coordinator”). DCPS presented no witnesses.

The Petitioner’s disclosures dated January 8, 2015, containing a witness list and Exhibits P-1 through P-22 were timely filed and admitted into evidence. DCPS’ disclosures dated January 8, 2015, containing a witness list and Exhibits R-1, R-2 and R-4 through R-5 were timely filed and admitted into evidence. Exhibit R-3 was withdrawn without objection.

The Petitioner participated in person. At the outset of the hearing, the Petitioner notified the Hearing Officer that she was required to report to her work and requested that be excused after she rendered her testimony. The hearing officer allowed the Petitioner to leave before the end of the hearing over DCPS’ objection.

The parties stipulated that the staff at Hart Middle School reduced the hours of service on the Student’s IEP on September 22, 2014.

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

1. Whether DCPS denied the Student a FAPE when it did not propose or provide an IEP that was reasonably calculated to enable the student to make progress in the general education curriculum because the September 22, 2014 IEP team inappropriately reduced the hours outside the general education setting.
2. Whether DCPS denied the Student a FAPE by failing to place the student in a separate day school on September 22, 2014.

Hearing Officer Determination

3. Whether DCPS denied the Student a FAPE by failing to conduct an evaluation that is sufficiently comprehensive to identify all of the student's special education and related service needs; specifically, a FBA.

For relief, Petitioner requested the Hearing Officer to order DCPS to fund the student's placement and transportation to Nonpublic School for the 2014-2015 school year; the Hearing Officer to award the student compensatory education to redress the lack of appropriate special education and related services as a result of the IEP team reducing the hours of specialized instruction from September 22, 2014 to present, the student being suspended on dates from March 27, 2014 to October 8, 2014 and the student being out of class and in the hall from March 27, 2014 to October 8, 2014.

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 lives with his mother in the District of Columbia. He was retained in the 3rd grade and the 6th grade. The Student attended a DCPS Elementary School from the 2004 -2005 school year to the 2008-2009 school year. He attended another DCPS Elementary School in August and September 2009 and then enrolled in Charter School. The Student was expelled from Charter School for an unknown reason and enrolled in the second DCPS Elementary School on November 29, 2010. He has attended Middle School since the 2012-2013 school year and is in the 6th grade.³
2. At the beginning of the 2013-2014 school year, the Student was referred to a DC Choices, Wrap Care Coordinator due to his inappropriate behavior in school. He and his family were provided with behavioral tools and strategies for both home and school to improve overall success at school.⁴
3. On September 4, 2013, the Student was suspended for two days for cursing at the teacher, walking out of class and walking the halls. On October 17, 2013, the Student was suspended for three days for refusing to attend any of his afternoon classes, walking the halls and hiding from security. On October 28, 2013, the Student was suspended for three more days for being off task, late to class, running the hallways and disrupting the class environment. On November 7, 2013, the Student was given a ten day suspension for pulling student's chairs from up underneath other students after refusing to stop pulling chairs by the teacher. On December 4, 2013, the Student was given an emergency suspension. On January 13, 2014, the Student was given a two day

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.

³ P-10, R-1, Petitioner

⁴ P-10, R-1, Petitioner, Coordinator

Hearing Officer Determination

emergency suspension. On March 5, 2014, the Student was suspended in school for directing profanity/offensive gestures toward staff.⁵

