

ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit

IN RE:

XXXXXXXXXXXX, as Parent in behalf of
XXXXXXXXXXXX, Student

PETITIONER

VS.

CASE NO. H-13-28

Booneville School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

The Petitioner, XXXXXXXXXXXX (hereinafter "Petitioner" or "Parent"), alleges that the Respondent, Booneville School District (hereinafter "Respondent" or "District"), violated the Individuals with Disabilities Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as "IDEA" or the "Act") when it denied XXXXXXXXXXXX (hereinafter "Student") a free and appropriate public education (hereinafter "FAPE") in the 2013 spring semester. Petitioner specifically alleges that the District violated the Act by:

1. Failing to adhere to Student's individual education plan (hereinafter "IEP") when it disciplined Student for an incident that occurred in February 2013 in choir class;
2. Failing to provide Parent with prior written notice that Student was being punished via in-school suspension (hereinafter "ISS") for a single manifestation of her disability;
3. Failing to provide Parent with the opportunity to participate in the decision-making process regarding the disciplinary action imposed on Student;

4. Failing to provide Parent with a description of each evaluation procedure, assessment, record, or report used by the District as a basis for disciplining student and removing her from show choir; and
5. Failing to provide Parent with prior written notice that her child was being removed from show choir.

Parent requested that Student be allowed a change of placement to an appropriate interim alternative educational setting for guitar and voice to remedy these alleged violations.

PROCEDURAL HISTORY:

On June 4, 2013, the Arkansas Department of Education (hereinafter “Department”) received from Parent a request to initiate due process hearing procedures. Parent requested the hearing because she believed that the District failed to comply with the IDEA by not providing the Student with FAPE, as noted *supra* in the statement of issues, when it disciplined Student in February 2013 for an incident that occurred in choir class. At the time that Parent filed a request for due processing hearing, Student was a seventeen-year-old, eleventh grade, female enrolled in the District.

In response to the Parent’s request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of July 17 was set as the date on which a hearing would commence, with July 18 provided as an additional hearing day, should the Parent and District fail to reach resolution prior to that time. An order setting preliminary timelines and instructions for compliance with the order was issued on June 5, 2013.

On June 10, 2013, counsel for Parent sent correspondence to this Hearing Officer (copy to District) stating that a single day would be sufficient for hearing, and requesting that July 18 be the designated hearing date. On June 12, 2013, District filed a Notice of Petitioner’s Failure to Meet

Sufficiency Requirements, requesting dismissal of the due process complaint or, in the alternative, that Parent be required to amend the complaint. By order dated June 24, 2013, this Hearing Officer granted the District's sufficiency motion and, therefore, ordered Parent to amend her complaint within ten days. In addition, July 18 was set as the date for the hearing of this matter.

On July 3, 2013, Parent filed an Amended Due Process Complaint. Thereafter, on July 15, 2013, the District again filed a Notice of Petitioner's Failure to Meet Sufficiency Requirements. On July 17, 2013, this Hearing Officer issued an order denying the District's motion and finding the Parent's amended complaint to be sufficient under the IDEA.

A prehearing conference regarding this matter was conducted, via telephone, on July 16, 2013, and counsel for both parties participated. During the prehearing conference, the parties discussed unresolved issues to be addressed at the hearing, as well as the witnesses and evidence which would be necessary to address same. Thereafter, the hearing began as scheduled on July 18, 2013.¹ At the Parent's request, the hearing was open.

The following witnesses testified in this matter: Student, Parent, Melissa Haney (hereinafter "Haney"), and Frances Ann Jones (hereinafter "Jones").

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, conducted an open impartial hearing. Parent was represented by attorney John Verkamp (Charleston, Arkansas) and the District was represented by attorney Jay Bequette (Little Rock, Arkansas).

¹ See Hearing Officer Binder of Pleadings and Orders; Hearing Transcript.

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.²

FINDINGS OF FACT:

Background

Student is a seventeen-year-old female that attends high school at District. At the time of the hearing in this matter, Student had completed the eleventh grade.³ Student was diagnosed as having attention deficit hyperactivity disorder (hereinafter “ADHD”) when she was in elementary school, and she began taking medication, specifically Focalin (10 mg), at the time of diagnosis.⁴ Student’s disability, which is Other Health Impaired due to ADHD, affects her ability to focus. “Student is easily distracted and very hyper and has to be redirected to task. Student is sensitive to everything going on around her.”⁵

In January and February of 2013, Student was undergoing a medication change.⁶ Student’s physician initially changed her medication from Focalin to Datrayna (10 mg patch), which worked well for approximately two and one half months. Thereafter, however, Student began having a skin reaction to the patch and had to discontinue its use.⁷ Student was then placed on Focalin (5 mg extended release), which caused severe headaches as a result of the speed at which the medication was being released.⁸ Student was taking Focalin (5 mg extended release) on February 28, 2013.⁹ Parent testified that she told Ms. Payne, Student’s choir aide, about the medication change and the

² See Hearing Officer Binder of Pleadings and Orders.

