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]

Petitioners,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: November 29, 2011

Hearing Officer: Jim Mortenson

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on September 16, 2011. The Petitioner is represented by Darnell Henderson, Esq., and the Respondent is represented by Laura George, Esq. No resolution meeting was convened in this case and no waiver of the resolution meeting was agreed to. A response to the complaint was filed on September 27, 2011. A prehearing conference was held on October 4, 2011 and a prehearing order was issued on that date. A second prehearing conference was held on October 10, 2011 and a second prehearing order was issued on October 11, 2011.

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

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, Chap. 30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the Independent Hearing Officer (IHO) are:

(1) Whether the Respondent failed to evaluate the Student in all areas of suspected disability and identify all of the Student's special education and related service needs when it failed to conduct or provide requested neurological and psychiatric assessments?

(2) Whether the Respondent failed to offer or provide the Student with an individualized education program (IEP) reasonably calculated to provide education benefit when the Student's IEP lacks: behavioral goals and services; sufficient speech and language services; and occupational therapy (OT) services?

The substantive requested relief at the time of hearing is:

- Compensatory education in the form of OT tutoring until Student performing at appropriate age level and a "reasonable amount" of counseling services;
- Independently provided psychiatric and neurological assessments; and
- Revisions to the Student's IEP including: behavioral goals and services, 60 minutes per week of speech and language services, and OT services.

The Respondent did not fail to evaluate the Student in all areas of suspected disability and identify all of his special education and related service needs when it refused to conduct

requested psychiatric and neurological assessments. It did fail to provide prior written notice of its refusals. The Respondent failed to offer or provide the Student with an IEP reasonably calculated to provide educational benefit when the IEP lacked 60 minutes per week of speech and language services and OT services which were determined necessary by the IEP team for the Student. The Petitioner failed to show, however, that the failure to revise the IEP in accordance with the IEP team's determinations resulted in a lack of progress toward the annual goals or in the general education curriculum.

IV. EVIDENCE

Seven witnesses testified at the hearing, four for the Petitioner and three for the Respondent. The Petitioner's witnesses were:

1) Educational Advocate (Y.P.)
2) The Student's Mother, Petitioner (P)
3) Step Father
4) Clinical Psychologist (T.G.)

The Respondent's witnesses were:

1) Speech and Language Pathologist (R.W.)
2) Special Education Teacher
3) Occupational Therapist (O.T.)

Seven exhibits were admitted into evidence of 15 disclosures from the Petitioner. The Petitioner's exhibits are:

Ex. No.	Date	Document
P 4	June 15, 2011	Advocate's Notes
P 5	June 15, 2011	Multidisciplinary Team (MDT) Meeting Notes
P 6	March 31, 2011	IEP

P 8	March 31, 2011	Advocate's Notes
P 9	May 4, 2011	Occupational Therapy Evaluation
P 10	December 16, 2010	Confidential Comprehensive Psychological Evaluation
P 11	January 1, 2011	Speech and Language Evaluation

The Respondent disclosed no documents and offered no exhibits.

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. To the extent the findings of fact do not reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are not 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 a year old student enrolled at School.[2] The Student is eligible for special education and related services and is classified under the definition of multiple disabilities.[3] The Student has attention deficit hyperactivity disorder, inattentive type; depressive disorder; mixed receptive expressive language disorder; and microcephaly.[4] He was the victim of sexual abuse by another child on a school bus at age seven, and has abandonment/rejection issues resulting from his relationship with his parents.[5]

[2] P 6, Testimony (T) of P.
[3] P 6.
[4] P 10.
[5] P 10, T of T.G.

2. A comprehensive psychological assessment of the Student was completed by Dr. Theresa Grant and a report written on December 16, 2010.[6] The assessment was to reassess the Student's cognitive, academic, and emotional functioning and to determine if he was autistic.[7] The results of the assessment provided a valid representation of the Student's cognitive, academic, and emotional/personality functioning.[8]
3. The comprehensive psychological assessment report included a list of 11 recommendations.[9] Included in the list was an evaluation by a psychiatrist who specializes in the treatment of adolescents to assess the Student's symptoms of ADHD and to determine if he is a candidate for pharmacological interventions.[10] The report also recommended a behavior plan to address the Student's behaviors at school, although the Student does not exhibit negative behaviors at school.[11] The report recommended the Student be "referred for a neurology consultation to ascertain the extent of biological factors, which may be impacting on his current level of functioning [out of concerns about his microcephaly]."[12] There were also several recommendations for services for the family, including social work and mentoring services, and counseling for the Student's unaddressed sexual trauma experienced at age seven.[13]

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[6] P 10, Undisputed Fact (UF).
[7] P 10.
[8] P 10.
[9] P 10.
[10] P 10, T of T.G.
[11] P 10, T of T.G., T of R.D., T of M.Y., T of P. (The Student's teacher, R.D., completed a Behavior Assessment System for Children, Second Edition (BASC-2) teacher rating scale, which was validated when compared to the assessment tool completed by the Student's grandmother in December 2010. The BASC-2 "suggested" aggressive and other behaviors such as being argumentative and threatening. However, both the assessment report and the record in general lack any specifics about the Student's actual behavioral functioning in the classroom that is negative, but for testimony that he has been in fights as a result of being picked on. The preponderance of the evidence is that the Student does not have behaviors that are negatively impacting his educational performance at school.)
[12] P 10, T of T.G.
[13] P 10, T of T.G.