4. Due to the Student's aggressive behaviors such as bullying, class-cutting and excessive disruptions, the Student was placed in the Behavior and Education Support ("BES") classroom, a self-contained classroom for student with disabilities under the IDEA. The Student refused to attend class and instead ran the halls, refusing the learning environment throughout the day.⁶
5. On March 7 and 10, 2014, the Student received an initial assessment. The evaluator noted the student failed all of this classes the past two years and the Student exhibits class cutting, non-compliance with school rules, running the hallway and a number of out of school suspensions. The assessment included a response to intervention where the Student received instruction using a computer based reading program, a writing program and math program. The Student refused support through a reading specialist; produced very little written work and the Student was easily distracted in Math. The evaluator interviewed the Student's English teacher who reported the Student is not demonstrating grade level work and rarely attends classes and when he did, he would do something disruptive that would warrant a referral to the Dean of Students. The teacher recommended the Student be placed in a smaller classroom size where he would obtain more academic support. The evaluator also interviewed the Student's Science teacher who stated the Student is very low academically and when work was placed in front of him, he would refuse to do it because he stated "it is too hard". The teacher recommended the Student be in a smaller classroom setting with less distractions to promote better concentration. Two other teachers stated the student attended 5 out of 25 classes and one teacher stated the Student never attended his class. The evaluator was not able to observe the Student due to his absences. The assessment included an Intelligence Quotient ("IQ") test which yielded borderline or moderately below average scores on the Composite Intelligence Index and Nonverbal Intelligence Index and below average scores on the Verbal Intelligence Index and Composite Memory Index. The assessment also included an academic achievement test which yielded average scores in writing to very low scores in math. The Student's teachers and parent was given behavior checklists which indicated a significant levels of heightened attentional problems, impulsivity and hyperactivity that adversely impact the educational environment for the Student. The evaluator stated the Student's lack of emotional control has gravely impacted the learning and preparedness during class instruction. The evaluator stated the Student is a student with an Other Health Impairment ("OHI") under the IDEA, as a result of his Attention Deficit Hyperactivity Disorder ("ADHD"). The evaluator further stated the Student requires a very structured and intense level of academic and behavioral support during instruction in all subjects. Finally, the evaluator stated the Student will benefit from a well-structured learning environment that includes limited distractions and is carefully planned and consistently implemented in terms of the physical arrangement, schedule of activities and expected behaviors within all of his classes.⁷
6. On March 27, 2014, the IEP reviewed the initial assessment and determined the Student is a student with an OHI under the IDEA. The team developed an IEP that provides 27.5 hours of

⁵ P-16

⁶ P-10, R-1, Coordinator

⁷ P-10, R-1, Psychologist

Hearing Officer Determination

specialized instruction per week outside the general education setting and 120 minutes per month outside the general education setting. The team placed the Student in the BES classroom.⁸

7. On April 23, 2014, the Student was suspended for five school days for using profanity at staff and peers, while running through the building tearing down the bulletin boards, hiding from staff and security.⁹
8. The Student was taken out of the BES classroom at the beginning of the 2014-2015 school year. He was placed in general education classes and by September 23, 2014, he attended only one group session of counseling. The Student left the group counseling session without permission before the group counseling session ended.¹⁰
9. On September 8, 2014, the student was suspended for three days for refusing to follow any directions by any staff and proceeded to run through the halls cursing and banging on lockers causing the teachers to step out of their classes.

The Student also ran in the main office after being redirected several times by many different staff members and the Student was cursing and causing a major disruption.¹¹

10. On September 22, 2014, DCPS reduced the student's hours of services to 18.75 hours per week of specialized instruction outside the general education setting and 120 minutes of behavior support services per week outside the general education setting.¹² The Petitioner never saw the revised IEP prior to the hearing.¹³
11. On September 30, 2014, the student was suspended for two days on-site for refusing to attend class after being asked to attend class several times by many different staff, screaming, cursing and throwing things at students and staff.¹⁴
12. On October 8, 2014, the Student received a FBA. The assessment states the Student's inappropriate and disruptive behavior is due to attention seeking from adults and his peer group. On that same day, the Student received a BIP that states the target behavior is inattention, unfocused, off task and easily distracted. He is also very impulsive and disruptive leading to his having to be repeatedly redirected and returned to task. This causes ongoing classroom disruption and an inability to fully participate in academic instruction.¹⁵
13. On October 22, 2014, the Student was suspended for 45 days as a result of an incident where the Student brought a screwdriver to school and ran through the security checkpoint.¹⁶

