

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

OSSE
Student Hearing Office
January 24, 2014

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

Case No: 2013-0661

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondents.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY¹**

Student presently attends a DCPS middle school. On November 27, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public Schools (“DCPS”). On December 9, 2013, DCPS filed its Response to the Complaint.

The parties concluded the resolution process by participating in a resolution session meeting on December 20, 2013. The parties did not resolve the matter at the resolution session. This is an expedited matter. Hence, the hearing will be held on January 8, 2014, which is within 20 school days of the filing of the Complaint, and the HOD will be due on January 23, 2014, which is ten school days after the hearing.

On January 3, 2014, the hearing officer conducted a prehearing conference and determined in a subsequent Prehearing Order that the claims to be adjudicated, defenses asserted, and relief requested were as follows: ***Petitioner’s Claims:*** (i) Alleged failure to comply with Child Find obligations and/or timely evaluate or identify Student as eligible for special education and/or develop an IEP for Student and make services available in a timely manner; (ii) Alleged inappropriate determination on or about November 18, 2013 that Student’s conduct was not a manifestation of his disability and alleged failure to conduct an FBA and/or develop a BIP for Student following a one week suspension, which exceeded 10 days of suspension in the same school year; (iii) Alleged failure to develop an appropriate IEP on or about November 26, 2013 because the IEP failed to provide a full-time therapeutic setting for students with ED and ADHD and failed to provide sufficient behavior support services in light of Student’s escalating behaviors; and (iv) Alleged failure to conduct a timely FBA and convene a follow-up meeting to develop a BIP during SYs 2012/13 and 2013/14 (although Petitioner acknowledged DCPS supplied an FBA and a BIP at the resolution session).

DCPS Defenses: (i) Although Student developed behavioral issues at his previous middle school during SY 2012/13 and Mother verbally requested an evaluation but Father did

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

not request one, Mother failed to appear for meetings to discuss said evaluations and provide informed written consent; (ii) Student's grades at the previous middle school were a direct result of his failure to complete homework assignments, in spite of additional assistance his teachers made available to him such as completing assignments during lunch and offering afterschool tutoring; (iii) Student exhibited minor behavior issues at another previous middle school during SY 2012/13, and the team met with Parent in May 2013 and the parties agreed that DCPS would put interventions in place and monitor Student until the end of the school year, at which time evaluations would be pursued if appropriate. DCPS also referred Parent for counseling assistance at home; (iv) Petitioner filed a May 10, 2013 Complaint, DCPS provided authorization for independent evaluations to resolve the Complaint, a November 7, 2013 IEP meeting was held and Student was determined eligible for special education services as a child with OHI although the team did not believe there was enough data to support an ED classification, the advocate requested a self-contained classroom based on the recommendation in the independent psychological evaluation but the team did not believe that to be the LRE for Student, the team agreed to reconvene after a few months of implementation of the IEP to discuss progress and whether a more restrictive setting was warranted, and the team agreed to conduct an FBA and develop a BIP; (v) DCPS is still investigating the issues regarding suspensions and a manifestation determination; (vi) DCPS denies a failure to comply with Child Find obligations as there was no reason to suspect Student may have had a disability, and DCPS denies all other allegations of the Complaint; and (vii) There has been no denial of FAPE, DCPS has completed the FBA, the team never discussed comprehensive auditory processing and audiological evaluations for Student but DCPS is willing to conduct same now that Petitioner has expressed an interest in them, and compensatory education is unwarranted.

Relief Requested: (i) Findings in Petitioner's favor. (ii) The IHO to either develop or order DCPS to develop an IEP consistent with Petitioner's assertions. (iii) DCPS to conduct a comprehensive auditory processing evaluation and an audiological evaluation at market rate, as well as any recommended evaluations; (iv) DCPS to revise Student's IEP to provide at least 60 minutes per week of counseling outside of general education, additional behavior supports, and placement in a full-time out of general education therapeutic setting (although Petitioner represented that DCPS agreed at the RSM to revise the IEP to include 60 minutes per week of counseling outside general education); (v) DCPS to fund placement and transportation for Student to a private school; and (vi) compensatory education.

With their respective five-day disclosure letters, Petitioner disclosed twenty-nine documents (Petitioner's Exhibits 1-29), and DCPS disclosed eleven documents (Respondent's Exhibits 1-11).

The hearing officer convened the due process hearing on January 8, 2014, as scheduled.² Petitioner's Exhibit 10 was admitted over DCPS's late objection at the hearing, and all other disclosed documents were admitted without objection. Thereafter, DCPS pointed out that it had included Student's FBA and BIP in its five-day disclosures, the parties acknowledged that DCPS has agreed to conduct the requested audiological and auditory processing evaluations subsequent to the hearing, DCPS stipulated to the revision of Student's IEP to include increased behavioral support services in the amount of 60 minutes per week, to be expressed in a monthly number, and Petitioner represented that a private placement was no longer being requested because Student had not been accepted at the desired school. Therefore, all of those items were removed from consideration at the hearing. The hearing officer then received opening statements, testimonial evidence, and closing statements from the parties prior to concluding the hearing.

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

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 comply with its Child Find obligations toward Student?
2. Did DCPS incorrectly determine on November 18, 2013 that Student’s conduct was not a manifestation of his disability and then fail to conduct a FBA and/or develop a BIP as required by IDEA?
3. Did DCPS fail to develop an appropriate IEP on or about November 26, 2013?

FINDINGS OF FACT³

1. Student presently attends a DCPS middle school.⁴
2. During SY 2011/12, when Student was in 6th grade, Student generally conformed to expected behavior standards with limited prompting.⁵
3. In SY 2012/13, Student began having behavior problems and his grades were low. Parent began receiving calls from the principal at Student’s school regarding Student’s behavior beginning in the first month of the school year. In general, Student was suspended about once per month at the first school he attended during SY 2012/13 for behavior problems such as talking back to teachers, not doing what teachers requested, disrupting class, not being still, and making noises while other students were trying to learn. Student was also involved in several altercations.⁶
4. At or near the beginning of SY 2012/13, in approximately September, Parent contacted the counselor at Student’s school, stated that he suspected Student was having problems academically, and asked for testing to determine whether Student was having problems learning. The counselor said she would look into the matter, but Parent never heard anything back from the counselor. However, DCPS had both parents coming up to the school to sit in class with Student in attempt to avoid suspensions, DCPS had Student interact with the counselor and social worker, and DCPS tried to work with parents to get Student help outside the school.⁷
5. Student earned three Fs for the first advisory of SY 2012/13 and four Fs for the second advisory of SY 2012/13, which was a cause of concern for Parent. Hence, in or about

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 See Complaint.

⁵ See Petitioner’s Exhibit 19.

⁶ Testimony of Parent; testimony of SEC.

⁷ Testimony of Parent; testimony of SEC.

February of 2013, Parent sent emails to three of Student's teachers, indicating that he was concerned about Student's grades, that he had asked the counselor to conduct testing of Student and was waiting for a response, and that perhaps Student was acting out because he was academically slow in some areas.⁸

6. During the third advisory of SY 2012/13, the principal at Student's school called Parent while Student was in the office and began yelling at Student. The principal expressed her opinion that Student would not have a good future and stated that Student was reading at a third grade. Parent stated that he was thinking about removing Student from that school.⁹
7. Thereafter, Parent wavered about withdrawing Student from the school. The principal stated that she would suspend Student if he remained at the school because Student had been in her office all week, and Student's homeroom teacher recommended removing Student from the school to prevent the principal from repeatedly suspending Student and eventually expelling him. Parent made the decision to withdraw Student from the school.¹⁰
8. Student began attending his second middle school for SY 2012/13 in February of 2013. On the first day, Parent spoke to the special education coordinator ("SEC"), shared his concerns about Student's academic ability, and shared Student's history at the previous school and Parent's request for testing there without results. The SEC said they would see how Student performed for approximately four weeks and then determine how to proceed, but the SEC never got back to Parent even though Student began misbehaving and the misbehavior did not subside.¹¹
9. Student's behavior problems at the second middle school began approximately three weeks after he began attending that school. He got into trouble repeatedly for misbehavior, and was suspended for two weeks near the end of the school year. At the end of that suspension, Student was suspended again for another two weeks. As there would only be two days left in the school year when Student was due to return, Parent made the decision not to take Student back at the end of the school year. Student received a work packet for the first two-week suspension, but not for the second suspension.¹²
10. During the summer of 2013, DCPS began Student's initial evaluation for special education and related services.¹³
11. Student's comprehensive psychological evaluation was conducted in September 2013. Cognitive testing revealed that Student's general intellectual ability, thinking ability, and cognitive efficiency are in the Average range, while his verbal ability is in the Low Average range. Academic achievement testing revealed that Student's reading and written language skills are in the Low range at a third grade level, while his math skills are in the Low Average at the fourth grade level. Student received multiple At Risk scores on the social emotional functioning scales utilized, and ultimately, he was

⁸ Testimony of Parent; Petitioner's Exhibits 17 and 26.

⁹ Testimony of Parent.

¹⁰ Testimony of Parent.

¹¹ Testimony of Parent.

¹² Testimony of Parent.

¹³ Testimony of Parent.

diagnosed with Disruptive Behavior Disorder Not Otherwise Specified and Attention-Deficit Hyperactivity Disorder, Combined Type. The September 2013 psychological evaluation recommends an FBA and a BIP for Student to uncover the antecedents of Student's off-task behaviors in class and begin to address them.¹⁴

12. Student exhibits all of the factors that comprise ED, except for somatization. These behaviors impact his academics because he has the intellectual ability to learn and do well in school, but he's doing poorly academically due to the behaviors.¹⁵
13. For SY 2013/14, Parent enrolled Student at his current DCPS middle school. Student began having behavior problems during the second week of school, which is when the principal called Parent for the first time. Parent began having meetings with the principal and Student about Student's behavior, and at the first meeting Parent told the principal about Student's background and Parent's request for testing of Student.¹⁶
14. Student was suspended at least three times at the start of SY 2013/14, as he had three re-entry meetings between October and December of 2013.¹⁷
15. Student's repeated misbehavior in school, which has resulted in constant calls from school to Parent and Parent having to go to school frequently on Student's behalf, has caused a deterioration of Student's relationship with Parent.¹⁸
16. Student has academic deficiencies, and his misbehavior is a result of his learning difficulties because he is trying to avoid the demands of doing the work in class. Hence, DCPS intends to address Student's academic issues, which in turn, should impact the behavior issues.¹⁹
17. On November 7, 2013, DCPS conducted an eligibility meeting for Student. The team noted that observations of Student in all classes revealed that Student was off task even in highly structured environments, and that Student had failing grades despite interventions such as counseling; however, the team also noted that Student is behind academically and determined that Student's academics are impacting his behavior. Although Student's advocate pointed out Student's many suspensions and problematic behaviors, the team determined there was not enough information to support ED. Ultimately, the team determined that Student qualified for special education and related services with a disability of OHI for ADHD.²⁰
18. On November 18, 2013, Student was suspended for being disruptive and using obscene, seriously offensive, or abusive language.²¹
19. On November 18, 2013, DCPS convened a manifestation determination review ("MDR") meeting for Student in connection with his suspension. The team determined that Student's behavior was not a manifestation of his disability. In making this

¹⁴ Petitioner's Exhibit 20; *see* testimony of licensed clinical psychologist.

¹⁵ Testimony of licensed clinical psychologist; *see* Petitioner's Exhibit 20.

¹⁶ Testimony of Parent.

¹⁷ Testimony of advocate; *see also* Petitioner's Exhibit 7.

¹⁸ Testimony of advocate.

¹⁹ Testimony of SEC of school psychologist.

²⁰ Testimony of advocate; testimony of school psychologist; Respondent's Exhibits 5 and 6.

²¹ Petitioner's Exhibit 7 at 1.

determination, the team noted that Student has a long pattern of misbehavior that escalates when Student is redirected. However, Parent stated that Student is not disrespectful at home and his behaviors are not as severe. The team considered Petitioner's disability of OHI and concluded that the behavior at issue was not a manifestation of his disability because his problem behaviors are not consistent across settings and they are a result of Student's choice. Petitioner's advocate disagreed with the determination, asserting that Student should be considered emotionally disturbed ("ED") instead of OHI for ADHD only. However, the DCPS team members were of the opinion that Student understands right from wrong, had time to make a decision as to whether to engage in the behavior, and had control over his behavior.²²

20. On November 26, 2013, Student's IEP team met to develop Student's initial IEP. The IEP lists OHI (ADD or ADHD) as Student's primary disability. The IEP requires Student to receive 3 hours per week of specialized instruction in general education, 2 hours per week of specialized instruction outside general education, and 120 minutes per month of behavioral support services. DCPS also indicated that Student would receive an additional 30 minutes per week of behavioral support that would not be listed on the IEP. Petitioner's advocate disagreed with the services to be provided, asserting that Student needed a full-time therapeutic placement, but DCPS did not want to pull Student totally out of general education and put too many services in place right at the outset, thereby stigmatizing him. DCPS team members also indicated the IEP could be revisited later if necessary once it had been given a chance to work.²³

22. On or about December 5, 2013, DCPS prepared an FBA for Student to target the following behaviors of concern, which the FBA indicates occur in all settings continuously: defiance, immature talking, moodiness, noncompliance, verbal aggression, depression, off task, talking out, disorganization, hyperactivity, making excuses, and poor motivation.²⁵

23. On or about December 20, 2013, DCPS developed a BIP designed to help Student, *inter alia*, perform on task consistently, exhibit compliant behavior in the school setting, complete all classroom assignments, and refrain from engaging in hostile, confrontational verbal or physical behaviors.²⁶

24. Petitioner is requesting the following forms and amounts of compensatory education in this case: 100 hours of independent 1:1 tutoring; 30 hours of behavioral support; and 10 hours of family therapy.²⁷

²² Testimony of advocate; testimony of school psychologist; Respondent's Exhibit 2; Petitioner's Exhibit 3.

²³ Respondent's Exhibit 4; testimony of advocate; testimony of school psychologist; *see* Petitioner's Exhibit 2.

²⁵ Respondent's Exhibit 8.

²⁶ Respondent's Exhibit 7.

²⁷ Petitioner's Exhibit 25.

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.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner's claims.

Child Find

Under IDEA's Child Find provision, each State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are identified, located, and evaluated. 34 C.F.R. § 300.111(a)(1)(i).

As a result, school districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction. Instead, school systems must ensure that all children with disabilities residing in the State who are in need of special education and related services, are identified, located, and evaluated. *See Branham. v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005) (citing 20 U.S.C. § 1412(a)(3)(A)).

In the instant case, Petitioner contends that Student's ongoing behavior problems that began in SY 2012/13 and never subsided, and which resulted in frequent suspensions of Student, were sufficient to trigger DCPS's child find obligations to identify, locate and evaluate Student to determine whether he was a child in need of special education and related services. A review of the evidence supports Petitioner's contention. Beginning in school year 2012/13 when Student started attending middle school, he began misbehaving frequently and receiving repeated suspensions, and his grades plummeted. This situation continued throughout the entire school year, even after Parent moved Student to a second DCPS middle school. These factors, taken together, were sufficient to trigger DCPS's Child Find obligations with respect to Student, especially since, throughout the entire period, Parent repeatedly asked DCPS to conduct testing of Student to determine whether he was having problems learning.

Based on the evidence outlined above, the hearing officer concludes that Petitioner has met its burden of proof on this claim. The hearing officer further concludes that Student suffered harm as a result of DCPS's failure to comply with its Child Find obligations because he did not begin receiving the special education and related services to which he was entitled until his initial IEP was developed well into SY 2013/14 on November 26, 2013. Under these circumstances, the hearing officer concludes that Petitioner has demonstrated that DCPS denied Student a FAPE by failing to timely honor its Child Find obligations with respect to Student, and the hearing officer has determined to grant Petitioner an award of compensatory education. *See Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005) (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).

With respect to compensatory education, in every case 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*, 401 F.3d at 524. In this case, the hearing officer has determined that by approximately the end of the first half of SY 2012/13, DCPS should have recognized and acted in accordance with its Child Find obligations toward Student, with the result that Student would have been identified as eligible and he would have begun receiving services by at least February of the second half of SY 2012/13. Hence, had DCPS timely complied with its Child Find obligations, Student would have received an additional seven months of special education and related services from February 2013 through the end of SY 2012/13 and from the start of SY 2013/14 through November 26, 2013, and Student's relationship with Parent likely would not have deteriorated to the extent it did as a result of Student's frequent behavior problems in school.

Student's existing IEP entitles him to receive 5 hours per week of specialized instruction inside and outside general education and 120 minutes per week of behavioral support services, and DCPS has been providing Student with an additional 30 minutes of behavioral support that is not reflected on the IEP. Given the significant amount of services Student has missed, and in light of Student's very low levels of academic achievement and his deteriorating relationship with Parent, the hearing officer agrees with Petitioner that the 100 hours of independent 1:1 tutoring, 30 hours of behavioral support, and 10 hours of family therapy requested in Petitioner's compensatory education plan will provide Student with the educational and social/emotional benefits he likely would have received had DCPS begun providing him with special education services in a timely manner pursuant to its Child Find obligation. Therefore, the hearing officer will award Petitioner the requested compensatory education.

Manifestation Determination Review

IDEA requires that 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 LEA, the parent, and relevant members of the child's IEP team 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 (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or (ii) if the conduct was the direct result of the LEA's failure to implement the IEP. 34 C.F.R. § 300.530(e)(1). If either of these two conditions is met, then the conduct must be determined to be a manifestation of the child's disability, and the IEP team must, *inter alia*, conduct an FBA if one does not exist and implement a BIP, or review and modify as necessary any existing BIP. *See* 34 C.F.R. § 300.530(e)(3) & (f)(1).

In the instant case, Petitioner argues that DCPS incorrectly determined on November 18, 2013 that Student's use of obscene and offensive language in school, which resulted in suspension, was not a manifestation of his disability. In this regard, Petitioner argues that Student was incorrectly classified initially as OHI instead of ED, and that if DCPS had considered all of the documentation in Student's file which supports the classification of ED, it would have realized that the misbehavior was a manifestation of Student's disability. However, a review of the evidence in this case reveals that, in determining that Student's behavior was not a manifestation of his disability, the team properly considered that Student's problem behaviors are not consistent across settings and include an element of choice because he is not disrespectful at home and his behaviors are not as severe at home. Based on this evidence, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS denied Student a FAPE by determining that his behavior which resulted in a suspension on November 18, 2013 was not a manifestation of his disability.

November 26, 2013 IEP

The FAPE required by IDEA is tailored to the unique needs of the handicapped child by means of an IEP. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). In determining whether a Student's IEP is appropriate, the hearing officer must determine (1) whether the LEA has complied with the procedures set forth in IDEA, and (2) whether the IEP developed through IDEA's procedures was reasonably calculated to provide Student with educational benefits. *Id.*

In the instant case, there is no contention that DCPS failed to comply with the procedures set forth in IDEA once it finally determined to conduct an initial evaluation of Student. Instead, Petitioner contends that the IEP DCPS ultimately developed was not reasonably calculated to provide Student with educational benefits because the IEP failed to provide a full-time therapeutic setting for students with ED and ADHD and failed to provide sufficient behavior support services in light of Student's escalating behaviors. However, a review of the evidence reveals that Student was able to earn satisfactory grades and comply with expected standards of behavior in elementary school, but he began exhibiting persistent behavior problems in 6th grade during SY 2012/13 when he started middle school, and academic achievement testing conducted in the Fall of 2013 revealed that Student functions at a 3rd to 4th grade level. To address these issues, DCPS provided Student with 5 hours of specialized instruction inside and outside of general education, as well as 120 minutes per month of behavioral support services on his initial IEP, and DCPS provided Student with an additional 30 minutes per week of behavioral support that was not reflected on his IEP. The DCPS team members explained to Petitioner at the initial IEP meeting that it would be inappropriate to pull Student totally out of general education and put too many services in place right at the outset, but the amount of services could be revisited if necessary after giving the IEP a chance to take effect. However, on the very next day after the IEP was developed, Petitioner filed the instant Complaint. Moreover, by the time of the due process hearing for this case Student had received only approximately two weeks of services under the IEP because he was suspended in early December and Winter Break began shortly after he returned to school from the suspension. Based on this evidence, the hearing officer concludes that (1) the IEP is not insufficient on its face in light of Student's academic and behavioral history, and (2) Petitioner has failed to allow sufficient time to determine whether the IEP will effectively meet Student's needs. As a result, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS denied Student a FAPE by failing to develop an appropriate IEP on or about November 26, 2013.

ORDER

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

1. DCPS shall provide funding for Student to receive 100 hours of independent one-on-one tutoring and 30 hours of independent behavioral support, and for Student and Parent to receive 10 hours of family therapy.
2. All remaining claims and requests for relief in Petitioner's November 27, 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: 1/23/14

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer