

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office

Parent,¹ on behalf of,
Student,*

Petitioner,

v.

Hearing Officer: Melanie Byrd Chisholm

Academy
Public Charter School,

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a _____ male, who is a rising _____ student who attended School A for the 2012-2013 school year. The student's most recent individualized education program (IEP) lists Speech-Language Impairment as his primary disability and provides for him to receive five (5) hours per week of specialized instruction within the general education environment in reading, three (3) hours per week of specialized instruction within the general education environment in mathematics, two (2) hours per week of specialized instruction within the general education environment in written expression, four (4) hours per month of speech-language pathology outside of the general education environment and two hundred forty (240) minutes per month of occupational therapy (OT) outside of the general education environment.

On _____ Petitioner filed a Due Process Complaint (Complaint) against Respondent _____ Day Academy Public Charter School (

In the Complaint, the Petitioner alleged that _____ denied the student a free appropriate public education (FAPE) by failing to implement the student's IEP, failing to provide current evaluations, failing to provide the student with an appropriate IEP with measurable goals, failing to provide appropriate related services, and failing to afford the parent an opportunity to participate in a placement meeting to discuss her choice placement. As relief, the Petitioner requested independent comprehensive psychological, occupational therapy,

¹ Personal identification information is provided in Appendix A.

*The student is a minor.

speech-language and social history assessments/evaluations; a multidisciplinary team (MDT) meeting within ten days of receipt of the independent evaluations to review the evaluations and determine the student's eligibility for specialized instruction and related services; for to complete an appropriate IEP, with measurable goals and objectives, after the review of the independent evaluations; the provision of appropriate related services; and for to convene an MDT or IEP Team meeting to afford the parent an opportunity to discuss an appropriate placement of her choice.

On Respondent filed an untimely Response to the Complaint. In its Response, Respondent asserted that: on the student's IEP Team met to review assessments conducted in Spring of 2012 and reviewed and revised the student's IEP as necessary; the goals on the student's IEP include appropriate baselines, goals and other interventions; the student's IEP provides a total of 10 hours per week of specialized instruction inside the general education setting, four hours per month of speech-language therapy, four hours per month of OT; the student's IEP was reasonably calculated to provide the student with educational benefit; throughout the 2012-2013 school year, School A implemented the student's IEP; during the 2012-2013 school year, the student demonstrated progress in all academic areas and toward his IEP goals; during the 2012-2013 school year, the student did not demonstrate any significant behavior problems and received no referrals for behavior; the parent did not request evaluations for the student; assessments to inform the student's triennial reevaluation were ordered in June 2013 and are in the process of being conducted; the student was not enrolled in School A in June 2012; and the parent was present at all MDT meetings where the student's IEP and placement was discussed.

the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on following the conclusion of the 30-day resolution period, and ends on The Hearing Officer Determination (HOD) is due on

Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

the Respondent filed a Motion for Continuance. The Respondent represented that three key witnesses would not be available on Rather than extend the 45-day timeline, the Hearing Officer suggested that the second day of hearing be held on rather than as agreed upon during the prehearing conference. The Petitioner objected to rescheduling the second day of hearing stating that the parent objected and that Petitioner's attorney had another case scheduled for

Petitioner filed Disclosures including eight (8) exhibits and six (6) witnesses. On Respondent filed Disclosures including eighteen (18) exhibits and six (6) witnesses.

the hearing officer held a status conference to discuss the motion. The parties agreed that the first day of hearing would commence on at 9:00 a.m. as stated in the Prehearing Order and that Respondent would present the three witnesses on

In order to allow adequate time for the witnesses to testify, in the time period allotted for the second day of hearing, the parties agreed that the hearing would begin at 9:00 a.m. on rather than 9:30 a.m. as indicated in the Prehearing Order. The parties further agreed to submit written closing arguments rather than provide oral closing arguments.

The Hearing Officer issued a Rescheduling Order on indicating that the second day of hearing would begin at 9:00 a.m. on and that the parties were to submit written closing arguments by 5:00 p.m. on

The Petitioner elected for the hearing to be closed however at the beginning of the hearing, the Petitioner's attorney requested that the hearing be open for the student's mother and grandmother. The Petitioner's attorney represented that the student's grandmother has a Power of Attorney for the student which would be sent to the Hearing Officer following the first day of hearing. The Petitioner provided the requested documentation. The Hearing Officer allowed the grandmother to be present during preliminary matters and allowed the mother to be present following her testimony. The mother was the first witness to testify.

Petitioner's Exhibits 1-8 were admitted without objection. Respondent's Exhibits 1-18 were admitted without objection.

The hearing recessed at 2:01 p.m. on Prior to going off of the record, the parties agreed to reconvene at 8:45 a.m., rather than 9:00 a.m., on for the second day of hearing. The Hearing Officer stressed that the hearing was to begin at 8:45 a.m.

, the Petitioner, the student's mother, the student's grandmother, the Respondent's attorney, the representative for the Respondent and the Hearing Officer were present. The Hearing Officer attempted to call the Petitioner's attorney twice before beginning the hearing at 9:00 a.m. The Petitioner's attorney arrived at 9:07 a.m.

Following the conclusion of the Respondent's case, the Petitioner requested that the grandmother be called as a rebuttal witness to testify regarding discussions during the

A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.
³ At the scheduled time to begin the hearing the Respondent's attorney and the Hearing Officer were present. At 9:06 a.m. the Respondent's representative arrived. At 9:20 a.m., the Hearing Officer called the Petitioner's attorney. The attorney informed the Hearing Officer that she was "in the building." Upon further conversation, the Hearing Officer informed the Petitioner's attorney that she was in the wrong building. The Petitioner's attorney arrived at approximately 9:35 a.m. The Petitioner did not appear however sent the student's grandmother in his stead.

2012 and May 2013 IEP Team meetings. The Hearing Officer denied the request, stating that the grandmother provided testimony during direct examination regarding discussions during the September 2012 and May 2013 IEP Team meetings.

The hearing concluded at approximately 10:43 a.m. on _____ Pursuant to the Rescheduling Order, the parties were instructed to submit written closing arguments by 5:00 p.m. on _____. Both parties submitted written closing arguments by the deadline.

With the Petitioner's written closing argument, the Petitioner included a letter from the OT expert witness who testified on behalf of the Petitioner. It is inappropriate for any additional evidence to be presented during closing arguments and through a forum in which the opposing party does not have an opportunity to cross-examine. Therefore, the Hearing Officer did not consider the letter from the expert witness.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUES

The issues to be determined are as follows:

1. Whether _____ failed to evaluate the student upon parental request in June 2012, September 2012, April 2013 and May 2013, and if so, whether this failure constitutes a denial of a FAPE?
2. Whether _____ denied the student a FAPE by failing to develop an appropriate IEP for the student on _____ specifically by failing to develop measureable written language, reading, math, speech-language, OT and social/emotional goals and objectives?
3. Whether _____ denied the student a FAPE by failing to develop an appropriate IEP for the student on _____ specifically by failing to include behavioral support services and/or counseling as a related service?
4. Whether _____ failed to allow the parent an opportunity to participate in placement discussions regarding the student on _____ and during June 2013, and if so, whether this failure constitutes a denial of a FAPE?
5. Whether _____ failed to implement the student's IEP during the 2012-2013 school year, specifically by failing to implement the student's specialized instruction pursuant to his _____ IEP during the first three quarters of the 2012-2013 school year, the student's OT pursuant to his _____ IEP for the first two quarters of the 2012-2013 school year, and

the student's speech-language therapy pursuant to his
the first two quarters of the 2012-2013 school year?

IEP during

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:

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. _____ is its own local educational agency (LEA). (Stipulated Fact)
3. On _____ a Comprehensive Psychological Evaluation was completed for the student. (Petitioner's Exhibit 4; Respondent's Exhibit 4)
4. The _____ evaluator summarized that results of behavioral rating scales completed by the teachers and clinical and classroom observations indicated elevated levels of hyperactivity consistent with a clinical diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). (Petitioner's Exhibit 4; Respondent's Exhibit 4)
5. In August 2010, the student's mother and grandmother reported that the student did not have any clinically significant levels of negative aspects of personality or behavior. (Petitioner's Exhibit 4; Respondent's Exhibit 4)
6. In August 2010, only one of the two teachers who completed the behavior rating scale demonstrated clinically significant scores for the student. (Petitioner's Exhibit 4; Respondent's Exhibit 4)
7. The student is diagnosed with ADHD. (Stipulated Fact)
8. The student attended School A for the 2011-2012 school year. (Petitioner's Exhibit 1; Respondent's Exhibits 7 and 8; Mother's Testimony; Principal's Testimony; Special Education Coordinator's Testimony; Teacher's Testimony)
9. During the 2011-2012 school year, the student did not display any behaviors which resulted in a discipline referral or caused concern for school staff. (Principal's Testimony; Special Education Coordinator's Testimony; Teacher's Testimony)
10. During the 2011-2012 school year, at times the student had attention issues but was able to get back on task with redirection and minimal prompting. (Teacher's Testimony)
11. The student attended School A for the 2012-2013 school year. (Stipulated Fact)
12. An IEP Team meeting was held on _____ to develop the student's IEP. (Stipulated Fact)
13. The student's father and grandmother participated in the _____ IEP Team meeting and the parents' attorney participated in the meeting by phone. (Stipulated Fact)
14. On _____ the special education teacher, special education coordinator, psychologist and social worker were present for the student's IEP Team meeting. (Petitioner's Exhibit 1; Respondent's Exhibits 7 and 8)
15. On _____ the most recent psychological evaluation of the student was finalized on _____ (Grandmother's Testimony; Special Education Coordinator's Testimony)

16. On the student was cooperative and attempted to complete all assignments, asked appropriate questions when he did not understand information, was a pleasant student and was eager to learn. (Petitioner's Exhibit 1; Respondent's Exhibit 8)
17. The student's IEP Team developed four math goals, five reading goals, two written expression goals, three speech-language goals and two OT goals. (Petitioner's Exhibit 1; Respondent's Exhibit 8)
18. Of the four math goals on the student's IEP, three contain the measurement of "4 out of 5 trials." The fourth math goal contains the measurement "in 4 out of trials." (Petitioner's Exhibit 1; Respondent's Exhibit 8)
19. Of the five reading goals on the student's IEP, one contains the measurement "in 3 out of 5 trials;" one contains the measurement "in 4 out of 5 trials;" two indicate "in 3 out of trials;" and one indicates "in 4 out of trials." (Petitioner's Exhibit 1; Respondent's Exhibit 8)
20. Of the two written expression goals on the student's IEP, both contain the measurement "in 3 out of 5 trials." (Petitioner's Exhibit 1; Respondent's Exhibit 8)
21. The first speech-language goal on the student's IEP includes the measurement of "80% accuracy [in] three consecutive session[s]." The second goal includes the measurement of "answer wh questions correctly with three consecutive sessions." The third goal includes the measurement of "80% accuracy [in] three consecutive sessions." (Petitioner's Exhibit 1; Respondent's Exhibit 8)
22. One of the OT goals on the student's IEP states that the student "will copy words and short sentences with proper letter formation, size, spacing, alignment and use of the baseline with minimal verbal cues" 80% of the time. (Petitioner's Exhibit 1; Respondent's Exhibit 8; Occupational Therapist's Testimony)
23. The OT goals on the student's IEP align with the student's most recent OT evaluation. (Occupational Therapist's Testimony)
24. The missing "5" on the math and reading goals on the student's IEP was a typographical error. (Teacher's Testimony)
25. The student's IEP prescribed five hours per week of specialized instruction within the general education environment in reading, three hours per week of specialized instruction within the general education environment in mathematics, two hours per week of specialized instruction within the general education environment in written expression, four hours per month of speech-language pathology outside of the general education environment and 240 minutes per month of OT outside of the general education environment. (Petitioner's Exhibit 1; Respondent's Exhibit 8; Teacher's Testimony; Special Education Coordinator's Testimony)
26. The teacher measured the student's progress toward mastery of his academic IEP goals with five trials. (Teacher's Testimony)
27. In September 2012, the student's grandmother requested to review the student's progress due to her concerns after receiving the student's report card. (Grandmother's Testimony)

28. In January 2013, the student's grandmother requested to review the student's progress due to her concerns after receiving the student's report card. (Grandmother's Testimony)
29. In February 2013, the student's grandmother requested to review the student's progress due to her concerns after receiving the student's report card. (Grandmother's Testimony)
30. The grandmother did not submit a written request for a reevaluation. (Grandmother's Testimony; Principal's Testimony; Special Education Coordinator's Testimony; Teacher's Testimony)
31. Based on the date of the student's prior evaluation, _____ began the reevaluation process for the student in April 2013. (Respondent's Exhibit 14; Special Education Coordinator's Testimony)
32. In April 2013, _____ obtained the parent's consent for reevaluation and ordered formal assessments. (Respondent's Exhibit 14; Special Education Coordinator's Testimony)
33. An MDT meeting regarding the student was held on _____ (Stipulated Fact)
34. The _____ MDT meeting was to discuss the student's report card and the student's academic performance. (Respondent's Exhibit 9; Mother's Testimony; Grandmother's Testimony; Principal's Testimony; Special Education Coordinator's Testimony)
35. The student's father and grandmother attended the _____ meeting and the mother participated by phone. (Stipulated Fact)
36. Also present at the _____ meeting were the special education coordinator, the special education teacher, the general education teacher, the principal and the student. (Respondent's Exhibit 9; Principal's Testimony; Special Education Coordinator's Testimony)
37. At the _____ MDT meeting, the student's special education teacher reviewed the results of the student's QRI assessment. (Respondent's Exhibit 9; Special Education Coordinator's Testimony; Teacher's Testimony)
38. At the _____ MDT meeting, the mother inquired about the content of the student's "tutoring sessions." After clarifying that the mother was requesting information regarding the content of instruction during times the special education teacher "pulled-out" the student, the special education teacher provided the requested information to the team. (Respondent's Exhibit 9)
39. At the _____ MDT meeting the mother presented her concern that the student may be confused by different instructional strategies. (Respondent's Exhibit 9)
40. The _____ MDT discussed the student's grades, teaching strategies, implementation of the student's IEP and the student's progress since enrolling in the LEA. (Respondent's Exhibit 9; Mother's Testimony; Grandmother's Testimony; Principal's Testimony; Special Education Coordinator's Testimony)
41. The _____ MDT discussed the student's tardiness and eating habits. (Respondent's Exhibit 9)
42. During the 2012-2013 school year, the teacher provided 90 minutes of specialized instruction to the student, three days per week for reading and written language and 90 minutes of specialized instruction to the student, two days per week for math. (Teacher's Testimony)

43. During the 2012-2013 school year, the student received one hour per week of speech-language pathology while school was in session. (Respondent's Exhibits 11 and 12; Special Education Coordinator's Testimony)
44. During the 2012-2013 school year, the student received four hours per month of OT services, while school was in session, during the months of September 2012, December 2012, January 2013, April 2013, May 2013 and June 2013. During the month of October 2012, the student received two hours of OT services. During the month of November 2012, the student received five hours of OT services. During the month of February 2013, the student received three hours of OT services. During the month of March 2013, the student received six hours of OT services. (Respondent's Exhibits 11 and 12; Special Education Coordinator's Testimony)
45. During the 2012-2013 school year, the student progressed toward all of his academic IEP goals. (Respondent's Exhibits 9 and 11; Mother's Testimony; Special Education Coordinator's Testimony; Teacher's Testimony)
46. During the 2012-2013 school year, the student's occupational therapist recommended that the student be exited from OT however, because of the objection of the parent, did not exit the student from OT. (Special Education Coordinator's Testimony)
47. During the 2012-2013 school year, the student did not display any behaviors which resulted in a discipline referral or caused concern for school staff. (Principal's Testimony; Special Education Coordinator's Testimony; Teacher's Testimony; Psychologist's Testimony)
48. During the 2012-2013 school year, at times the student had attention issues but was able to get back on task with redirection and minimal prompting. (Teacher's Testimony)
49. By the date of the hearing, all assessments and assessment reports ordered in April 2013 were complete. (Special Education Coordinator's Testimony)
50. The Mother gave credible testimony regarding what she believed to be true. The Mother acknowledged that the parents' main concern during the 2012-2013 school year was the student's grades and based the belief that the student's IEP was not being implemented on his report card grades.
51. The Grandmother gave credible testimony regarding what she believed to be true. The Grandmother testified that she requested "reevaluations" but acknowledged that she requested to, and her desire was to review the student's grades and progress and thought that this meant "evaluation."
52. The OT was qualified as an expert in occupational therapy. The OT gave credible testimony. The OT's testimony aligned with the student's most recent OT evaluation and the OT acknowledged that the student's needs could have changed since the OT evaluation.
53. The Principal gave credible testimony. His testimony aligned with that of other witnesses and the documents in the record.
54. The Special Education Coordinator was qualified as an expert in IEP development. The Special Education Coordinator gave generally credible testimony however her testimony regarding the implementation of the student's specialized instruction did not align with the Teacher's testimony of the implementation of the student's specialized instruction.

55. The Teacher gave generally creditable testimony. Although the Teacher testified that he implemented all of the specialized instruction on the student's IEP, the Teacher acknowledged that specialized instruction was provided to the student during academic blocks and not for all subject areas every day. Also, the Teacher's testimony regarding the student's Achievement Network (ANet) scores was not reasonable. Specifically the Teacher's Testimony that a drop in score from a 55% one quarter to a 32% the following quarter was not significant was not reasonable. However the Hearing Officer does acknowledge that the ANet assesses different concepts quarter to quarter.
56. The Psychologist was qualified as an expert in school psychology. The Psychologist provided creditable testimony. Her testimony aligned with that of other witnesses and the documents in the record.

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:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir.

Issue #1

The Petitioner alleged that _____ failed to evaluate the student upon parental request in June 2012, September 2012, April 2013 and May 2013.

The IDEA and its implementing regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student's parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005). In light of the lack of statutory guidance, *Herbin* concluded that "[r]evaluations should be conducted in a 'reasonable

The Petitioner failed to meet its burden with respect to Issue #1.

Issue #2

An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability. 34 CFR 300.320(a)(2)(i).

The Petitioner alleged that _____ denied the student a FAPE by failing to develop an appropriate IEP for the student on _____ specifically by failing to develop measureable written language, reading, math, speech-language, OT and social/emotional goals and objectives.

The student's IEP Team met on _____ Present at the meeting were the father, grandmother, special education teacher, special education coordinator, psychologist and social worker. The parent's attorney attended the _____ IEP Team meeting by phone. The student's _____ IEP Team developed four math goals, five reading goals, two written expression goals, three speech-language goals and two OT goals.

Of the four math goals, three contain the measurement of "4 out of 5 trials." The fourth math goal contains the measurement "in 4 out of trials." Of the five reading goals, one contains the measurement "in 3 out of 5 trials;" one contains the measurement "in 4 out of 5 trials;" two indicate "in 3 out of trials;" and one indicates "in 4 out of trials." Of the two written expression goals, both contain the measurement "in 3 out of 5 trials." The Teacher explained that the missing "5" on the math and reading goals was a typographical error and that he measured the student's progress toward mastery with five trials. The student's progress reports indicated that the student was progressing toward all of his academic IEP goals during the 2012-2013 school year.

The student's _____ IEP includes three speech-language goals. The first goal includes the measurement of "80% accuracy [in] three consecutive session[s]." The second goal includes the measurement of "answer wh questions correctly with three consecutive sessions." The third goal includes the measurement of "80% accuracy [in] three consecutive sessions."

The Petitioner's OT expert witness testified that one of the two OT goals was measureable and the second was measureable for aspects of the goal but unclear with how the student's progress toward the goal would be measured without including the level of support needed with a writing instrument.

While the goal would be more specific if it included the level of support the student needed with a writing instrument, the goal contains a measurement that can be used to quantify the student's level of mastery. Additionally, the OT acknowledged that the specificity that she would have included could be inferred from other information in the

student's IEP. The OT testified that the goals align with the student's most recent OT evaluation but that, in her opinion, a goal related to a structured handwriting program should be included.

The Hearing Officer concludes that the missing "5" within the academic goals and the missing percentage on one of the student's speech-language goals on the student's

IEP constitutes a procedural violation. The Teacher testified that the missing "5" was a typographical error and that he measured the student's progress toward mastery with five trials. Further, the student's progress reports indicate that the student was progressing toward all academic and speech-language goals which had been introduced.

The IDEA regulations at 34 CFR §300.513(a)(2) state that 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. Here, there was no evidence presented which suggested that the missing "5" on one of the student's math goals and three of the student's reading goals or the missing percentage on one of the student's speech-language goals impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child or caused a deprivation of educational benefit. The student progressed toward all goals with the measurement intended by the student's IEP Team. Additionally, the parents and the parents' attorney were involved in the development of the IEP. Therefore, the Hearing Officer concludes that the procedural violation does not constitute a denial of a FAPE.

While the student's OT goals did not address every one of the student's weaknesses in OT, there is no requirement that a student's IEP address every need resulting from his disability only that the goals enable the child to be involved in and make progress in the general education curriculum. The Petitioner's expert witness testified that one of the two OT goals was measureable and the other OT goal was measureable but not specific enough to describe the level of support given to the student with one aspect of the goal.

A FAPE need not provide the "absolutely best" or "potential-maximizing" education. *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010) (citation and internal quotation marks omitted). The FAPE need only be "appropriately designed and implemented so as to convey [the] [s]tudent with a meaningful benefit." *Id.* at 433 (citations and quotation marks omitted). "Meaningful educational benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). An eligible student is denied a FAPE if the IEP is not likely to produce progress, or if the program affords the child only a "trivial" or "de minimis" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk v. Cent. Susquehanna Intermed. Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988); see also *Bd. of Educ. of Frederick County v. I.S. ex rel. Summers*, 325 F. Supp.2d 565, 576-77 (D. Md. 2004).

The Hearing Officer concludes that the OT goals on the student's IEP enabled the student to be involved in and make progress in the general education curriculum and were appropriately designed and implemented so as to convey the student with meaningful benefit. In fact, the student's occupational therapist recommended that the student be exited from OT however, because of the objection of the parent, _____ did not exit the student from OT. While the OT expert suggested ways to make the student's OT goals ideal, the goals did not need to be the "absolute best" that they could have been.

The Petitioner failed to meet its burden with respect to Issue #2.

Issue#3

The Petitioner alleged that _____ denied the student a FAPE by failing to develop an appropriate IEP for the student on _____ specifically by failing to include behavioral support services and/or counseling as a related service on the student's IEP.

Pursuant to 34 CFR §300.324(a)(2)(i), in the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other behavioral strategies, to address that behavior. The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (quoting *Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)).

Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, *citing Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041. On _____ the most recent psychological evaluation of the student was finalized on _____. The evaluator summarized that results of behavioral rating scales completed by the teachers and clinical and classroom observations indicated elevated levels of hyperactivity consistent with a clinical diagnosis of ADHD. However, the parent rating scales administered to the student's mother and grandmother did not indicate any clinically significant levels. Additionally, only one of the two teachers who completed the behavior rating scale demonstrated clinically significant scores for the student. There was no evidence presented which suggested that the behaviors noted by the student's kindergarten teacher in the _____ evaluation were exhibited by the student in September 2012.

The Principal, Special Education Coordinator, Teacher and Psychologist testified that the student did not exhibit any behaviors during the 2011-2012 school year which would have prompted the student's _____ IEP Team to include behavioral support services and/or counseling on the student's IEP. The Teacher testified that at times the student has attention issues but with redirection and minimal prompting the student is able to get back on task. In the course of conducting observations of other students, the psychologist observed the student within the classroom. During the observations, the student displayed no behaviors challenges or signs of attention and/or focus issues. During the 2012-2013 school year, the student received no behavior referrals. The Mother and Grandmother testified regarding

concerns with the student's grades and implementation of the student's IEP however neither expressed concerns regarding the student's behavior during the 2012-2013 school year.

On the student's IEP, the speech and language present level of performance indicates that the student is "cooperative and attempts to complete all assignments" and "he ask[s] appropriate questions if information is not understood." The motor skills/physical development present level of performance indicates that the student "is a pleasant student who is eager to learn."

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. Here, the Hearing Officer concludes that the Petitioner did not present sufficient evidence to prove that the student's IEP should have contained behavioral support services or counseling. While the student has an ADHD diagnosis, the record contains no evidence that the student was exhibiting any behaviors related to ADHD which impeded his learning or that of others. Likewise, the record contains no evidence that the student exhibited any other behavior which impeded his learning or that of others on

The Petitioner failed to meet its burden with respect to Issue #3.

Issue #4

Pursuant to the IDEA regulations at 34 CFR §§300.327 and 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child. In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that the placement decision 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. 34 CFR §300.116(a)(1). *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted), describes "educational placement" as the educational program of the student. *AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004), also describes educational placement as the environment in which educational services are provided.

The Petitioner alleged that failed to allow the parent an opportunity to participate in placement discussions regarding the student on and during June 2013.

On the student's IEP Team, including father, grandmother, special education teacher, special education coordinator, psychologist and social worker met for an annual review of the student's IEP. The parent's attorney attended the meeting by phone. The IEP Team determined that the student would receive five hours per week of specialized instruction within the general education environment in reading, three hours per week of specialized instruction within the general education environment in mathematics, two hours per week of specialized instruction within the general education environment in written expression, four hours per month of speech-language pathology outside of the general education

environment and 240 minutes per month of OT outside of the general education environment. Neither the Grandmother's testimony nor the exhibits indicated that the parents or the parents' attorney did not participate in the placement discussion which occurred during the IEP Team meeting.

At the meeting, an MDT met to discuss the student's report card and the student's academic performance. Present at the meeting were the special education coordinator, the special education teacher, the general education teacher, the father, the grandmother, the principal and the student. The mother participated via telephone. The student's special education teacher reviewed the results of the student's QRI assessment. The mother inquired about the content of the student's "tutoring sessions." After clarifying that the mother was requesting information regarding the content of instruction during times the special education teacher "pulled-out" the student, the special education teacher provided the requested information to the team. The mother also presented her concern that the student may be confused by different instructional strategies. The team then engaged in a discussion regarding the student's grades, teaching strategies, implementation of the student's IEP, the student's progress since enrolling in the LEA. The team finally discussed the student's tardiness and eating habits. With the exception of the mother's inquiry into the content of the instruction during the student's "pull-out" sessions, there is no evidence which suggests that the MDT discussed anything regarding the student's placement. Likewise, the record does not contain evidence that a request was made to discuss the student's placement.

The Hearing Officer concludes that did not deny the student a FAPE by failing to allow the parent an opportunity to participate in placement discussions regarding the student on and during June 2013. First, the evidence supports Respondent's argument that the parent participated in the placement discussion on The father, grandmother and parent's attorney participated in the meeting. Neither the Grandmother's testimony nor the exhibits indicated that the parents or the parents' attorney did not participate in the placement discussion which occurred during the IEP Team meeting. Next, the Petitioner did not present evidence which suggested that a "placement discussion" occurred on The record indicates that the meeting was held to discuss the student's report card and academic performance. While the mother inquired regarding the content of the services provided in the student's "pull-out" sessions, the MDT did not discuss changing the environment of the student's specialized instruction during the meeting. Finally, there was no evidence presented which indicated that any meeting or placement discussion was held during June 2013 regarding the student.⁴

It is truly unfortunate in this matter that the grandmother desired to discuss the environment in which the student received specialized instruction, specifically desired for the

⁴ While the Petitioner did not meet its burden for Issue #4, during the hearing the Special Education Coordinator testified that is an "inclusion" school and the parents have chosen for the student to attend the LEA. The Hearing Officer reminds that the IDEA mandates that a student's educational programming and placement are to be based on the student's needs not the educational philosophy or the administrative convenience of an LEA. Should this student need specialized instruction outside of the general education environment, must provide specialized instruction outside of the general education environment to the student, even if the parents have chosen for the student to attend the LEA.

student to receive some level of specialized instruction outside of the general education environment, however was not aware of how to ask for a placement discussion. Although the father, the mother, the grandmother and/or the attorney attended the [redacted] and [redacted] meetings, a request to change the environment in which the student received specialized instruction was not made. Since it is now clear that the parents are requesting that the student's IEP Team discuss the environment in which the student will receive specialized instruction, the Hearing Officer strongly suggests that [redacted] schedule an IEP Team meeting in order for all IEP Team meeting to participate in discussion regarding the student's educational placement.

The Petitioner failed to meet its burden with respect to Issue #4.

Issue #5

The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. A material failure to implement a student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

In the present matter, the Petitioner alleged that [redacted] failed to implement the student's [redacted] IEP during the 2012-2013 school year, specifically by failing to implement the student's specialized instruction pursuant to his [redacted] IEP during the first three quarters of the 2012-2013 school year, the student's OT pursuant to his [redacted] IEP for the first two quarters of the 2012-2013 school year, and the student's speech-language therapy pursuant to his [redacted] IEP during the first two quarters of the 2012-2013 school year.

In failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. *E.g., S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), the Fifth Circuit held that "to prevail on a claim under the IDEA, 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 ... authorities failed to implement substantial or significant provisions of the IEP." *Id.* at 349; *see also Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."). "[C]ourts applying [this] standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.*, 200 F.3d at 349, n. 2. Failure to provide the services must deprive the student of educational benefit. *See Savoy v. District of Columbia*, 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012).

The student's IEP prescribes five hours per week of specialized instruction within the general education environment in reading, three hours per week of specialized instruction within the general education environment in mathematics, two hours per week of specialized instruction within the general education environment in written expression, four hours per month of speech-language pathology outside of the general education environment and 240 minutes per month of OT outside of the general education environment.

The Teacher testified that he provided 90 minutes of specialized instruction to the student, three days per week for reading and written language and 90 minutes of specialized instruction to the student, two days per week for math. Therefore, in total, the student received four and one half hours per week of specialized instruction combined for reading and written language and three hours per week of specialized instruction for math. The student was not provided two and one half hours per week of specialized instruction combined for reading and written language pursuant to his IEP during the 2012-2013 school year.

The Service Log Report included in the record indicates that the student received one hour per week or four hours per month (240 minutes per month) of speech-language pathology during the entirety of the 2012-2013 school year while school was in session. The Service Log Report indicates that the student received four hours per month of OT services, while school was in session, during the months of September 2012, December 2012, January 2013, April 2013, May 2013 and June 2013. During the month of October 2012, the student received two hours of OT services. During the month of November 2012, the student received five hours of OT services. During the month of February 2013, the student received three hours of OT services. During the month of March 2013, the student received six hours of OT services.

The Hearing Officer concludes that failure to provide two and one half hours per week of specialized instruction combined for reading and written language from through the end of the 2012-2013 school year constitutes a material failure to implement the student's IEP. The Hearing Officer further concludes that failure to provide the student with two hours of OT services in October 2012 and one hour of OT services in February 2013 was not a material failure to implement the student's IEP. Although the student missed three hours of OT in specific months, the student received three hours of additional OT during the school year. Two of the three additional hours were provided in the months immediately following the month the service was missed.

The Respondent argued that any failure to implement the student's IEP was not a denial of a FAPE because the failure was *di minimis* and the student made progress during the school year and therefore suffered no harm. The Hearing Officer is not persuaded by this argument. First, failing to provide approximately 92.5 hours of specialized instruction from through the end of the school year was more than a *di minimis* failure. Next, if there is a material failure to implement the student's IEP, as the Hearing Officer has concluded in this matter, no harm must be shown. The material failure to implement the student's IEP, in and of itself, constituted a denial of a FAPE. *See Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

The Petitioner met its burden with respect to Issue #5.

Requested Relief

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* “. . .the inquiry must be fact-specific and . . . 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 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

In this case, _____ denied the student a FAPE by failing to implement five hours per week of specialized instruction within the general education environment in reading and two hours per week of specialized instruction within the general education environment in written expression pursuant to the student’s _____ IEP. Specifically, _____ failed to implement two and one half hours per week of specialized instruction combined for reading and written expression from _____ through the end of the 2012-2013 school year.

As relief, the Petitioner requested independent comprehensive psychological, OT, and speech-language evaluations; for _____ to convene an MDT meeting within 10 days of the completed independent evaluations to review the evaluations, revise the student’s IEP as appropriate and discuss placement; and for _____ to provide appropriate related services to the student. Although the Petitioner requested independent evaluations and a revision of the student’s IEP as relief, the Hearing Officer concludes that providing independent evaluations and a revision of the student’s IEP is appropriate relief for the failure to implement the student’s IEP.

When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. *See also Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education.

Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

In this matter, it is appropriate to award compensatory education to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. One-on-one tutoring is a more intensive form of instruction and allows a student to progress at a faster rate than receiving instruction in a group setting within the general education environment. Therefore, the Hearing Officer concludes that it is appropriate to provide the student with one and one half hours of one-on-one tutoring for each of the 37 weeks⁵ that _____ failed to provide two and one half hours of

⁵ From _____ through the end of the 2012-2013 school year there were 39 weeks of school, not including Winter Break and Spring Break. There were an additional 14 days of which there was no school for students or a half day for students for professional development, national holidays and parent-teacher conferences.

specialized instruction within the general education environment for the student pursuant to his IEP.

ORDER

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

1. Mary McLeod Bethune shall provide the student with a total of 55.5 hours of independent one-on-one tutoring in reading and written expression, at a rate not to exceed the Office of the State Superintendent's (OSSE's) established rate for this service, to be completed by 4.
2. All other relief sought by Petitioner herein is **denied**.

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 USC §1415(i).

Date:


Hearing Officer