

**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,

Petitioner,

v.

District of Columbia Public Schools
and

Respondents.

Date Issued: February 18, 2012

Hearing Officer: Virginia A. Dietrich

2012 FEB
DSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

Background

Petitioner, the parent of _____-year old Student, filed a due process complaint notice on December 5, 2011 alleging that the District of Columbia Public Schools (“DCPS”) and _____ had denied Student a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that (1) DCPS had failed to complete behavioral assessments on Student in response to a sexual assault that occurred at school which negatively impacted Student’s behavior, and (2) DCPS had failed to provide Student with an Individualized Education Program (“IEP”) that accurately reflected Student’s needs in the areas of goals, present levels of performance and impact on Student; with both allegations occurring from May 23, 2011 until the end of the 2010-2011 school year. Petitioner requested independent behavioral support services as a remedy.

¹ Personal identification information is provided in Appendix A.

Hearing Officer Determination

Petitioner also alleged that (1) [redacted] had failed to complete behavioral assessments on Student since the beginning of the 2011-2012 school year in order to get a handle on Student's behaviors that resulted in an excess of 25 behavioral incident reports, and (2) [redacted] had failed to implement Student's IEP since the beginning of the 2011-2012 school year by failing to provide Student with the behavioral support services required by her IEP or by failing to create a new IEP with sufficient behavioral support services to address Student's increasing behavior problems. Petitioner requested independent behavioral support services as a remedy.

DCPS asserted that it had not denied Student a FAPE because (1) the IEP that DCPS had developed on 05/25/11 was an accurate description of Student's problems and needs, and (2) DCPS had adequately addressed Student's behavior problems by completing an FBA and BIP and instituting a safety plan.

[redacted] asserted that it had not denied Student a FAPE because (1) it had not materially deviated from its obligation to provide Student with the behavioral support services required by her IEP and Student did not require more behavioral support services than what was required by her IEP, and (2) it had completed a FBA and BIP within a reasonable amount of time of Petitioner's request for these assessments.

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

The due process complaint was filed on 12/05/11. This Hearing Officer was assigned to the case on 12/07/11.

The complaint named DCPS, [redacted] and the Office of the State Superintendent of Education ("OSSE") as co-respondents. On 12/15/11, OSSE filed a motion to dismiss the complaint against OSSE. By Order dated 12/28/11, OSSE was dismissed as a party to the litigation.

Petitioner waived the resolution meeting, but DCPS and [redacted] did not. The 30-day resolution period ended on 01/04/12, the 45-day timeline to issue a decision began on 01/05/12 and the final decision was due by 02/18/12. A resolution meeting did not take place between Petitioner and DCPS. A resolution meeting between Petitioner and [redacted] occurred on 01/12/12, at which time no resolution was reached.

The due process hearing was a closed hearing that took place on 02/07/12 and 02/09/12. Petitioner was represented by Kiran Hassan, Esq., DCPS was represented by Linda Smalls, Esq.

Hearing Officer Determination

goals, present levels of performance and impact of the disability did not address how Student's behavior impeded her learning or that of others.

Whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability since October 2010; specifically, by failing to conduct a Functional Behavioral Assessment ("FBA") and Behavior Intervention Plan ("BIP") to address Student's problem behaviors that included fear of going to school which resulted from Student being sexually assaulted in school in October 2010.

Whether denied Student a FAPE by failing to implement Student's IEP following her enrollment at at the beginning of the 2011-2012 school year; specifically, by failing to provide behavioral support services or create a new IEP within a reasonable amount of time that provided for appropriate behavioral support services.

Whether denied Student a FAPE by failing to evaluate Student in all areas of suspected disability following the MDT meeting on 11/16/11; specifically, by failing to conduct a FBA and BIP to address Student's behaviors of running away from people trying to escort her; problem behaviors on the bus; and behavior problems in school that consisted of bullying, cursing, abusive language, running through the halls and threatening language, which resulted in suspension.

For relief², Petitioner requested a finding that Student was denied a FAPE on each of the issues presented, an award of compensatory education in the form of independent behavioral support services for DCPS' failure to conduct a FBA from 05/25/11 until the end of the school year, an award of compensatory education in the form of independent behavioral support services for failure to conduct a FBA from 11/16/11 until 12/14/11, and an award of compensatory education for failure to provide Student with appropriate behavioral support services since the beginning of the 2011-2012 school year.³

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

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

² Petitioner withdrew her request for (1) funding for an independent Functional Behavioral Assessment because had completed the assessment, (2) to amend Student's IEP to accurately reflect Student's present levels of performance, impact on performance and goals because Student's IEP had been amended by in January 2012, and (3) to convene a Multidisciplinary Team ("MDT") meeting to review the independent FBA since the FBA completed by had been reviewed at a MDT meeting in January 2012.

³ objected to any consideration of relief of compensatory education for alleged failure to provide Student with appropriate behavioral support services since the beginning of the 2011-2012 school year because it was not specifically stated in the Prehearing Order and maintained that it did not have proper notice of the request. The Hearing Officer determined that the request for relief was appropriate based on the issues alleged and Petitioner's overall request for compensatory education for the denials of a FAPE, as was stated in the complaint.

Hearing Officer Determination

#1. Student, age 11, is a resident of the District of Columbia. During the 2010-2011 school year, Student attended _____ which is a DCPS school.⁴

#2. In October 2010, Student was sexually assaulted by some boys at school. As a result of the sexual assault incident, the police and the court became involved. This legal involvement was very much the talk of the school and many unsavory or inappropriate comments were directed at Student, by both staff and students. The negativity associated with the repercussions of the incident caused Student to be somewhat polarized from the students and staff, which contributed to Student's acting out behaviors. Prior to the incident, Student's behavior in school was not good; she walked out of the classroom, cursed at students and staff and was generally defiant to the degree that Petitioner was contacted by the school at least 2-3 times per week. Petitioner's contact with the school increased after the incident such that Petitioner was at the school every day; however, Petitioner's increased contact with the school was not in proportion to an increase in Student's negative behaviors. Rather, Petitioner's increased contact with the school was due to Petitioner's increased anxiety over the staff and students' treatment of Student after the incident. Petitioner's concerns for Student's safety at school were responded to by DCPS making sure that a staff member was present with Student at school at all times and this safety plan was about 99% effective.⁵

#3. At the time the IEP was developed on 05/25/11, Student was capable of completing grade level assignments. Student's behavior did not impact her ability to be successful in the academic areas of math, reading, and written language nor did her behavior impede her learning or that of others.⁶ Student's IEP accurately described Student's behavior in the emotional/social/behavioral domain as impulsivity and a proclivity for off task peers and behavior; however, by 05/25/11, those behaviors were at a minimum due to the safety plan implemented by the staff at _____ which had severely curtailed Student's problem behaviors of disrespect, physical and verbal aggression and leaving the classroom at will.⁷

#4. At the MDT meeting on 05/25/11, Petitioner had no problems with the present levels of performance, the goals and the impact statement as stated in Student's IEP. Petitioner's only concern about the IEP was the inaccuracy of the background history.⁸

#5. During the 2010-2011 school year, DCPS developed a FBA and BIP, both of which were reviewed and revised at a meeting in November 2010.⁹

#6. During the 2011-2012 school year, Student attended _____ Student enrolled at _____ with a FBA and BIP that was developed during Student's prior year at _____. Both the FBA and BIP that Student brought with her from _____ had no applicability to Student's functioning

⁴ Stipulation #1.

⁵ Petitioner.

⁶

⁷ Petitioner, DCPS SEC.

⁸ Petitioner, Advocate #1.

⁹ DCPS SEC.

¹⁰ SEC.

Hearing Officer Determination

at _____ and were not utilized to address Student's behaviors at _____ because these assessments were school specific to _____.

#7. When Student enrolled at _____ at the beginning of the 2011-2012 school year, Student had an IEP that prescribed 1.5 hours/week of behavioral support services outside of general education.¹¹ During the month of September 2011, _____ provided Student with five out of six hours of required behavioral support services. During the months of October and November 2011, _____ provided Student with the required amount of behavioral support services. From December 1, 2011 until the time the complaint was filed on December 5, 2011, _____ provided Student with the required amount of behavioral support services.¹²

#8. From 08/29/11 through 11/14/11, Student received 26 behavioral referrals and was suspended for five days. 18 of the referrals resulted from misbehavior on the bus that mainly consisted of failing to wear a seatbelt and stay in her seat, but also included Student's use of profanity and an occasional hitting of other students. All but one of the bus incidents occurred in October, with one bus incident occurring on 11/01/11. The eight incidents that occurred in school were scattered in time from 08/29/11 through 11/14/11 and were scattered over the locations of the hallway, cafeteria, and the bathroom; none of the incidents occurred in the classroom.¹³

#9. On 11/16/11, the MDT convened at _____ to discuss Student's behavior in school and on the bus, but the main purpose of the meeting was to discuss Student's behavior on the bus, which had escalated.¹⁴ Petitioner's advocate, who attended the MDT meeting, asked to complete a FBA and a BIP to address Student's behavior on the bus.¹⁵

#10. _____ developed a FBA on 12/14/11 due to ongoing concerns with Student's willful, defiant, aggressive and task avoidant behaviors during structured and unstructured activities. The FBA described behaviors of concern that included physical aggression towards other students, refusing to follow adult directives, inappropriate language, not sitting in her seat on the bus, and verbally instigating fights between peers. These behaviors took place on a daily basis on the bus and at least once a week in school, and usually occurred after dismissal from school. Student's overall behavior adversely impacted her ability to remain in class and benefit from instruction; however, her behaviors did not adversely impact her academic skills and Student did not have any academic deficits.¹⁶ Student was bright and when she attended class, she was fully capable of doing the classwork.¹⁷

#11. _____ developed a BIP on 12/09/11 to address Student's target behaviors of physical aggression towards peers; verbal aggression towards faculty, staff and peers; defiance with respect to teacher directives and refusing to work with certain teachers; and inappropriate bus behavior. The BIP defined appropriate replacement behaviors, listed

¹¹ _____ -2.

¹² _____ -10.

¹³ P-26.

¹⁴ _____ SEC, Advocate #2.

¹⁵ _____ Advocate #2.

¹⁶ _____

¹⁷ Petitioner, _____ SEC.

Hearing Officer Determination

rewards/reinforcements, listed consequences, provided a crisis intervention plan, and provided strategies or procedures for addressing Student's inappropriate behaviors.¹⁸

12. The FBA and BIP developed by _____ were reviewed at a meeting on 01/12/12 that was attended by Petitioner and Petitioner's advocate.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 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 appropriate IEP on 05/25/11 that accurately reflected Student's current academic needs; specifically, the goals, present levels of performance and impact of the disability did not address how Student's behavior impeded her learning or that of others.

In developing each child's IEP, the IEP Team must consider the academic, developmental and functional needs of the child. 34 C.F.R. 300.324(a)(1)(iv). The IEP must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. 34 C.F.R. 300.320(a).

Petitioner failed to meet her burden of proof on this issue. When the IEP was developed on 05/25/11, Student was capable of completing grade level assignments when she was in the classroom. Student had a proclivity for off task peers and behavior; however, by 05/25/11, her

¹⁸ 6.

¹⁹ 8, SEC, Advocate #2.

Hearing Officer Determination

problem behaviors were at a minimum due to the safety plan that had implemented by the staff at

The impact of Student's behavior on academics was accurately reflected in the 05/25/11 IEP at the time the IEP was developed, i.e., Student's behaviors did not negatively affect her ability to be successful in academics and access the general education curriculum. Moreover, Petitioner credibly testified that at the MDT meeting on 05/25/11, she did not have any problems with the present levels of performance, the goals and the impact statement in Student's IEP.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to evaluate Student in all areas of suspected disability since October 2010; specifically, by failing to conduct a Functional Behavioral Assessment ("FBA") and Behavior Intervention Plan ("BIP") to address Student's problem behaviors that included fear of going to school which resulted from Student being sexually assaulted in school in October 2010.

Each public agency must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. 300.304(c)(4). "Evaluation" means procedures to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. 34 C.F.R. 300.15. FBAs qualify as evaluations. *Harris v. District of Columbia*, 50 IDELR 194 (2008).

Petitioner failed to meet her burden of proof on this issue. DCPS presented credible testimony that a FBA and BIP were completed during the 2010-2011 school year and reviewed and revised at a meeting in November 2010; a date that occurred after the sexual assault incident. Petitioner presented no evidence to refute this.

The third issue to be determined is whether _____ denied Student a FAPE by failing to implement Student's IEP following her enrollment at _____ at the beginning of the 2011-2012 school year; specifically, by failing to provide behavioral support services or create a new IEP within a reasonable amount of time that provided for appropriate behavioral support services.

At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP. 34 C.F.R. 300.323(a). Each public agency must ensure that as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. 34 C.F.R. 300.323(c)(2). "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).

A party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that 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 IEP's, but it still holds

Hearing Officer Determination

those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. Thus, a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." *Catalan et al., v. District of Columbia*, 478 F Supp 2^d 73 (2007), 47 IDELR 223.

Petitioner failed to meet her burden of proof on this issue. When Student enrolled at the beginning of the 2011-2012 school year, Student had an IEP that prescribed 1.5 hours/week of behavioral support services outside of general education. substantially complied with providing Student with the behavioral support services required by her IEP. The evidence revealed that between the end of August 2011 and the time the complaint was filed on 12/05/11, had provided Student with all of the required behavioral support services except for one hour and this deficiency did not constitute a material failure to implement Student's IEP. None of Student's problem behaviors took place in the classroom and none of the behaviors affected Student's ability to be academically successful in the classroom. Student was capable of completing classroom work. Petitioner failed to establish any direct link between one hour of missed behavioral support services and any educational harm to Student.

"The Hearing Officer must determine whether the procedural requirements of the Act have been followed. Second, it must determine whether the IEP developed under those procedures is "reasonably calculated to enable the child to receive educational benefits." If the Hearing Officer finds that both requirements are satisfied, then the government has complied with the obligations imposed by Congress and the courts can require no more." *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982).

There was also no evidence in the record to suggest that the amount of behavioral support services provided by was insufficient to meet Student's educational needs. By all accounts of Petitioner and staff at Student was bright and easily capable of completing grade level academic assignments. Student suffered no academic atrophy as a result of her behaviors; from 08/26/11 through 10/26/11, Student made progress towards achieving her IEP goals in the areas of math, reading, written language and social/emotional/behavioral functioning; Student's inappropriate behaviors predominately occurred on the school bus; and the eight behavioral incidents that occurred in school were scattered in time from 08/29/11 through 11/14/11 and were scattered over the locations of the hallway, cafeteria, and the bathroom, with no incidents occurring in the classroom. The Hearing Officer determines that the behavioral support services provided by the IEP during the 2011-2012 school year were sufficient to enable Student to access the curriculum and receive educational benefit.

The fourth issue to be determined is whether denied Student a FAPE by failing to evaluate Student in all areas of suspected disability following the MDT meeting on 11/16/11; specifically, by failing to conduct a FBA and BIP to address Student's behaviors of running away from people trying to escort her; problem behaviors on the bus; and behavior problems in school that consisted of bullying, cursing, abusive language, running through the halls and threatening language, which resulted in suspension.

Hearing Officer Determination

Petitioner failed to meet her burden of proof on this issue. Student's problem behaviors occurred predominantly on the bus throughout the month of October 2011 and timely convened a meeting on 11/16/11 to address the behaviors. On that day, Petitioner's advocate requested that conduct a FBA and BIP. responded to the request by completing a FBA and BIP within 30 days of the date of the request by Petitioner; i.e., the BIP was completed on 12/09/11 and the FBA was completed on 12/14/11. These assessments specifically addressed Student's problem behaviors and were reviewed and discussed by the IEP Team on 01/12/12.²⁰ The assessments were timely completed and reviewed, given the Thanksgiving and Christmas holiday when school was not in session, given the fact that the target behaviors occurred mainly on the bus and when they did occur in school, they occurred outside of the classroom, and given the fact that Student was always able to access the curriculum and be successful in academics, despite her problem behaviors.

Summary

Petitioner failed to meet her burden of proof on any of the issues in the complaint. Student was not denied a FAPE by DCPS or by All relief requested by Petitioner is DENIED.

ORDER

The complaint is dismissed with prejudice against DCPS and

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: February 18, 2012

/s/ Virginia A. Dietrich
Hearing Officer

²⁰ See 34 C.F.R. 300.305 that states that as part of any reevaluation, the IEP Team must review existing evaluation data on the child.