³ Hearing Transcript, p. 14.

⁴ *Id.* at 15, 43.

⁵ Stipulated Exhibits, BSD 003.

⁶ Hearing Transcript, p. 44.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 47.

headaches that it was causing.¹⁰ She further testified that Mr. Payne, Student's choir instructor, was aware of the medication change as well.¹¹

Student had an IEP for the 2012/2013 school year which was created on April 30, 2012.¹² The IEP included a section that addressed "Behavior Intervention Strategies." Pursuant to that section of the IEP, the District was to provide clearly defined limits, rules, and consequences, as well as provide frequent reminders of rules to address behavioral issues with Student. In addition, the District was to intervene and redirect inappropriate behavior, as well as engage in private, planned discussions with Student to identify solutions to inappropriate behavior.¹³ The IEP did not include a separate behavioral intervention plan.¹⁴ Student was subject to the District's regular disciplinary policies.¹⁵

Student attended choir class and strings (guitar) daily. In addition, she was a member of show choir.¹⁶ All three of these subjects were taught by Mr. Payne and his wife, Ms. Payne.¹⁷ On February 28, 2013, Student testified that she was suffering from a headache as a result of the medication change that she was undergoing.¹⁸ Mr. Payne asked Student to read her part for a play they were rehearsing and Student stated that she did not want to read because she had a headache.¹⁹ Mr. Payne responded by telling Student to go lay down in an office, as opposed to on the stage in the choir room.²⁰ Student testified that she was sitting at the time that Mr. Payne was asked her to go to an office and lay down; however, she testified that prior to that time, she had

¹⁰ *Id.* at 47-48.

¹¹ *Id.* at 48.

¹² Stipulated Exhibits, BSD 002-BSD 018.

¹³ *Id.* at BSD 007.

¹⁴ Hearing Transcript, pp. 40, 79; Stipulated Exhibits, BSD 002-BSD 018.

¹⁵ Hearing Transcript, pp. 79, 101,117.

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 19.

¹⁸ *Id.* at 17.

¹⁹ *Id.* at 21-22.

²⁰ *Id.*

been laying on the choir room stage.²¹ While this was occurring, other students were talking and Student testified that she could not concentrate.²² Mr. Payne continued to tell Student to go lay down in his office, and student, in response, put her fingers in her ears and said “nah, nah, nah, nah.” Mr. Payne then sent all other students out of the room. ²³ Student stated that she felt overwhelmed at the time that she did this action. After the other students left the classroom, Mr. Payne moved close to Student and yelled at her that she had been disrespectful and that she needed to go to the office.²⁴ The principal immediately placed Student in ISS for three days.²⁵

Student stated that she had never done anything of that nature in the past.²⁶ Student stated that she had been disrespectful to teachers in the past but had not been punished for it because she had stated that she was sorry.²⁷ Jones testified that Student had put her fingers in her ears before when she was overwhelmed, but she had never said “nah, nah, nah, nah” at the same time that she was blocking out sound.²⁸ Jones further stated that Student disrupted choir class to the extent that Mr. Payne had to remove the class from the room and write her a discipline referral, adding that Student was punished for not stopping and listening to Mr. Payne and following directions that he was giving. ²⁹

Prior to this incident, Student loved and respected Mr. and Ms. Payne. Student depended on Mr. Payne to help her when she sang the national anthem at football games.³⁰ Mr. and Ms. Payne had taught Student since junior high school. Approximately one year prior to the incident that

²¹ *Id.* at 21-23.

²² *Id.* at 22.

²³ *Id.* at 22-23.

²⁴ *Id.* at 28.

²⁵ *Id.* at 28-29; *See also* Stipulated Exhibits, BSD 016.

²⁶ Hearing Transcript, p. 24.

²⁷ *Id.* at 27.

²⁸ *Id.* at 121.

²⁹ *Id.*

³⁰ *Id.* at 48-49.

occurred on February 28, 2013, Student was disciplined for hitting another student. Besides these two incidents, Student had not had disciplinary issues in school.³¹

Parent was not informed that Student had been placed in ISS until Student came home on the evening of the incident and told Parent what had happened.³² Parent did not meet with Student's IEP team prior to the issuance of ISS to student.³³ Following Student's ISS, Parent spoke with Jones and it was decided that, pending an IEP meeting on March 11, 2013, Student would not attend show choir.³⁴ Jones and Parent agreed that Student be removed from vocal choir and strings. Jones stated that Student's boyfriend was also in that class and Student "liked to play a little bit" instead of being focused.³⁵

On March 11, 2013, Student's IEP team convened to discuss the incident which occurred on February 28, 2013. Included on Student's IEP team were: Parent, Tonya Berry (School Nurse), Jones (Special Education Coordinator), Haney (Special Education Supervisor), and Mr. and Ms. Payne (choir instructor and aide, respectively).³⁶ The purpose of the meeting, in light of the incident on February 28, 2013, was to implement a behavior management plan.³⁷ In addition, Jones announced that she and Parent had discussed removing Student from choir and strings and decided that it would be good for Student to not be in the same environment for three back to back classes, all of which Mr. and Ms. Payne taught.³⁸

Parent testified that Ms. Payne became irate when she learned that Student was being removed from choir and strings, and that she began insisting that she wanted Student to also be

³¹ *Id.* at 50-52.

³² *Id.* at 42.

³³ *Id.* at 43.

³⁴ *Id.* at 85.

³⁵ *Id.* at 131.

³⁶ *Id.* at 53.

³⁷ *Id.* at 54.

³⁸ *Id.* at 55, 97-98.

removed from show choir.³⁹ Ms. Payne further stated that Student “was the most disrespectful person that she had ever met in her entire life” and that she had the right to determine whether Student remained in show choir.⁴⁰ In response to this tirade, Jones and Haney informed Ms. Payne that she did not have such right and that Student would not be removed from show choir.⁴¹ Ms. Payne then stated “[w]e don’t allow students like these in [s]how [c]hoir.”⁴² Jones and Haney were taken aback when Ms. Payne made this statement.⁴³ Haney told Parent after the meeting that Mr. and Ms. Payne could not remove Student from show choir.⁴⁴

During the IEP meeting, a “Separate Programming Conference Decision Form/Notice of Decision” was completed. This form states that “[Student’s] schedule will be changed to remove her from strings and vocal music. [Student] will remain in show choir at this time.⁴⁵ Following the meeting, Parent decided to remove Student from show choir because she did not feel that the Student would be treated fairly by Mr. and Ms. Payne in light of the events that had transpired.⁴⁶ Parent subsequently sent a letter to the District which stated that she was removing Student from show choir based on the behavior of Mr. and Ms. Payne at the March 11, 2013 IEP meeting.⁴⁷ Parent testified that Student experienced a lot of stress as a result of the incident with Mr. and Ms. Payne, as well as the reactions of other students as a result of the incident.⁴⁸ Haney was not aware that Parent had removed Student from show choir until March 13, 2013, when she was informed

³⁹ *Id.* at 55, 91, 127.

⁴⁰ *Id.*

⁴¹ *Id.* at 55, 91, 130.

⁴² *Id.* at 55, 128-29.

⁴³ *Id.* at 59-60.

⁴⁴ *Id.* at 96.

⁴⁵ Stipulated Exhibits, BSD 020.

⁴⁶ Hearing Transcript, pp. 63-64.

⁴⁷ Stipulated Exhibits, BSD 022.

⁴⁸ Hearing Transcript, p. 72.

that Parent had sent a letter to the District.⁴⁹ Jones testified that she told Student that she was not removed from show choir and did not have to come out of the activity. In response, Student indicated that she felt that she did not want to attend show choir.⁵⁰

Mr. and Mrs. Payne retired at the end of the 2012/2013 school year.⁵¹ Student testified that she was not worried about being in strings and show choir next year.⁵²

CONCLUSIONS OF LAW AND DISCUSSION:

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one.⁵³ In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law.⁵⁴ Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the Student's IEP is reasonably calculated to enable her to receive educational benefits.⁵⁵

In the present case, the question of whether Student was provided FAPE hinges on whether the District took appropriate action when it disciplined Student on February 28, 2013 for an incident that occurred in choir class. As such, it is necessary to review the relevant IDEA regulations and case law applicable to disciplinary actions.

⁴⁹ *Id.* at 97.

⁵⁰ *Id.* at 126.

⁵¹ *Id.* at 143.

⁵² *Id.* at 36.

⁵³ 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a).

⁵⁴ 458 U.S. 176, 206-07 (1982).

⁵⁵ *Id.*

Pursuant to the U.S. Supreme Court's decision in *Honig v. Doe*, certain disciplinary actions are prohibited to the extent that the result would be a change of placement for a disabled student.⁵⁶ Specifically, the Court in *Honig* held that a proposed suspension of more than ten school days constitutes a change of placement which triggers the IDEA's procedural safeguards, *i.e.* a manifestation determination and possible functional behavior assessment.⁵⁷ Inferring from the Court's decision in *Honig*, the 2006 IDEA regulations addressed situations where a student is issued a disciplinary action that falls short of the ten-day period considered by the Court. Specifically, the regulations provide that a school district may remove a student with a disability, where there is a violation of the district's code of student conduct, from her current placement to an appropriate interim alternative educational setting, another setting, or suspension for not more than ten consecutive school days, as long as the same change of placement would be made in the case of a student without a disability.⁵⁸ This same rule is also applied to additional removals of less than ten consecutive school days in the same school year for separate incidents of misconduct, assuming that such removals do not constitute a change of placement as defined by regulation.⁵⁹ In addition, customary in-school disciplinary procedures do not typically trigger the procedural protections of the IDEA, as the Court in *Honig* stated that "such procedures may include the use of study carrels, time-out, detention, or the restriction of privileges."⁶⁰

With regard to the present case, it is necessary to first determine whether Student's conduct on February 28, 2013 constituted misconduct in violation of the District's code of student conduct. Parent and Student testified that Student's failure to follow Mr. Payne's verbal directions on this date was a result of the medication side effects that Student was suffering on account of a

⁵⁶ 484 U.S. 305 (1988).

⁵⁷ *Id.*

⁵⁸ 34 C.F.R. 300.530(b)(1).

⁵⁹ 34 C.F.R. 300.530(b)(2).

⁶⁰ 484 U.S. 305 (1988).

medication change related to her diagnosis of ADHD. In addition, it was asserted that Student's placement of her fingers in her ears while simultaneously repeating "nah, nah, nah, nah" was a manifestation of Student's disability. Based on the evidence in this case, however, this Hearing Officer is not convinced that Student's conduct on February 28, 2013 was a result of her ADHD diagnosis or the side effects of her medication. Student, herself, testified that due to her headache, she was lying down and or sitting on the stage in the choir room. When she was asked by Mr. Payne to get up and read her play lines, Student informed Mr. Payne that she did not feel well and, in response, he told her to go to an office and lay down. Essentially, this was an opportunity for Student to leave the noisy classroom and move to a quiet area so that she could rest. Instead, Student repeatedly refused to do as instructed and, eventually, plugged her ears and started saying "nah, nah, nah, nah."

Jones, who appeared to have a positive relationship with Student, testified that she had never seen Student's disability manifest in this manner. Jones did indicate that Student had put her fingers in her ears before; however, she had never seen student do so while repeating "nah, nah, nah, nah." In addition, Jones testified as to the severity of the incident, explaining that Mr. Payne was forced to remove all other children from the classroom to handle the situation with Student. Finally, Jones indicated that Student often "played" in choir on account of the fact that Student's boyfriend was also in the class. In fact, this was such a concern to Jones that she recommended that Student not be in choir or strings because Student's boyfriend was also in these classes.

Considering all of these issues, it is the opinion of this Hearing Officer that Student's conduct on February 28, 2013 was more likely than not an act of disrespect and defiance by Student, as opposed to behavior on account of her disability. As it has been deemed that Student engaged in misconduct in violation of the District's code of student conduct, it is now necessary to determine

whether the disciplinary action imposed by the District violated the IDEA. In this regard, Parent asserts that the District violated the IDEA by: (1) failing to adhere to the behavior strategies in Student's IEP; (2) failing to provide Parent with prior written notice that Student was being given ISS; (3) failing to provide Parent with an opportunity to participate in decision making regarding the discipline imposed; and (4) failing to provide Parent with any documentation supporting the District's disciplinary decision.

With regard to the issue of adherence to Student's IEP, Student and Parent assert that Mr. Payne, prior to sending Student to the office for disciplinary purposes, failed to follow the instructional modifications set forth in Student's IEP. Specifically, they assert that Mr. Payne failed to set clearly defined limits, provide frequent reminders of rules, intervene and redirect inappropriate behavior, and engage in a private planned discussion with student to identify solutions. Based on the evidence in this case, however, this Hearing Officer disagrees.

First, Student testified that she had been in classes with Mr. Payne for many years; therefore it is more likely than not that she was well aware of his classroom rules and limits. In addition, based on Student's testimony, Mr. Payne was very clear that he wanted Student to get up from the choir room floor and move to a private office. According to Student, Mr. Payne continued to repeat this instruction despite the fact that Student was declining to follow directions. Based on these facts, the evidence supports that Mr. Payne was enforcing clearly defined limits, providing reminders of rules, and intervening in response to Student's inappropriate behavior, *i.e.* failure to follow directions. Contacting the principal also constituted a form of intervention regarding inappropriate behavior on the part of Student. The Hearing Officer notes that there was no private planned discussion with student to identify solutions; however, given the severity of the issue, it is understandable that a private discussion to identify solutions would not have occurred at the

specific time of the incident. Therefore, it is the opinion of the Hearing Officer that Mr. Payne followed the IEP as stated during the incident that occurred on February 28, 2013.

Having determined that the District followed Student's IEP on February 28, 2013, it is necessary to determine whether the District violated the IDEA when it failed to provide Parent with prior written notice, an opportunity to participate in decision making, and documentation pertaining to the imposition of ISS for Student. In the present case, it is undisputed that Student was given three days of ISS for the incident that occurred in choir class on February 28, 2013. The testimony established that Student was subject to the District's normal disciplinary procedures, as she had not had significant disciplinary issues in the past and there was no specific behavior intervention plan attached to her IEP. In addition, pursuant to IDEA regulations, the District was entitled to remove Student from class and assign her ISS as long as the disciplinary action did not exceed ten days and would have been the same discipline imposed in the case of a student without a disability.

Essentially, Student engaged in misconduct and the school disciplined her, as it was permitted to do so, under its normal code of student conduct. Because the disciplinary action imposed was for a time period less than ten days and did not constitute a change in placement under the IDEA, this action did not trigger an obligation on the part of the District to notify Parent in writing prior to the imposition of discipline. Similarly, the District had no obligation to include Parent in the decision-making process or provide supporting documentation prior to imposing discipline.

Finally, it is necessary to address the allegation that Student was removed from show choir without prior written notice to Parent. It is clear from the facts in this case that the District did not remove Student from show choir. Parent testified that she talked with Student and made the

decision to remove her from show choir. In addition, Parent sent a letter stating affirmatively that she was removing Student from show choir. Jones and Haney both testified that they were not going to allow Mr. and Ms. Payne to remove Student from show choir, and they would have dealt with any issues that might have arisen. The March 11, 2013 "Separate Programming Conference Decision Form/Notice of Decision" supports this fact as well, in that it states that Student will remain in show choir. Based on these facts, it is the opinion of this Hearing Officer that the choice to not attend show choir was that of Parent and Student, as opposed to the District.

It should be noted that there was a significant amount of testimony during the pendency of this hearing regarding inappropriate behavior on the part of Mr. and Ms. Payne. Specifically, it was stated that Mr. and Ms. Payne attended Student's March 11, 2013 IEP meeting and made numerous derogatory comments about Student. In addition, Mr. and Ms. Payne indicated that they wanted Student to be removed from show choir. However, an important fact in this case is that Jones and Haney, who were responsible for Student's special education programming, made it clear to Mr. and Ms. Payne what was expected and assured Parent and Student that Student could remain in show choir. Despite these assurances, Parent made the decision to remove Student from the activity. As such, the District had no obligation to take any actions other than those that it had already taken with regard to this situation.

Certainly, this Hearing Officer is not condoning the behavior of Mr. and Ms. Payne, and it is unfortunate that Parent and Student, as well as District staff, had to endure such conduct. However, it is this Hearing Officer's duty, and only duty, to determine whether there were any violations of the IDEA with respect to Student. While it might be possible that Student has some other legal recourse, the purview of this Hearing Officer is limited to the issue of whether the District violated

the IDEA. The facts in this case indicate that the District did not violate the IDEA when it disciplined Student for her conduct on February 28, 2013.

Because this Hearing Officer found no IDEA violations by the District, it also follows then that the District did not fail to procedurally or substantively deny Student FAPE.

ORDER:

The results of the testimony and evidence warrant a finding that the District did not violate Student's rights under the IDEA and, as such, has not failed to provide FAPE to Student. As such, the alternative placement (guitar and voice lessons) requested by Parent is not appropriate.

FINALITY OF ORDER AND RIGHT TO APPEAL:

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either federal district court or a state court of competent jurisdiction pursuant to the Individual's with Disabilities Education Act within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards (Arkansas Department of Education 2008), the Hearing Officer has no further jurisdiction over the parties to the hearing.

IT IS SO ORDERED.

/s/ Danna J. Young
HEARING OFFICER

DATE