⁸ P-7, Petitioner, Psychologist

⁹ P-16, Petitioner, Coordinator

¹⁰ P-8, Petitioner, Psychologist

¹¹ P-14, P-16, Petitioner, Psychologist, Coordinator

¹² P-6, Stipulation

¹³ Petitioner

¹⁴ P-14, P-16, Petitioner, Psychologist, Coordinator

¹⁵ P-11, P-12, R-4, R-5

¹⁶ P-15, Petitioner, Psychologist, Coordinator

Hearing Officer Determination

14. On November 9, 2014, the IEP team conducted a Manifestation Determination Review (“MDR”). The team reviewed the October 22, 2014 incident. The team determined the Student’s behaviors were not a manifestation of the Student’s disability. The Petitioner and her attorney did not agree with the IEP team’s determination that the behavior was not a manifestation of the Student’s disability. The Student’s suspension was reduced to 15 days.¹⁷
15. The Student is currently failing all of his classes with the exception of English where he is receiving a D. Although the Student is attending school on a regular basis, he is not going to his classes.¹⁸
16. The Student was accepted in to Nonpublic School contingent on amending the hours of specialized instruction in the Student’s IEP to 31 hours per week outside the general education curriculum and receipt of a prior written notice from DCPS placing the Student at the Nonpublic School. Nonpublic School is approved by the Office of the State Superintendent and provides specialized educational and therapeutic programs for children and adolescents in grades 1-12 with emotional disabilities. Each class has a teacher with a master’s degree and an assistant. Student progress is assessed through quarterly meetings and 30 day reviews. The school offers behavioral support through a levels system, point system and an assigned support room. The school offer an academic curriculum as well as Art and Physical Education. Nonpublic School identified a classroom for the student. The Student’s IEP may be implemented at Nonpublic School with the contingent amendment to the Student’s IEP; changing the number of hours of specialized instruction and the Student would receive educational benefit if he enrolled at the Nonpublic School. The Petitioner and the Student visited Nonpublic School and like the program.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:

“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).

Free appropriate public education or FAPE means special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...

¹⁷ P-9, Petitioner

¹⁸ P-13, P-14, Petitioner

¹⁹ P-18, Petitioner, Non-Public

DCPS denied the Student a FAPE when it did not propose or provide an IEP that was reasonably calculated to enable the student to make progress in the general education curriculum because the September 22, 2014 IEP team inappropriately reduced the hours outside the general education setting

"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).

In this case, the March 27, 2014 IEP team determined the Student required a full time IEP after reviewing the March 7 and 10, 2014 Initial Assessment that states the Student will benefit from a well-structured learning environment that includes limited distractions and is carefully planned and consistently implemented in terms of the physical arrangement, schedule of activities and expected behaviors within all of his classes.

On September 22, 2014, DCPS unilaterally amended the IEP. There is nothing in the record that indicates the IEP team amended the IEP. No new information was reviewed to support this decision. In fact, the information available at the time indicates that was exhibiting the following behaviors: 1) using profanity at staff and peers, while running through the building tearing down the bulletin boards, 2) hiding from staff and security, 3) leaving group counseling session without permission before the group counseling session ended, 4) refusing to follow any directions by any staff, 5) running through the halls cursing and banging on lockers, 6) refusing to attend any of his classes while totally disrupting the environment, 7) running in the main office after being redirected several times by many different staff members, and 8) cursing.

Given the recommendations in the initial assessment and behavior presented by the Student at the time, it was not reasonable for DCPS to reduce the hours of specialized instruction outside the general education setting from 27.5 hours per week to 18.5 hours per week. Accordingly, the Hearing Officer finds the Petitioner met her burden of proof by a preponderance of the evidence.

DCPS denied the Student a FAPE by failing to place the student in a separate day school on September 22, 2014.

Pursuant to 34 C.F.R. § 300.115(a), DCPS "must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." The comments to the regulations clarify that

The Act does not require that every child with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class placement may not be appropriate for every child with a disability is reflected in the requirement that LEAs make available a range of placement options, known as a continuum of alternative placements, to meet the unique

Hearing Officer Determination

educational needs of children with disabilities. This requirement for the continuum reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each child with a disability. The options on this continuum must include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). These options must be available to the extent necessary to implement the IEP of each child with a disability.

See 71 Fed. Reg. 46,587 (2006). As stated above, the continuum, in general, ranges from the least restrictive to the most restrictive: instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b)(1) and *H.H. v. Indiana Bd. of Special Educ. Appeals*, 50 IDELR 131 (N.D. Ind. 2008).

In this case, the student was placed by DCPS in a special class located in a school with general education students. When he was placed in the special class, the Student used profanity at staff and peers, while running through the building tearing down the bulletin boards, hiding from staff and security. His behaviors is also preventing him from accessing the general education curriculum. The Hearing Officer finds the student is not receiving a FAPE in his current educational placement.

