

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

OSSE
Student Hearing Office
November 01, 2013

[Parent], on behalf of
[Student],¹

Date Issued: November 1, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

[Local Education Agency],

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The initial complaint in this matter was filed by the Petitioner on August 15, 2013, and was Case No. 2013-0458. The Petitioner and Respondent are both represented by counsel. A response to the complaint was filed by the Respondent on August 23, 2013. A prehearing conference was held and a prehearing order issued on September 3, 2013. A resolution meeting was held on September 9, 2013, and resulted in no resolution.

On September 13, 2013, the Respondent moved to amend the September 3, 2013, prehearing order. The Petitioner replied to the motion on September 18, 2013, and the motion was denied in a written order on that date. In the meantime, on September 17, 2013, the Petitioner filed another complaint, Case No. 2013-0526. A response to the new complaint was filed on September 26, 2013.

¹ All proper names have been removed in accordance with Student Hearing Office policy and are referenced in Appendix C which is to be removed prior to public dissemination.

On September 20, 2013 the Petitioner moved to consolidate the two complaints. A prehearing conference was held on September 30, 2013, and the motion, among other things, was discussed. A prehearing order was issued on October 1, 2013, which included, among other things, a grant of the motion to consolidate and treating the new complaint as an amended complaint, restarting the resolution and hearing timelines as of the date the new complaint was filed. Another resolution meeting was held on September 30, 2013, following the prehearing conference, and no agreements were reached.

Both parties filed their trial briefs and exchanged their disclosures on October 11, 2013. The Respondent moved to permit one of its witnesses,, R.W., to testify via telephone on October 11, 2013. The hearing was convened on Monday, October 21, 2013, in room 2003 at 810 First Street NE, Washington, D.C., and concluded the same day after a full day of hearing. As part of the preliminaries the Respondent's motion for telephone testimony was granted. Closing briefs were requested and were filed on October 28, 2013. The due date for this Hearing Officer's Determination (HOD) is December 1, 2013. This HOD is issued on November 1, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

- 1) Whether the Respondent failed to appropriately evaluate the Student and ensure he was assessed in all areas related to his suspected disability when it refused to conduct

a functional behavioral assessment (FBA) following the Parent's request on April 8, 2013?

- 2) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to propose or provide an individualized education program (IEP) reasonably calculated to enable him to be involved in and make progress in the general education curriculum, and meet each of his other educational needs that result from his disability, when the IEP lacks: a) a specific behavior intervention plan (BIP); b) full-time specialized academic instruction in a special classroom; and c) counseling for one hour per week?

The Petitioner is seeking an independently provided FBA or a deadline for completion of the Respondent's FBA, compensatory education consisting of six hours of counseling services to address increased behavior problems, and prospective placement at a Non-public Special Education School.

The Respondent did not fail to appropriately evaluate the Student and ensure he was assessed in all areas related to his disability. The Respondent failed to provide proper prior written notice concerning the reevaluation of the Student because the notice did not address the dispute over the FBA. However, the FBA was eventually initiated, and the Student was no longer exhibiting behaviors interfering with his learning or the learning of others. Thus, any procedural deficiencies were harmless.

The Respondent did not deny the Student a FAPE because it did not fail to propose or provide him with an IEP reasonably calculated to enable him to be involved in and make progress in the general education curriculum, and meet each of his other educational needs based on his disability. The IEP proposed September 9, 2013, lacks documentation of all of the current supplementary aides and services being provided to the Student, but this error is merely procedural and can be corrected. The Student is currently receiving educational benefits based on the IEP and additional services and supports provided. Thus, he has not been denied a FAPE.

IV. EVIDENCE

Eight witnesses testified at the hearing, four for the Petitioner and four for the Respondent. The Petitioner's witnesses were: the Petitioner herself (P); an administrator from a non-public special education day school (J.C.); the Student (S); and the Petitioner's Educational Advocate (K.C.). The Respondent's witnesses were: the Student's Special Education Teacher (A.A.); the Student's Regular Education Teacher (A.F.); the Student's School Social Worker (R.W.), and the School Psychologist (D.R.) who provided an expert opinion on why the Student did not require a smaller classroom environment.

All 25 of the Petitioner's disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. All nine of the Respondent's disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. Any credibility issues are specifically noted in the findings of fact. Both P and S displayed limited recall during their respective testimony, limiting the credibility of each. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. 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. Student is a fifth grader with a disability enrolled at the Attending School.² He was determined eligible for special education and related services in third grade during the 2010-2011 school year.³
2. The Student is classified, under the IDEA, as Other Health Impaired.⁴ His full-scale IQ is in the sub-average range of intellectual functioning, but his adaptive skills are in the above average range.⁵ He exhibits hyperactivity symptoms and inattentiveness which may be impeding his academic progress and appears to meet diagnostic criteria for Attention Deficit Hyperactivity Disorder Combined Type (ADHD).⁶ He struggles in math, reading, and writing, and was performing at the second grade level in math and reading, and the first grade level in writing, at the start of the 2013-2014 school year.⁷ While the Student previously exhibited hyperactivity, impulsivity, and inattentiveness that negatively impacted his ability to be engaged in the classroom, behavior has not been an issue for him since at least near the end of the 2012-2013 school year and he has been responding well to redirection when inattentive.⁸
3. On September 23, 2012, the Student's IEP was revised for the fourth grade.⁹ The Student had scored below basic in both reading and math on the April 2012 DC CAS.¹⁰ The IEP included three math goals, two of which were the same as the prior year's IEP.¹¹ The three reading goals were all new.¹² The IEP included two writing goals, writing having not been addressed

² Testimony (T) of K.C.

³ P 10.

⁴ P 10.

⁵ P 4.

⁶ P 4.

⁷ P 4, P 10.

⁸ P 4, T of A.A., T of A.F., T of R.W., T of D.R.

⁹ P 7.

¹⁰ P 7.

¹¹ P 6, P 7.

¹² P 6, P 7.

the previous year.¹³ The IEP maintained three functional goals concerning behavior that had not been achieved the prior year.¹⁴ The IEP required specialized instruction in the general education setting for 10 hours per week, behavioral support services in the general education setting for two hours per month, and an hour of behavioral support services every day, outside of the general education setting.¹⁵ The amount and setting for the specialized instruction was identical to that required the previous year, but behavioral support services were greatly increased from just four hours per month outside of the general education setting.¹⁶ The IEP also required a location with minimal distractions and preferential seating, among other things, identical to the previous IEP revision.¹⁷

4. There was an IEP team meeting in March 2013, and another in April 2013, where the IEP was revised to include an additional five hours per week of specialized instruction, and the one hour per day of behavioral support services were removed.¹⁸ The functional goals were revised to just two, one concerning the reduction of defiance and aggression, and the other concerning improving on-task behavior.¹⁹
5. At the April meeting the Petitioner, through K.C., advised the Respondent that she was concerned about the Student's poor academic progress since 2010.²⁰ The Petitioner was also concerned about the Student's behavior, even though staff had indicated his previously aggressive behavior had recently abated, because the Student had been in a fight in the fall of

¹³ P 6, P 7.

¹⁴ P 6, P 7.

¹⁵ P 7.

¹⁶ P 6, P 7.

¹⁷ P 6, P 7.

¹⁸ P 9.

¹⁹ P 9. (A.A. testified that there was a compromise on behavioral services because the Petitioner still wanted them, and the Respondent thought they should be reduced.)

²⁰ T of K.C., P 11.

2012.²¹ As a result of her concerns about behavior, the Petitioner, through K.C., requested a FBA, which was refused because the Student was no longer exhibiting behaviors resulting in significant problems in the classroom or with his educational performance.²² She had also requested a comprehensive psychological evaluation.²³

6. The Respondent did not provide written notice about its proposal to conduct the comprehensive psychological evaluation until June 6, 2013.²⁴ The notice did not address the refusal to conduct the FBA.²⁵
7. The Petitioner pulled the Student out of school near the end of the 2012-2013 school year for four days.²⁶
8. The evaluation, sans FBA, was conducted over the summer of 2013, and a report written on August 13, 2013.²⁷ The IEP team met on September 9, 2013, and reviewed the evaluation report, the IEP, and revised the IEP.²⁸
9. The Student had made no progress academically over the course of the last year and all of the academic goals in the IEP remained the same.²⁹ The functional goals from April 2013 remained, and all of the supports and services were the same as those determined in April 2013.³⁰
10. In addition to the services in the IEP, the Student looped with his general education teacher from last year, A.F.³¹ He is also seeing a Reading Specialist, individually, for one hour per

²¹ T of K.C., P 11.

²² T of K.C., T of A.F., P 11.

²³ T of K.C., P 11.

²⁴ R 9/P 23.

²⁵ R 9/P 23.

²⁶ T of A.A., R 5.

²⁷ P 4.

²⁸ P 10, T of K.C.

²⁹ P 7, P 10, T of K.C.

³⁰ P 9, P 10.

³¹ T of A.F.

day this year, in addition to the 15 hours per week he receives specialized instruction from A.A. in the classroom.³² Also, in addition to the general education teacher, A.F., and the special education teacher, A.A., the Student's classroom includes another support person in the classroom of 26 students.³³ The Student responds well to redirection, group work, teacher support, and adult approval including affirming statements and rewards.³⁴

11. The Respondent agreed to conduct a FBA and it was in the process of being completed at the time of the hearing.³⁵
12. The Petitioner determined to send the Student to a non-public special education day school, which accepted the Student on October 2, 2013, but would provide services based on the "incoming IEP," which is the IEP the Petitioner has challenged here.³⁶ The Petitioner had not enrolled or sent the Student to attend the non-public school at the time of hearing.³⁷

VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the 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." D.C. Mun. Regs. 5-E3030.14. The recognized standard is a preponderance of the

³² T of A.A., T of D.R., R 2.

³³ T of A.F., T of D.R., R 2.

³⁴ T of D.R., R 2.

³⁵ T of R.W.

³⁶ R 18, P 10, T of P, T of J.C.

³⁷ T of P, T of A.F., T of J.C.

evidence. *See, e.g., 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); 34 C.F.R. § 300.516(c)(3).

2. A public agency must ensure that a reevaluation of a child with a disability is conducted in accordance with the requirements of the IDEA when a parent requests a reevaluation. 34 C.F.R. § 300.303(a). The agency must ensure, among other things, that the reevaluation is sufficiently comprehensive to identify all of the student's special education and related service needs, whether or not commonly linked to the disability category in which the student has been classified. 34 C.F.R. § 300.304(c)(6). Whether the Respondent proposes or refuses, based on the parent's request for a reevaluation, to conduct the reevaluation, it must provide prior written notice, including:

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (7) A description of other factors that are relevant to the agency's proposal or refusal.

34 C.F.R. § 300.503(b), *see also*, D.C. Mun. Regs. 5-E3025.1.

3. In this case the Respondent failed to provide proper prior written notice of its proposal and refusal with regard to the FBA requested by the Petitioner. It ultimately did proceed with conducting the FBA as part of the reevaluation, however. Further, its reason for not including the FBA, originally, was that the Student was no longer exhibiting behaviors resulting in significant problems in the classroom or with educational performance. Thus, there was no violation that resulted in any harm to the Student.

4. The analysis to apply when looking at an IEP is to first determine whether the agency “complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982)

(footnotes omitted). A FAPE for a child with a disability under the IDEA is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1). Thus, a procedural violation will only be found to have resulted in a denial of FAPE 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)(2). Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA’s purpose and the provision of educational benefits. *See*: 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. “[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State’s content standards.” 71 Fed. Reg. 46662 (2006). In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide these education benefits. Suggs v. District of

Columbia, 679 F. Supp. 2d 43, 51 (D.D.C.2010). “An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see Reid v. District of Columbia*, 401 F.3d [516,] 519-20 [(D.C.Cir. 2005)]; the nature and effects of the child's disability have not been adequately monitored, *see Harris v. District of Columbia*, 561 F. Supp. 2d [63,] 68 [(D.D.C. 2008)]; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” Suggs, 679 F. Supp. 2d at 51-52. This line of reasoning is supported by the statute and regulations themselves. The IEP is a living document that, once initially created and consented to, is reviewed “periodically, but not less than annually, to determine whether the annual goals for the child are being achieved[.]” 34 C.F.R. § 300.324(b).³⁸ The IEP must then be revised to address:

- (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
- (B) The results of any reevaluation conducted under § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
- (D) The child’s anticipated needs; or
- (E) Other matters.

34 C.F.R. § 300.324(b)(2)(ii). The IEP team must, for a “child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]” 34 C.F.R. § 300.324(a)(2)(i).

District of Columbia Municipal Regulations provide, regarding IEP development, that:

- In developing an IEP for a child with a disability, the IEP team shall consider and document:
- (a) Strengths of the child;
 - (b) Concerns of the parent for enhancing the education of the child;

³⁸ The law does not provide for periodic review to determine whether the “LRE” is appropriate. This would not make sense because the goals are the drivers of the services and, ultimately, the educational placement. As noted above, placement is based on the IEP, so the placement would be determined following the rest of the elements of the IEP.

- (c) Results of the initial or most recent evaluation; and
- (d) As appropriate, the results of the child's performance on any District-wide assessment programs.

and

If a child's behavior impedes the child's learning or the learning of others, the IEP team shall consider strategies, including positive behavioral intervention, strategies, and supports, to address that behavior. An individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

D.C. Mun. Regs. 5-E3007.2 and 5-E3007.3.

5. The Petitioner argues the Student's IEP, most recently revised in September 2013, requires a BIP and more counseling services. However, the Student is not currently experiencing behavior that is impeding his learning or the learning of others. Thus, it was reasonable to not include a BIP in the IEP and there was no need for increase counseling services.
6. The Petitioner argues that the IEP should include "full-time" specialized academic instruction in a special classroom. Given the paltry progress the Student had previously made, this is not an unreasonable expectation of the Petitioner. However, reasonable changes to both the IEP and the regular classroom were made for the 2013-2014 school year which will likely address that poor progress. The IEP lacks the specifics of some of the changes which are important to the Student, and this must be corrected by the Respondent. However, this is merely a procedural violation that is easily resolved, and the specifics are described in the order below.³⁹

VII. DECISION

The Respondent did not fail to appropriately evaluate the Student and ensure he was assessed in all areas related to his disability.

³⁹ The order includes recommended revisions to the IEP. These revisions are recommended here because there is no denial of FAPE justifying an Order from this IHO. However, if the changes are not made, the Respondent may face compliance problems from the SEA.

The Respondent did not deny the Student a FAPE because it did not fail to propose or provide him with an IEP that reasonably calculated to enable him to be involved in and make progress in the general education curriculum, and meet each of his other educational needs based on his disability.

VIII. ORDER

The complaint is dismissed with prejudice. The Respondent is advised to revise the Student's IEP to document the following services that are being provided and were not properly documented in the program plan pursuant to 34 C.F.R. §§ 300.320(a)(4) & (a)(7):

1. Reading Specialist, outside of the general education setting, for one hour per day;
2. A paraprofessional or teacher's aide available in the classroom; and
3. Redirection and affirming statements of approval and rewards for positive academic and functional performance.

IT IS SO ORDERED.

Date: November 1, 2013



Independent Hearing Officer

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).