DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],[1]

Petitioner,

v

Respondent.

Date Issued: July 25, 2012

Hearing Officer: Jim Mortenson

Case No: 2012-0360

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on May 14, 2012. A response to the complaint was filed on May 24, 2012. The Respondent did not have counsel available at the time the complaint was filed or when it filed its response. Counsel for the Respondent filed a notice of appearance on May 31, 2012. A resolution meeting was convened on June 12, 2012. The parties agreed that no agreement could be reached and that the matter should proceed to hearing. The 45 day hearing timeline began June 13, 2012.

A prehearing conference was convened by the undersigned on June 13, 2012. Counsel for the Respondent moved to filed an amended response. The motion was granted as the amended

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[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

response was simply a clarification of the original response filed and not substantively different. The prehearing order was issued on June 13, 2012. The parties exchanged disclosures and filed trial briefs on July 11, 2012.

The hearing was convened at 8:45 a.m. on July 18, 2012, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. A recording problem in room 2003 resulted in the hearing being moved to room 2004 about 12:30 p.m. The Petitioner was represented by Olekanma Ekekwe, Esq., and the Respondent was represented by Lauren Baum, Esq.

The hearing concluded at 2:00 p.m. following the close of the Petitioner's case and a motion for directed verdict by the Respondent. The motion was made and, after arguments and discussion with the parties, granted based on the lack of evidence in the record to persuade the undersigned that the Petitioner had requested any assessments or that there was a lack of data to program for the Student thereby requiring the assessments requested as relief, or that any procedural violations in the Student's individualized education program (IEP) resulted in a denial of a free appropriate public education (FAPE) to the Student.

The due date for this HOD is July 27, 2012. This HOD is issued on July 25, 2012.

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. 5E, Chap. 30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

(1) Whether the Respondent failed to conduct a reevaluation of the Student sufficiently comprehensive to identify all of his special education and related service needs when it failed to provide the following assessments requested in March 2012: a comprehensive psychological assessment with a clinical component because the prior comprehensive psychological assessment was not complete; a neuropsychological assessment because the Student suffered head trauma during the course of the school year; a speech and language assessment because the Student has articulation problems; and a social history so the evaluation team can have a complete view of the Student's life when evaluating him?

(2) Whether the Respondent denied the Student a FAPE when it failed to provide him an individualized education program (IEP) reasonably calculated to enable him to be involved in and progress in the general education curriculum because the IEP lacks measurable annual academic goals and appropriate related services including speech and language services and sufficient behavioral support services?

The substantive requested relief at the time of hearing was:

(1) An Independent educational assessment including: a comprehensive psychological assessment with a clinical component; a neuropsychological assessment; a speech and language assessment; and a social history.

(2) A subsequent IEP team meeting to review the assessments and revise the IEP to include measurable goals and the appropriate related services.

(3) Compensatory education consisting of 40 to 60 hours of tutoring to enable the Student to make up missing academic work, and 30 to 45 hours of social/emotional counseling to enable him to attend school without getting into fights and removed.

The Petitioner never requested a reevaluation of the Student. The Petitioner failed to show the Respondent lacked sufficient data to program for the Student. The Petitioner failed to show that any problems with the IEP resulted in a lack of involvement or progress in the general education curriculum, and therefore resulted in a denial of FAPE. The Respondent's motion, made at

hearing, for a directed finding, was granted on the record for the reasons documented herein, and the complaint is dismissed with prejudice.

IV. EVIDENCE

Five witnesses testified at the hearing, all for the Petitioner. The Petitioner's witnesses were:

1) The Student's Mother, Petitioner (P)
2) The Student's Grandmother, (G)
3) The Student's Uncle
4) Ruby Ledbetter, Advocate (R.L.)
5) Sharman Word Dennis, Education Specialist (S.D.)[2]

Seven exhibits were admitted into evidence of 11 disclosures from the Petitioner. The Petitioner's exhibits are:

Ex. No.	Date	Document
P 2	Undated	[Student's] Daily Schedule
P 3	October 24, 2011	Child Study Referral
P 5	Undated	Comprehensive Psychoeducational Evaluation (September 2011) (See R 1)[3]
P 6	Undated	Occupational Therapy Evaluation (February 2012) (See R 4)
P 8	April 12, 2012 IEP	Amended Individualized Education Program (IEP)
P 9[4]	February 3, 2012	Email from Frazell to Petitioner
	February 15, 2012	Email from Frazell to Petitioner & Taylor
	September 26, 2011	Email from Duskin to Petitioner
	May 16, 2012	Email from Crosson to Petitioner
	May 9, 2012	Email chain ending from Petitioner to Goede
	April 24, 2012	Email chain ending from Crosson to Petitioner
	March 20, 2012	Email (with attachment) from Duskin to Petitioner
	May 16, 2012	Email chain ending from Frazell to Petitioner

[2] This witness gave lay testimony about the Student's IEP and had not done a complete review of the Student's educational records or even met the Student or the Petitioner prior to the date of the hearing. Thus, her testimony carries little weight.
[3] Duplicate exhibits are cross referenced.
[4] It is unknown why the emails are in the order they were submitted but they are listed here in the order presented by the Petitioner.

	May 21, 2012	Email chain ending from Petitioner to Frazell
	January 30, 2012	Email chain ending from Goede to Petitioner
P 11[5]	Undated	C.V. for Sharman Word Dennis

Eight exhibits were admitted into evidence of the Respondent's 10 disclosures. The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	Undated	Comprehensive Psychoeducational Evaluation (September 2011) (See P 5)
R 2	November 16, 2011	Final Eligibility Determination Report
R 3	November 16, 2011	IEP
R 4	Undated	Occupational Therapy Evaluation (February 2012) (See P 6)
R 5	March 1, 2012	Eligibility Meeting (sign in)
R 6	April 12, 2012	Standard IEP Amendment (LEA Initiated)
	May 18, 2012	Amended IEP
R 7	May 23, 2012	IEP Meeting (sign in)
R 10	Undated	C.V. for Alfred Amado

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 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 an year old learner with a disability who is currently not enrolled in school.[6]

The Student was enrolled in the second grade in the Respondent School near the start of the

[5] P 11 included two curricula vitae. The only one admitted was for the witness who testified, Sharman Word Dennis. This witness was not identified as a proposed expert witness in the disclosures and so was not an expert witness.
[6] Testimony (T) of P, T of G. R 2.

2011-2012 school year, until the last week of school in June 2012.[7] His mother removed him for the last week of school, June 11 through June 14, because she was concerned about his safety following an incident with a staff member in mid-May 2012.[8]

2. When the Student began attending the Respondent School in the fall of 2011 he exhibited serious behavior problems which resulted in the Respondent School requiring the Petitioner to provide an adult to attend school with him.[9] An initial evaluation of the Student was initiated, including the provision of an assessment report provided to the School by the Petitioner, which resulted in a determination of eligibility under the definition of Other Health Impaired (OHI) on November 9, 2012.[10]

3. The Student has average academic skills, and his disability, Attention Deficit Hyper Activity Disorder/Combined Type, results in serious behavioral problems including being generally disruptive in the classroom because he has difficulty coping with external stressors.[11] The Student is not intentionally disruptive and feels shame when he gets in trouble as a result of his behavior.[12] His behaviors have resulted in removals from previous schools.[13] Left untended, the Student's behavioral challenges impact his ability to be involved in and progress in the general education curriculum because he gets distracted and sometimes engages in behavior disruptive to the classroom and is then removed.[14]

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[7] T of G, T of P.
[8] T of P, T of G. (The Petitioner testified she removed the Student from school for the last week of school because she was not comfortable sending him back following an incident where she claims staff used excessive force in dealing with the Student. This incident, according to the Grandmother, occurred in mid-May. Thus, it is not clear why the Petitioner was willing to send the Student to school for up to a month before she decided she was uncomfortable sending him any longer.)
[9] T of P, T of R.J., P 9.
[10] T of P, R 2.
[11] T of P, T of R.L., R 1/P 5, P 9.
[12] R 1/P 5.
[13] R 1/P 5.
[14] R 1/P 5, R 2.

4. An IEP was created and implemented for the Student in November 2011.[15] The IEP was amended on April 12, 2012.[16] The IEP includes goals in the areas of reading, mathematics, writing, and emotional, social, and behavioral development.[17] The four goals in the area of math are not academic goals, they are functional goals designed to assist the Student in completing work and participating in class.[18] Despite average reading skills, the IEP includes one academic reading goal concerning making connections between texts, which is measurable: "In 4 out of 5 situations, [Student] will make connections between text he currently reads and 3 other types of information: other texts he has read, his personal experience, and information he has learned in the past."[19] The other four goals concerning reading are functional goals concerning techniques and behaviors to help him access the reading curriculum and participate in class.[20] The IEP includes three goals in the area of writing which are also functional goals designed to address behavior.[21] The area of emotional, social, and behavioral development includes five functional goals designed to address behavior.[22] While some of the functional goals tend towards vagueness, they are all measurable.[23] The IEP requires specialized instruction for six hours per week, outside of the general education setting, and 30 minutes per week of behavioral support services, outside of the general education setting.[24] It does not require the use of a dedicated aide, and the School

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[15] R 3.
[16] P 8.
[17] P 8.
[18] P 8.
[19] P 8. (The Student has low average comprehension skills. R 1 & R 2.)
[20] P 8.
[21] P 8.
[22] P 8.
[23] P 8.
[24] P 8.

Principal continued to ask the Petitioner to attend school with the Student following implementation of the IEP, which Petitioner refused to do any longer.[25]

5. Following the initial evaluation of the Student, the Petitioner never requested additional assessments until the resolution meeting following the filing of the complaint in this matter.[26]
6. The Student was able to participate in class, without an additional adult or aide, after the IEP was put in place, and had infrequent behavioral problems following the implementation of the IEP.[27] The Petitioner presented no evidence of the Student's academic achievement over the course of the school year, other than her testimony that she received good reports from the Student's teachers.[28]
7. The Petitioner believes the Student requires more counseling services, more specific goals, a behavior intervention plan, and a neuropsychological assessment to learn why the Student behaves the way he does.[29] Prior to the complaint, the Petitioner never requested to revise the IEP because she did not think the IEP was helping the Student because he still had occasional behavior problems at school.[30]
8. The Petitioner testified the Student suffered head trauma, specifically a concussion, as a result of being pushed into a wall by a staff member in mid-May 2012.[31] The Petitioner presented no police report or medical report supporting this assertion (which would reasonably be expected as evidence of such serious assertions) and so it is not given any

[25] P 8, T of P. (For much of the time prior to the IEP, R.J. attended school with the Student. T of P, T of R.J.)
[26] T of P.
[27] T of P, T of R.L., P 9.
[28] T of P.
[29] T of P.
[30] P 9, T of P. (It is interesting to note that the Petitioner made a similar report to the evaluator as recorded in R 1/P 5 wherein she is reported as saying the Student had been prescribed medication for his ADHD and the Petitioner gave the Student "the medication for one week, and then stopped because her son was doing well and she did not notice any improvement." According to the report, the Student had been having considerable behavioral issues at school, resulting in removals from school which eventually resulted in the medication for the Student. Obviously, if he was doing well, there was an improvement.)
[31] T of P, T of G. (The Student made the report about being pushed into a wall and hitting his head. Interestingly, he made the same report a year earlier at his previous school. R 1/P 5.)

weight. Furthermore, the Petitioner's testimony contradicts her claim in the complaint, and clarified at the prehearing, that she had requested a neuropsychological assessment in March 2012 as a result of head trauma suffered by the Student, further causing suspicion of the veracity of the claims and specific testimony.[32]

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 preponderance of the 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. The Respondent is required to ensure that in "evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. § 300.304(c)(6).
3. A reevaluation of a child with a disability must be conducted at least once every three years or when a parent or teacher requests. *See,* 34 C.F.R. § 300.303(a)(2), D.C. Mun. Regs. tit. 5, § 3005.7.

[32] *See* Due Process Complaint Notice, and the Prehearing Order of June 13, 2012.

4. A free appropriate public education (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.

5. A "determination of whether a child received FAPE must be based on substantive grounds." 34 C.F.R. § 300.513(a)(1). 34 C.F.R. § 300.513(a)(2) provides that:

> (2) 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.

6. Federal regulations at 34 C.F.R. § 300.320 lists the required contents of an IEP which includes, inter alia:

> (a)(2)(i) A statement of measurable annual goals, including academic and functional goals designed to —
> (A) 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
> (B) Meet each of the child's other educational needs that result from the child's disability;
> (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
> . . .
> (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child —
> (i) To advance appropriately toward attaining the annual goals;
> (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
> (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

7. The Petitioner, the Student's parent, never requested a reevaluation of the Student, and admitted so in her testimony, despite her claim that a request was made in March, 2012. (Her attorney advised that a request for reevaluation was made in March, 2012, during the

prehearing conference when the issues were clarified by the undersigned. This was documented in the prehearing order and the parties were advised to advise the undersigned of any errors. No errors were reported.) Furthermore, the Petitioner stated she now wants a neuropsychological assessment of the Student completed in order to learn why the Student behaves the way he does. In fact, we already know why the Student behaves the way he does. He has Attention Deficit Hyperactivity Disorder, which involves dysfunction of a person's executive functioning skills, leading to impulsive actions. His disability results in inappropriate coping with external stimuli, which is manifested in his behavior. The Student's need for a constant one to one aide to address his behavior, demanded by the Respondent for the first few months of the school year, (likely illegally because the Student was effectively threatened with expulsion if no adult provided by the Petitioner attended with him), was no longer necessary once the IEP was put into place. Thus, it is clear sufficient data for programming for the Student was in the IEP team's possession. Furthermore, the Petitioner made no showing that the Student, while he had some behavioral problems following the creation of the IEP (not unexpected because the IEP is not a tool to cure a disability) failed to progress in and be involved in the general curriculum. In fact, the Petitioner testified that the Student's teachers reported to her that the Student was doing well. No records or testimony from teachers was presented to show the Student was not involved in or progressing in the general education curriculum, or otherwise deprived of educational benefit. Thus, it was appropriate to grant the Respondent's motion for directed finding.

VII. DECISION

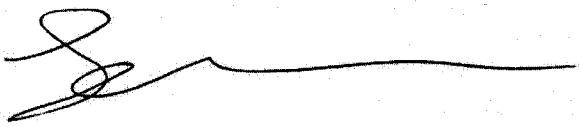
Because the burden of persuasion is on the Petitioner, and because the evidence and arguments made by the Petitioner did not minimally demonstrate that the Respondent was

required to conduct a reevaluation of the Student or that the IEP was so flawed that it resulted in a denial of FAPE, the Respondent's motion for directed finding is granted and the complaint is dismissed with prejudice.

VIII. ORDER

The complaint is dismissed with prejudice.

IT IS SO ORDERED.



Date: July 25, 2012

Jim Mortenson, 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).