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

District of Columbia Public Schools (DPCS),
on behalf of

Respondent.

Date Issued: November 12, 2010

Hearing Officer: Jim Mortenson

Case No:

Hearing Date: November 3, 2010

Room: 2005

HEARING OFFICER DETERMINATION

I. BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 3:00 p.m. on November 3, 2010, in hearing room 2005, and concluded on that date. The due date for the Hearing Officer's Determination (HOD) is November 13, 2010, pursuant to 34 C.F.R. § 300.515(a). This HOD is issued on November 12, 2010.

The hearing in this matter was conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30. The hearing was closed to the public.

Present at the due process hearing were:

Zachary Nahass, Esq., Petitioner's Counsel

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

Kendra Berner, Esq., Respondent's Counsel

Five witnesses testified at the hearing:

For Petitioner:

Petitioner. (P)

Serene Peterson, Educational Advocate. (S.P.)

Natasha Nelson, Psychologist (N.N.)

For Respondent:

School Psychologist.

Special Education Coordinator

The complaint in this matter was filed on August 30, 2010. The Respondent filed a response on September 9, 2010. A prehearing conference was held on September 9, 2010, and a prehearing order was issued on that date. A resolution meeting was held on September 15, 2010, and the matter was not resolved.

The Petitioner is seeking a determination of eligibility of the Student for special education and related services under the category of other health impairments. The Respondent does not believe the Student is eligible under the IDEA.

Five documents were disclosed and offered by the Petitioner. (P 1 – P 5) There were no objections to the disclosed documents and they were entered as evidence into the record. Petitioner's exhibits are:

P 1	-	Individualized Education Program (IEP) cover page, February 3, 2010
P 2	-	IEP Meeting Notes, February 25, 2010; Multidisciplinary Team Meeting Notes, February 25, 2010.
P 3	-	Advocate Notes, February 25, 2010
P 4	-	Specialized Services, (undated)
P 5	-	Comprehensive Psychological Evaluation, December 1, 2009

Seven documents were disclosed and offered by the Respondent. (R 1 – R 7) There were no objections to any of the offered documents and all were entered into the record. Respondent's exhibits are:

R 1	-	Comprehensive Psychological Evaluation, December 1, 2009
R 2	-	Analysis of Existing Data, December 1, 2009; Intervention Behavior Plan, (undated).
R 3	-	Final Eligibility Determination Report, February 26, 2006.
R 4	-	IEP cover page, February 25, 2010; Multidisciplinary Team Meeting Notes, February 25, 2010; Intervention Behavior Plan, (undated); Prior Written Notice – Identification, February 25, 2010.
R 5	-	Section Conduct Sheet, August 30, 2010; Section Conduct Sheer, August 31, 2010; Section Conduct Sheet, September 1, 2010; Section Conduct Sheet, September 2, 2010; Section Conduct Sheet, September 3, 2010; Section Conduct Sheet, September 7, 2010; Section Conduct Sheet, September 8, 2010; Section Conduct Sheet, September 9, 2010; Section Conduct Sheet, September 10, 2010; Section Conduct Sheet, September 13, 2010; Section Conduct Sheet, September 14, 2010; Section Conduct Sheet, September 15, 2010.
R 6	-	Report of Vivian Claypool, September 16, 2010
R 7	-	Student Conference Report, September 17, 2010

II. ISSUE

Whether the Respondent failed to determine the Student is a child with a disability and therefore failed to develop and implement an individualized education program (IEP) for the Student following an IEP meeting held February 25, 2010?

III. 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 an year old learner in the grade at a public charter school in the District of Columbia.[2]

[2] P 1, R 6.

2. The Student was given a comprehensive psychological assessment as part of an initial evaluation, in November 2009.[3] The assessment report was reviewed at a team meeting on February 25, 2010.[4] The team determined, based on a review of the assessment report and academic performance at the time, that the Student meet the criteria for other health impairment (OHI) under IDEA, but that he did not qualify for services under that law because he did not require special education to address any academic needs.[5] The team recommended certain related services, including counseling, to be provided to the Student under Section 504 of the Rehabilitation Act.[6]
3. The Student has attention deficit hyperactivity disorder, combined type and oppositional defiant disorder.[7] These disabilities result in behaviors in the classroom that cause the student to not be focused on teaching and learning and sometimes results in disruptions to other students.[8] The Student's academic performance, in February 2010, was not impacted such that the Student required specialized instruction at that time.[9]
4. The Student was earning good grades in classes during the beginning of the 2010-2011 school year and had scored "proficient" on the DC-CAS in reading.[10] The Student scored

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[3] P 5/R 1, R 2.
[4] Testimony (T) of , T of T of ,P 2, P 3, R 3, R 4.
[5] T of T of P 2, P 3, R 3, R 4.
[6] T of T of P 2, P 3, R 4. (S.P. testified that the team determined the Student was eligible under IDEA. The preponderance of the evidence, including S.P.'s notes from the meeting, show this was not the case and that S.P. may have been confused about what was to follow the team meeting. The Respondent contributed to this confusion by creating a, IEP "cover sheet" that was signed by the meeting participants and by the fact that, according to "we [special education staff] don't do 504, that is for regular education." (See R 4 and P 1, and T of
[7] P 5/R 1.
[8] P 5/R 1. P 2, P 3, R 4, T of P, T of
[9] P 2, P 3, R 4, T of T of (While there was evidence of struggles with functional performance including behavior and organization, and some struggles for which tutoring was recommended, the Petitioner did not meet her burden in persuading this IHO that the Student's academic performance at the time was so impacted that the student was not involved in and progressing in the general curriculum.)
[10] R 5, R 6, R 7, T of T of P.

"basic" in math on the DC-CAS, however.[11] The Student is not on grade level in math and requires additional help in math to learn the material.[12]

IV. 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. Federal regulations at 34 C.F.R. § 300.8 define a child with a disability under the Individuals with Disabilities Education Improvement Act (IDEA) as (in relevant part):

> a child evaluated in accordance with §§ 300.304 through 300.311as having . . . an other health impairment. . . and who, by reason thereof, needs special education and related services.
> (2)(i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under §§ 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

   See also, D.C. Mun. Regs. tit. 5, § 3001.1.

2. Special education includes specially designed instruction which means:

> adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction —
> (i) To address the unique needs of the child that result from the child's disability; and
> (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

   34 C.F.R. § 300.39, see also: D.C. Mun. Regs. tit. 5, § 3001.1.

3. When the IEP team met on February 25, 2010, the Student had an other health impairment based primarily on his behavioral problems resulting from ADHD and oppositional defiant disorder. The Student's involvement and progress in the general curriculum at the time was not significantly affected and it was reasonable to conclude

[11] R 7, T of.
[12] R 7.

the Student did not require special education services, despite needed related services that would be provided under Section 504.

4. As of September 2010, the Student was not on grade level in mathematics and had scored "basic" on the DC-CAS. "Basic" is one level below "proficient" which is the level students achieve when they demonstrate knowledge of the State standards for the grade level of the subject. Thus, whether or not the Student was provided the related services determined necessary in February 2010, the Student's academic performance had slipped between February and September 2010.[13] Based on the evidence in the record, it is reasonable to conclude this decline is a result of his disability which prevents him from being fully engaged in the classroom. The Student's behavioral needs resulting from his disability are impacting his access to the general education curriculum and preventing him from meeting State education standards. Because his disability is impacting his academic performance at this time he requires specialized instruction.

V. ORDER

1. The Student is a child with a disability under the IDEA because he is eligible under the category OHI and requires special education and related services.
2. The Respondent must convene an appropriately constituted IEP team meeting no later than December 3, 2010. An IEP must be developed for the Student that will address all of his academic and functional needs resulting from his disabilities and enable him to be involved in and progress in the general education curriculum. The IEP, at a minimum,

[13] It is not clear whether the accommodations under Section 504 were provided. Such a question is not for this forum. Rather, whether Section 504 was complied with must be answered under the procedural safeguards of the LEA for Section 504 or through a complaint to the United States Department of Education Office for Civil Rights.

must address the Student's academic needs in math, and functional needs relating to behavior and organization.

3. The LEA must propose at least three possible IEP team meeting times, not consecutive on the same day, and the Petitioner must choose one of the proposed meeting times. If the Petitioner fails to choose one of the proposed times, the Respondent will advise the Petitioner of the meeting time it will proceed to meet on, and offer the Petitioner alternative means of participating, such as via telephone.

IT IS SO ORDERED.

Date: November 12, 2010

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).