4. A speech and language assessment of the Student was completed by Donna Rashad and a report written on January 1, 2011.[14]
5. The speech and language assessment report recommended the Student continue with his then-current level of speech and language services of 60 minutes per week.[15] Speech and language services were to help him: increase his clarity of speech (articulation therapy); increase understanding of concepts (vocabulary); increase understanding of what is said to him; improve ability to express himself; improve auditory comprehension and reasoning skills; and to improve retention of information.[16] Articulation therapy was recommended because the Student "may benefit from therapy to correct his vowel distortions, final consonant deletions, and extend his sentence length to 5 or 6 words with clarity and acceptable fillers."[17]
6. The IEP team met to review the comprehensive psychological assessment and the speech and language assessment and to review and revise the IEP on March 31, 2011.[18] The speech and language therapist at the meeting advised the team that the Student did not require articulation therapy, and so did not require 60 minutes per week of speech and language services, because he could correctly say words.[19] The team, however, agreed to keep the Student at 60 minutes per week of speech and language services but with 30 minutes per week provided in the general education setting and 30 minutes per week provided outside the general education setting.[20] The IEP was not revised to reflect the team's decision and it only

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[14] P 11, UF.
[15] P 11.
[16] P 11.
[17] P 11.
[18] P 8, T of Y.P.
[19] P 8, T of R.W. (The witness gave the Student a model and corrected him, resulting in the correct pronunciation of words.)
[20] P 8.

showed the equivalent of 30 minutes per week as recommended by the speech pathologist.[21] Only the 30 minutes of speech and language services per week recorded in the IEP were provided.[22]

7. The Petitioner's Advocate, Y.P., requested, at the March 31, 2011, IEP team meeting that a psychiatric assessment and a neurological assessment be done on the Student and one of the LEA staff members objected.[23] The IEP team did not determine to conduct the requested assessments.[24]
8. The IEP team determined that an occupational therapy (OT) assessment would be completed on the Student at the March 31, 2011 IEP team meeting.[25] The OT assessment was completed in May and the assessment report reviewed at an IEP team meeting on June 15, 2011, IEP team meeting.[26]
9. At the June 15, 2011, IEP team meeting it was determined the Student would receive OT services.[27] However, the IEP was never revised.[28] The speech and language pathologist did provide some OT services and wrote her own goals for the Student.[29]
10. Despite the Student's low cognitive functioning he is getting A, B, and C grades and in general is doing well in school and is progressing toward IEP goals, indicating the special education and related services he is receiving are meeting his needs.[30]

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[21] P 6, P 8.
[22] T of R.W.
[23] P 8.
[24] There is no prior written notice of this refusal in the record, as required by 34 C.F.R. §§ 300.503 or 300.508. The Response to the complaint does, however, suggest the requested assessments were not completed.
[25] P 8, T of Y.P.
[26] P 4, P 5, P 9, T of Y.P., UF.
[27] P 4, P 5, T of Y.P.
[28] T of Y.P., T of S.D.
[29] T of S.D., T of R.D.
[30] P 10, T of T.G.,T of P, T of R.D, T of R.W.

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. In conducting an evaluation of a student the Respondent must ensure that:

   > The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

   and that:

   > the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

   34 C.F.R. § 300.304(c)(4) & (6), D.C. Mun. Regs. 5-E3005.9(g) & (h).

3. There was a recommendation for a psychiatric assessment by an independent evaluator in an assessment report, among a long list of recommendations. The Petitioner, through her Educational Advocate, requested this assessment at the March 31, 2011 IEP team meeting. The evidence shows the purpose for the recommended assessment was not for reasons of identifying the special education and related service needs of the Student, but rather for identifying medical needs, specifically whether the Student would benefit from medications

for his ADHD. Thus, the Respondent did not fail to evaluate the Student in all areas of suspected disability and identify all of the Student's special education and related service needs when it failed to conduct or provide a psychiatric assessment. The Respondent was, however, required to provide written notice of its refusal, consistent with 34 C.F.R. § 300.503, and failed to do so.

4. The same evaluator also recommended a "neurological consult" and this was followed up by a request for a neurological assessment by the Advocate at the March 31, 2011 IEP team meeting. Again, the Respondent failed to provide proper written notice of its refusal, including the reasons and data upon which the refusal was based. However, the evidence at hearing does not support the conclusion that the Student requires a neurological assessment because his present academic achievement and functional performance show he is doing well with the services he has been receiving.

5. 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.

6. Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose. *See:* 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. The Supreme Court has described the purpose of the IDEA as providing a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to

provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). When a child is mainstreamed:

> the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit.

Id. at 203. The Court held:

> When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Id. at 203-204. Thus, the "basic floor of opportunity" provided by the IDEA for this Student, and as described by the Supreme Court, consists of the opportunity for advancement in the grade level content for the grade in which the Student is enrolled.

7. An IEP is "a written statement for [a] child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324, ..." 34 C.F.R. § 300.320(a).

8. IEPs must include, inter alia, statements of the special education and related services to be provided to the child and a statement of the projected date for the beginning of related services and the anticipated frequency, location, and duration of the related services. 34 C.F.R. § 300.320(a)(4) & (7), D.C. Mun. Regs. 5-E3009.1(d) & (h).

9. Local education agencies must ensure that IEP teams review IEPs periodically, but not less than annually, to determine whether the annual goals are being achieved and to revise the IEP, as appropriate, 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), D.C. Mun. Regs. 5-E3008.1.

10. The IEP team determined in March 2011 that the Student required 60 minutes per week of speech and language services, 30 minutes provided in the general education setting and 30 minutes pull out. The IEP was not revised to reflect this determination and the services were not provided in accordance with the IEP team's determination. Because the IEP was not revised in accordance with 34 C.F.R. § 300.324, the Student was denied a FAPE. The Petitioner failed to demonstrate, however, that the reduced amount of speech services the Student received failed to enable the Student to progress appropriately toward his annual IEP goals or in the general education curriculum. The only remedy warranted is a revision of the IEP consistent with the IEP team's determination.

11. The IEP team determined in June 2011 that the Student required OT services. Again, the IEP was not revised to reflect this determination. Some OT services were, nonetheless, provided to the Student. Because the IEP was not revised in accordance with 34 C.F.R. § 300.324, the Student was denied a FAPE. The Petitioner failed to demonstrate, in light of the OT services that were provided, any lack of appropriate progress toward annual IEP goals or progress in the general education curriculum, and so the only remedy warranted is a revision of the IEP consistent with the IEP team's determination.

12. The Petitioner failed to show the Student's academic achievement or functional performance is impacted at school by behaviors resulting from a disability for which he requires positive behavioral interventions and supports and other strategies. Thus, the IEP was not inappropriate as a result of any lack of such behavioral support services.

13. This hearing officer must grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid ex rel. Reid v. District of Columbia, 401 F.3rd 516, ___, 43 IDELR 32, (p 5, p 6) (D.C. Cir. 2005), *citing* G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the hearing officer's broad discretion, compensatory education is warranted, the "goal in awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, *citing* Reid, 401 F.3d at 518, and Carter at 15-16. "Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake 'a fact-specific exercise of discretion' designed to identify those services that will compensate the student for that denial." Id., *citing* Reid, 401 F.3d at 524; *see* Stanton ex rel. K.T. v. District of Columbia, 680 F. Supp. 2d 201, 207 (D.D.C. 2010); Phillips ex rel. T.P. v. District of Columbia, 736 F. Supp. 2d 240, 247 (D.D.C. 2010).

14. In this case, the denials of FAPE did not result in any educational harm to the Student for which compensatory education is warranted. The Student was provided half of the speech and language services the IEP team determined were necessary and still made appropriate progress toward his goals and in the general education curriculum. Likewise, the Respondent provided some OT services, and the Petitioner did not demonstrate that the Student is not progressing appropriately toward his annual goals or in the general education curriculum, and so the Student is already in the place it was expected he would be in, despite the failures to

record the IEP team's determinations in the IEP. The Respondent must, however, ensure the Student's IEP is revised in accordance with the IEP team's determinations.

VII. DECISON

The Respondent did not fail to evaluate the Student in all areas of suspected disability and identify all of his special education and related service needs when it refused to conduct requested psychiatric and neurological assessments. The Respondent did fail to properly document the IEP team's determinations regarding speech and language services and OT services in the IEP. However, this denial of FAPE did not result in substantive harm to the Student. The IEP must be revised in accordance with the IEP team's determinations.

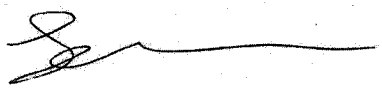
VIII. ORDER

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

1. No later than December 14, 2011, the Respondent must provide to the Petitioner, and her Counsel, a copy of an IEP that includes the speech and language and occupational therapy services the IEP team determined were necessary for the Student in March and June of 2011 (as identified and found in this determination), including any annual goals for which those services are necessary and that were not already included in the IEP. This order does not limit the Petitioner or Respondent from convening the IEP team to review and revise the IEP based on the Student's current progress toward goals, in the general curriculum, or other matters, consistent with 34 C.F.R. § 300.324 and D.C. Mun. Regs. 5-E3008.1.

IT IS SO ORDERED.

Date: November 29, 2011



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).