Many factors may be considered in making a placement determination, the most important of which are the conformity with the LRE considerations of 34 C.F.R. § 300.114 through 34 CFR 300.118. What is pertinent in making the placement decision will vary, at least to some extent, based upon the child's unique and individual needs. *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994). See *Board of Educ. of the Williamsville Cent. Sch. Dist.*, 37 IDELR 79 (SEA NY 2001) (finding that a school 2,000 miles from the student's home was the LRE). The IDEA states that the educational placement of a student with a disability shall be "as close as possible to the child's home" and that "unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school he or she would attend if nondisabled." 34 C.F.R. § 300.116.²⁰

The most suitable placement may not always be the school closest to the student's home. In determining the most suitable placement, districts have the discretion to consider a variety of

²⁰ In determining the educational placement of a child with a disability...[DCPS] must ensure that--

(a) The placement decision-- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (2) Is made in conformity with the LRE provisions...;

(b) The child's placement-- (1) Is determined at least annually; (2) Is based on the child's IEP; and (3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. § 300.116.

Hearing Officer Determination

factors including the advantages of the proposed program, distance from the student's home, and the cost involved in making the neighborhood school equally suitable. *See Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 18 IDELR 16 (8th Cir. 1991); and *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 24 IDELR 673 (5th Cir. 1996), cert. denied, 112 LRP 26083 , 519 U.S. 1111 (1997).

Here, the Student's behaviors were preventing him from accessing the general education curriculum despite the student's placement in a separate classroom in a general education school. The Student eloped from the separate classroom to run the halls in the general education setting. The initial assessment stated the Student would benefit from a well-structured learning environment that includes limited distractions and is carefully planned and consistently implemented in terms of physical arrangement, schedule of activities and expected behaviors within all of his classes.

Therefore, the IEP team should have placed the student in a separate day school program where he would have no interaction with nondisabled peers. The student continues to run the halls in the current general education school placement. Therefore, the hearing officer find that the Student should have been placed in a separate day school by September 22, 2014. The Petitioner met her burden of proof by a preponderance of the evidence that DCPS denied the Student a FAPE by failing to place the Student in a separate day school.

DCPS did not deny the Student a FAPE by failing to conduct an evaluation that is sufficiently comprehensive to identify all of the student's special education and related service needs; specifically, a FBA

On October 8, 2014, the Student received a Functional Behavioral Assessment ("FBA"). The assessment states the Student's inappropriate and disruptive behavior is due to attention seeking from adults and his peer group.

Pursuant to 34 C.F.R. § 300.530(f), the IDEA requires that if the district, parent, and relevant members of the IEP team determine that a student's conduct (that gave rise to a change in placement, i.e., a removal for more than 10 consecutive school days during a school year or a series of removals that constituted a pattern) was a manifestation of the student's disability, the IEP team must conduct a FBA (provided the district had not conducted such assessment prior to the conduct at issue) and implement a behavioral intervention plan for the child.

Although the Student was suspended on numerous occasions, the suspensions did not cumulate to over ten days from the date the Student was determined to be a student with a disability under the IDEA on March 27, 2014 to the end of the 2013-2014 school year or from the beginning of the 2014-2015 school year until the Student received a FBA on October 8, 2014. Notwithstanding the Petitioner's assertion, DCPS did conduct a FBA. Therefore, the Hearing Officer finds that DCPS did not deny the student a FAPE by failing to conduct a FBA.

Compensatory Education

Hearing Officer Determination

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

The Hearing Officer concludes based on the evidence offered at hearing that the student was denied a FAPE as a result of DCPS' failure to place the Student in a separate day school. Therefore, the Hearing Officer concludes that to award the student compensation for the inappropriate IEP would be equitable.

ORDER

- (1) The IEP shall be revised to provide full time hours of specialized instruction out of general education;
- (2) DCPS shall place the Student in Nonpublic school for the 2014-2015 school year;
- (3) DCPS shall fund the Student's placement at Nonpublic School, including transportation;
- (4) DCPS shall convene an IEP team meeting within 30 school days of the Student's placement at Nonpublic School to review the Student's progress and revise the Student's IEP and BIP as necessary;
- (5) For everyday of delay by the Petitioner, DCPS shall have one day to convene the IEP team meeting;
- (6) DCPS shall fund 60 hours of independent tutoring services to be completed by the end of the 2014-2015 school year; and
- (7) All other relief is denied.

SO ORDERED.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: February 2, 2015

/s/ John Straus
Hearing Officer