

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

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

OSSE
STUDENT HEARING OFFICE
2010 OCT -1 AM 10:20

Through

Petitioner,

v

Respondent.

Date Issued: September 30, 2010

Hearing Officer: Kimm Massey, Esq.

Case No:

Hearing Date: September 13, 2010

Room: 5b

HEARING OFFICER DETERMINATION

BACKGROUND

Student is an _____ year-old female, who was retained in the _____ grade at the end of the 2009/10 school year. Student's recently revised IEP is dated August 26, 2010. That IEP lists specific Learning disability ("SLD") as Student's primary disability and requires Student to receive 25 hours per week of specialized instruction, 60 minutes per week of behavioral support services, 30 minutes per week of occupational therapy, and 1 hour per week of speech-language pathology services, with all specialized instruction and related services to be delivered in an outside of general education setting.

On July 27, 2010, Petitioner filed a Complaint against Respondent LEA, alleging that the LEA denied Student a FAPE by (1) failing to provide an appropriate placement, (2) failing to devise and implement an appropriate IEP by including a BIP, more one-on-one instruction, and an attendance plan, (3) failing to evaluate because the ophthalmological evaluation recommended in Student's 2008 OT evaluation, and (4) failing to provide compensatory education as a related service by continuing previous counseling Student received from Huntington.

On August 5, 2010, the LEA filed an Answer to the Complaint, in which it either admitted or denied each specific allegation of the Complaint. In its Answer, the LEA acknowledged that

Student was retained at the end of SY 2009/10, but denied that Student had not made progress and asserted that any lack of progress by Student was a result of her history of absenteeism and tardiness. The LEA further asserted that Student's IEP contained an attendance plan that had not proven successful and a BIP that had resulted in significantly improved behavior, that Parent must obtain the ophthalmological evaluation in question because it is a medical evaluation to determine if Student needs glasses, and that compensatory education is not warranted in this case. The LEA also maintained that the Complaint was filed prematurely because it was filed after the LEA had scheduled a meeting to discuss Parent's concerns.

On August 19, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer issued the Prehearing Order on August 24, 2010.

On August 23, 2010, Petitioner filed a Motion for Expedited Due Process Hearing, asserting that Student was being emotionally harmed at her existing placement where she was underachieving and expressing negative behaviors that interfered with her learning. On August 23, 2010, the LEA filed its Opposition to the Motion. On August 24, 2010, the hearing officer issued an Order Denying Petitioner's Motion for Expedited Due Process Hearing, ruling primarily that the alleged emotional harm to Student did not rise to the level that would justify an expedited hearing.

By their respective cover letters dated September 3, 2010, the LEA disclosed documents numbered 1 through 18 and 20 (LEA-1 through LEA-18 and LEA-10), and Petitioner disclosed 20 documents (Petitioner's Exhibits 1 through 20).

The hearing officer convened the due process hearing on September 13, 2010.¹ The LEA objected to a number of Petitioner's disclosed documents and pointed out that several of the documents were mislabeled and one exhibit actually contained two separate documents. Petitioner withdrew Petitioner's Exhibit 19 as irrelevant and agreed to relabel and renumber other exhibits as appropriate. Ultimately, the hearing officer admitted all of Petitioner's exhibits into the record, except number 19, which was withdrawn, and number 15, which was conditionally excluded unless and until Petitioner authenticated it during testimony. Petitioner initially objected to any and all of the LEA's disclosures that the LEA failed to provide to Petitioner by the five-day disclosure deadline; however, Petitioner later withdrew its objections and the LEA's documents were admitted into the record.

After Petitioner presented its testimonial evidence, the LEA made a motion for a directed finding in all areas. The hearing officer allowed the parties an opportunity to argue for and against a directed finding on each claim. Thereafter, the hearing officer granted the motion on the issue of compensatory education due to Petitioner's failure to meet its burden of proving what compensatory education would be appropriate. The hearing officer also granted the motion in part on the issue of the appropriateness of the IEP, but ruling that the LEA would be specifically ordered to 1) complete the speech and language section of the IEP by completing the portions concerning the present levels of performance, the needs and the impact of the disability, and 2) to review the speech and language goals with Parent and Parent's representatives, and the parties

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

would be encouraged to review the entire IEP at the meeting concerning the speech and language portion of the IEP. The hearing officer denied the motion on the issues of the appropriateness of Student's placement and the ophthalmological evaluation, ruling that the latter issue was a legal issue that the hearing officer would decide based on argument and citations provided by the party.

In light of the hearing officer's ruling on the LEA's motion for a directed finding, the LEA opted to present testimony from one witness going to the issue of the appropriateness of the placement. Thereafter, the hearing officer received closing statements and concluded the hearing. The hearing officer agreed to allow the parties two business days to file briefs on the issue of the ophthalmological evaluation. The hearing officer also advised the parties that as the 10-day HOD rule from the *Blackman-Jones* settlement was no longer applicable, the HOD would be issued more than 10 days after the hearing but within the 75-day timeline.²

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUES

The issues to be determined are as follows:

1. Did the LEA deny Student a FAPE by failing to provide an appropriate placement?
2. Is the LEA required to conduct the recommended ophthalmological evaluation?

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 has attended the LEA since kindergarten. Student received an IEP when she was in grade. However, for the past two school years, since she was in the grade, Student has performed poorly in school. The teachers complained that Student was never focused and would turn around and talk to her classmates during class, so in September of 2008 Student was placed in a seat at the front of the class. Student received this preferential during the 2008/9 and 2009/10 school years. Still, at the end of her grade year in SY 2009/10, Student was retained in grade. As a result, Student is repeating grade in the current school year, SY 2009/10.³

² Upon the SHO's receipt of an inquiry from the LEA's counsel about the issuance of an HOD, the SHO advised the hearing officer that the 10-day rule was being abolished only for cases filed on or after October 1, 2010. Thereafter, the hearing officer promptly issued the instant HOD.

³ Testimony of Parent.

2. In May and June of 2008, an occupational therapy evaluation was administered to Student. In the resulting evaluation report, the OT evaluator included the following recommendation: [Student's] parents to schedule an appointment with an Ophthalmologist to get a vision testing to rule out any visual problems.⁴ As of the date of the administrative due process hearing for this case, Student had not received the recommended ophthalmological evaluation.
3. Student's history suggests problems with frustration, self-esteem and confidence as a result of not being able to perform academically. Although she has exhibited some showing out, there has been nothing to suggest emotional disturbance. The way to handle a situation such as Student's is to start out with a certain number of hours of assistance to address the social/emotional issues surrounding the disability. If the expected progress is not made, then more services should be provided. If there is still no progress after increasing services a few times, then the level of services must be intensified by pulling the child out from setting with his or her peers, even though normally a great part of learning is through interaction with peers.⁵
4. The clinical psychologist who conducted Student's evaluations in 2008 has attended all of Student's IEP meetings since the evaluations. At the time of the 2008 evaluations, the psychologist did not feel that Student needed a full-time out of general education placement, which is more of a gradual step anyway. Moreover, the psychologist never felt that the current LEA was inappropriate in light of his recommendations in the 2008 evaluation. At this point, however, because Student has not consistently responded positively to the support she has received, the psychologist is of the opinion that she should be placed in a full-time out of general education setting, and then she can be reintegrated into a general education setting when appropriate. At this point, a regimented and organized classroom would be helpful in light of Student's history of inattentiveness, which shows a lack of internal control and means that Student needs external controls both at home and at school until she develops internal controls. Student's behaviors, such as sulking and withdrawing when she does not want to perform, are disruptive but not major. Therefore, the psychologist recommends supportive behavior management that teaches her techniques, strategies, and constructive ways to verbalize her issues and deal with them more constructively. A reward system with positive encouragement and rewards could prove helpful.⁶
5. Student's initial IEP in 2008 contained less than 12 hours of services. Her revised IEP from 2009 provided 12 hours of service. In May of 2009, the LEA informed Parent that it was concerned about Student's progress and the LEA also requested a change in placement review for Student from OSSE. However, Parent indicated that she did not want Student in a full-time special education program and was happy with the LEA, so the LEA canceled the request for an OSSE change of placement review. Thereafter, the LEA awarded Student to receive after-school tutoring through a federally funded

⁴ LEA-4; Petitioner's Exhibit 9.

⁵ Testimony of clinical psychologist.

⁶ Testimony of clinical psychologist.

program under the No Child Left Behind Act. The maximum amount of money Student could receive for tutoring during SY 2009/10 was

6. Although Student has made progress at the LEA, the rate of progress has been negatively impacted by Student's excessive absences and tardiness. During SY 2009/10, Student was tardy more than 100 times, which resulted in her missing some or all of her reading instruction class that started at 8:15 am. The LEA made a case referral for Student to D.C. Child and Family Services Agency during SY 2009/10 for educational neglect based on the violations of the LEA's attendance policy. The LEA did not have a tardiness policy during SY 2009/10 but has since enacted one. In any event, Parent had to go to court to answer the charges lodged with CFSA, but the case was ultimately thrown out.⁸
7. Near the end of SY 2009/10, Parent asked for an MDT meeting to review a letter she had received from the LEA indicating that Student could possibly be retained in grade for the SY 2010/11. The meeting was held in May 2010 with Parent, Student's grade teacher, and the LEA's principal, social worker and director of special education. The teacher advised Parent that Student would be retained if she received an F in either reading or math; however, if Student received a D in either of those classes, she could go to summer school to pass to the next grade. The social worker said that Student's problems with processing would prevent more speedy academic progress. Parent was given two options: either keep Student at the LEA and have her participate in the more intensive special education program that would be provided to all special education children during SY 2010/11, or consider a full-time special education placement for Student.

After the meeting ended, parent and the director of special education had a discussion in the hallway, and Parent indicated that she would think about the options over the summer and let the director of special education know. However, when the director of special education learned in July 2010 that Student had missed a week of summer school because she visited/sat in on classes at two private schools, she asked Parent whether Parent had decided on a full-time special education placement for Student and told Parent that Student would need a full-time IEP first. A couple of days later, on July 16, 2010, the director of special education scheduled an IEP meeting for August 4, 2010 and put OSSE on notice that a full-time placement was being considered for Student. Thereafter, upon receipt of Petitioner's July 27, 2010 Complaint in this action, the director of special education forwarded a copy of the Meeting Notice to Petitioner's counsel.

Parent subsequently cancelled the August 4th meeting and rescheduled it for August 6th, saying that Parent and Petitioner's counsel were no longer available on August 4th. Ultimately, the resolution meeting for this case was held on August 6th, but Petitioner's counsel refused to participate in drafting a full-time IEP for Student at the resolution meeting. The LEA informed Parent and Petitioner's counsel that Student needed a full-time IEP before a referral was made to OSSE for a change in placement; otherwise, OSSE would place Student in a program based on her existing program. Nevertheless, Petitioner's counsel insisted that another referral be made to OSSE and stated that the IEP could be drafted later. Therefore, another meeting was scheduled for

⁷ Testimony of Director of Special Education; LEA-5.

⁸ Testimony of Director of Special Education; testimony of Parent; LEA-17.

August 26, 2010. At that meeting, Student's disability was confirmed as SLD, and her IEP was revised to provide for 25 hours of specialized instruction, 60 minutes of speech language services, one hour per week of counseling, and 30 minutes of occupational therapy, for a total of 27.5 hours per week. The Meeting Notes for the August 26th meeting also indicate that an placement meeting with OSSE had been scheduled for September 7th, at which time the team would recommend a full-time IEP/placement for Student.⁹

8. On August 20, 2010, the LEA submitted a justification for removal statement for Student, together with supporting academic records, to OSSE.¹⁰
9. On September 7, 2010, a placement meeting with OSSE was held for Student. At that meeting, OSSE stated that if the team determines a more restrictive placement is required, OSSE will choose the location of the new placement and issue a location assignment within 10 business days. Thereafter, the team reviewed Student's needs, her performance and the program at the LEA. Ultimately, the team determined that Student requires a more restrictive placement despite OSSE's determination that a change in placement is not warranted.¹¹

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:

a. Appropriateness of Placement

Under IDEIA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. See 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. An LEA satisfies its obligation to provide a child with a disability with a free appropriate public education ("FAPE") by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction, and the personalized instruction provided should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982).

In this case, Petitioner contends that the LEA failed to provide Student with an appropriate placement because her IEP at the time the Complaint was filed provided for only 12 hours of services, she was retained in 5th grade at the end of SY 2009/10, and the LEA repeatedly put off referring Student to OSSE for a change in placement review, with the result that Student had to return to the LEA at the start of SY 2010/11 instead of going to a new location of services.

⁹ Testimony of Director of Special Education; LEA-11, LEA-13.

¹⁰ Petitioner's Exhibit 14.

¹¹ LEA-20.

On the other hand, the LEA contends that Student has made academic progress and received educational benefit at the LEA, but her below grade level performance and retention at the end of SY 2009/10 were due to excessive absences and tardiness. The LEA also contends that it attempted to refer Student to OSSE for a change in placement as far back as May of 2009 but withdrew the referral after Parent indicated she wanted Student to remain at the LEA. Moreover, the LEA asserts that upon learning that Parent had taken Student to visit private schools during Summer 2010, it made contact with Parent and promptly began scheduling meetings and initiating the process to obtain a change of placement review with OSSE for Student.

A review of the evidence of record supports the LEA's position in this case. Hence, the evidence confirms that the LEA referred Student to OSSE for a change of placement review in May of 2009 but subsequently withdrew that referral. The evidence also demonstrates that Student was tardy more than 100 times during SY 2009/10 and she was absent so many times that the LEA referred her case to CFSA on a charge of educational neglect, which supports the LEA's contention that it was Student's excessive tardiness and absences, not the appropriateness of the placement, that hindered Student's academic progress during SY 2010/11.

The testimonial and documentary evidence in this case also tends to prove that the LEA initially referred Student to OSSE for a change of placement review in May of 2009 but withdrew the referral at Parent's request, then the LEA offered to refer Student to OSSE for a change in placement review in May 2010 but agreed to wait until Parent thought the matter over during Summer of 2010, and upon later learning from other sources that Parent was exploring private school options for Student, the LEA contacted parent to confirm her decision to place Student in a private school and promptly scheduled a meeting to initiate the change of placement review process. Thereafter, even though the LEA met with some resistance from Petitioner's counsel in attempting to complete each step of the process that ultimately would lead to a change in placement for Student, the LEA continued to press forward and a change of placement review meeting with OSSE was finally held on September 7, 2010, at which time the team made the recommendation for a more restrictive placement for Student that obligated OSSE to assign her a new location of services.

The hearing officer also notes that Petitioner's testimonial evidence presented through the psychologist who performed Student's evaluations indicates that the proper approach to dealing with a student such as Student is to begin providing services, gradually increase the services as necessary if the student fails to make the expected progress, and to ultimately make the change to more intensive full-time services only if warranted based on a lack of progress. That approach was followed in this case, with the result that the psychologist, who has remained involved with Student's case since he evaluated her in 2008, has never felt that LEA was an inappropriate placement for Student and has only recently arrived at the conclusion that Student now requires a more intensive full-time special education placement.

Based on the evidence in this case, as outlined herein, the hearing officer concludes that Petitioner has failed to meet its burden of proving its inappropriate placement claim.

b. Ophthalmological Examination

The IDEIA defines a FAPE as specialized instruction and related services that, *inter alia*, are provided at public expense, under public supervision and direction, and without charge. 34 C.F.R. § 300.17. In turn, “related services” means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes, *inter alia*, medical services for diagnostic or evaluation purposes. 34 C.F.R. § 300.34.

In this case, Petitioner contends that the LEA denied Student a FAPE by failing to provide her with the ophthalmological evaluation recommended in her 2008 OT evaluation report, while the LEA notes that the OT evaluator instructed Parent to obtain the ophthalmological evaluation. Although the LEA further argues that the ophthalmological evaluation is needed to determine whether Student needs glasses, and therefore, does not fall within IDEIA’s definition of related services, a review of the plain language of the OT evaluation report reveals that the ophthalmological evaluation was recommended “to rule out any visual problems.” See Finding of Fact 2. As a result, the hearing officer concludes that the recommended ophthalmological evaluation constitutes a medical service for diagnostic or evaluation purposes, within the meaning of IDEIA, and the LEA denied Student a FAPE by failing to provide her with the recommended evaluation.¹²

ORDER

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

1. Within 15 calendar days of this HOD, the LEA shall (i) complete the speech and language section of Student’s August 26, 2010 IEP by completing the portions concerning the present levels of performance, the needs and the impact of the disability, and (ii) conduct a meeting to review the speech and language goals with Parent and Parent’s representative(s). The parties are encouraged to review the entire IEP at the meeting ordered herein.
2. Within 15 school days of the issuance of this Order, the LEA shall either provide or fund an ophthalmological evaluation for Student.
3. Petitioner’s claim of an inappropriate placement is **Dismissed** and all relief requested in connection with said claim is **Denied**.
4. All remaining claims in Petitioner’s July 27, 2010 Complaint are **Dismissed** and all relief requested in connection with said claims is **Denied**.

¹² The hearing officer acknowledges that the OT evaluator instructed Student’s parents obtain the ophthalmological evaluation at issue; however, that fact is not controlling for purposes of determining whether the recommended evaluation qualifies as a related service under IDEIA.

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: 9/30/2010

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer