

Hearing Officer Determination

The 45-day timeline for this Hearing Officer Determination (“HOD”) began to run on May 18, 2014 and will conclude on July 1, 2014.

The undersigned IHO held a Pre-hearing Conference (“PHC”) by telephone on May 12, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by Tuesday, June 3, 2014 and that the Due Process Hearing (“DPH”) would be held on June 10, 2014, later rescheduled by agreement of the parties to June 20, 2014. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued May 17, 2014.

The DPH was held at the Student Hearing Office, 810 First Street, NE, Room 2006, Washington, DC 20002 on Friday, June 20, 2014. Petitioner elected for the hearing to be closed.

Petitioner’s disclosures were timely filed on June 13, 2014. Respondent’s disclosures were also timely filed on June 13, 2014. At the DPH, the following documentary exhibits were admitted into evidence without objection:

- (a) Petitioner’s Exhibits: P-1 through P-23.
- (b) Respondent’s Exhibits: R-1 through R-14.

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) OT Expert (Parent) (qualified as an expert in the area of occupational therapy);
- (b) Educational Advocate (educational advocate – offered, but not qualified, as an expert in the area of development of IEPs for students with speech and language impairment; permitted to offer lay opinion testimony consistent with Federal Rule of Civil Procedure 701);
- (c) Non-Public Director (Director of Primary and Middle School – Non-Public School);
- (d) Parent/Petitioner.

The following witnesses testified on behalf of Respondent at the DPH:

- (a) OT Expert (School) (DCPS occupational therapist – qualified as an expert in the area of providing occupational therapy services in a school based setting and making recommendations for IEPs regarding occupational therapy).
- (b) Special Education Teacher (Special Education Teacher, District Elementary School)

The parties gave oral closing arguments.

III. ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (1) Whether the IEP DCPS developed for the Student on March 13, 2014 denied the Student a free and appropriate public education (“FAPE”) by inappropriately classifying the Student.
- (2) Whether the IEP DCPS developed for the Student on March 13, 2014 denied the Student a FAPE by providing the Student an insufficient level of services.
- (3) Whether the IEP DCPS developed for the Student on March 13, 2014 denied the Student a FAPE by providing for occupational therapy consultation, rather than providing for direct occupation therapy.
- (4) Whether DCPS denied the Student a FAPE by failing to appropriately implement the Student’s IEP by failing to provide the Student 2.5 hours per week of specialized instruction outside of the general education setting.

IV. RELIEF REQUESTED

Petitioner has requested the following relief:

- (1) findings in favor of Petitioner on all issues;
- (2) an Order that DCPS develop an IEP consistent with the claims made;
- (3) an Order that DCPS provide funding and transportation for the Student to attend Non-Public School, Non-Public School B, Non-Public School C or some other appropriate public or non-public school, or in the alternate that DCPS be ordered to convene an MDT meeting within 5 business days of the Order to develop an IEP consistent with the allegations made in the DPC, and the MDT be ordered to determine the Student’s placement and compensatory education
- (4) that DCPS be ordered to provide reasonable compensatory education for the violations alleged in the DPC, consistent with the compensatory order plan Petitioner will circulate by email to the IHO and Respondent at least 10 business days prior to the DPH (**by 11:59 p.m. May 27, 2014**). Should the Petitioner fail to email the proposed compensatory education plan to the IHO and opposing counsel by the 11:59 p.m. May 27, 2014 deadline, the request for an Order for compensatory education shall be deemed waived.
- (5) that DCPS be ordered to provide such other and further relief as may be deemed appropriate, relating to the violations alleged in the DPC.

V. FINDINGS OF FACT

Jurisdictional Facts

2. The Student resides with his mother, the Petitioner, in Washington, D.C.⁴
3. The Student has been determined to be eligible for special education and

⁴ *Id.*

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related services under the IDEA.⁵

The Student's School Background

4. The Student has attended District Elementary School since he participated in the Head Start preschool there. The Student was found eligible for special education services as a first grader.⁶

5. During the 2013-2014 school year, the Student was _____ at District Elementary School.⁷

6. Special Education Teacher was the Student's special education teacher for the 2012-2013 and the 2013-2014 school years.

7. The Student had an individualized education program ("IEP") dated March 13, 2014⁸ (the IEP challenged in this action). An MDT meeting was also convened for the Student on June 17, 2014, and the Student's IEP was revised to reflect the change in classification from speech and language impairment to other health impairment ("OHI").⁹

The Student's Disability Classification and ADHD Diagnosis

8. Initially, the Student's disability classification was speech and language impairment.¹⁰

9. In January 2014, the Student received a diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD") from Children's Hospital.¹¹

10. At the June 17, 2014 meeting of the Student's multi-disciplinary ("MDT") team, the Student's disability classification was changed to OHI.¹² Neither the Student's deficits, nor his IEP goals and objectives, changed between when the Student's classification went from speech and language impairment to OHI. Neither the Petitioner nor the Petitioner's educational advocate raised any concerns about the Student's goals and objectives remaining unchanged.¹³

The Student's Occupational Therapy Services

11. In accordance with his IEP dated May 1, 2013, the Student had been receiving fifteen minutes per month of consultative occupational therapy ("OT") for most of the 2013-2014 school year.¹⁴ At the Student's March 2014 IEP meeting, the Student's occupational

⁵ P-2; P-3; P-4; R-2; Testimony of Special Education Teacher.

⁶ Testimony of the Parent; P-5.

⁷ R-4.

⁸ P-2.

⁹ Testimony of Educational Advocate.

¹⁰ P-3.

¹¹ Testimony of Parent.

¹² Testimony of Educational Advocate.

¹³ *Id.*

¹⁴ P-4; Testimony of OT Expert (School).

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therapist recommended that the 15 minutes per month of consultative OT the Student had been receiving be increased to 60 minutes per month of consultative OT.¹⁵

12. As opposed to direct OT, which would involve the occupational therapist pulling a student out of class, working directly with him or her, and helping the student to develop a skill(s) the student does not yet possess, consultative OT is focused on helping a student maintain and strengthen a skill(s) the student has already demonstrated.¹⁶

13. During the 2013-2014 school year, consultative OT for the Student focused on: (1) visual motor skills (including hand-eye coordination) and (2) sensory processing. The occupational therapist would periodically visit the Student's classroom, make minor recommendations directly to the Student, and consulting with the Student's teacher to discuss his needs.¹⁷

14. The occupational therapist made several recommendations to the Student's teacher during the 2013-2014 school year, including: (1) giving the Student an opportunity to work at various places within the classroom (for example, sitting at the table or on the floor, standing along the wall), ensuring that there were lines on the Student's writing paper, and working to motivate the Student to "buy into" his writing assignments.¹⁸

15. The Student made progress in OT during the 2013-2014 school year. The Student's writing is more legible.¹⁹ While he does not enjoy writing, he benefits from his teachers' benefits from frequent prompting and redirection to encourage him to remain focused on his writing assignments, and he has been completing his writing assignments more frequently.²⁰

The Student's Specialized Education Outside the General Education Setting

16. Pursuant to the Student's March 13, 2014 IEP, he was supposed to have received 2.5 hours per week of specialized instruction, outside the general education setting.²¹ No evidence was offered that the Student was not receiving 2.5 hours per week of special education services outside the general education setting.

The Student's Comprehensive Psychological Evaluation dated June 15, 2013

17. The Student was given a comprehensive psychological evaluation on June 15, 2013. The evaluation was administered by DCPS School Psychologist Valerie Rivers-Bethel, and she collected data from parent and teacher interviews, clinical and class observations, Kaufman Assessment Battery for Children-II, Kaufman Test of Educational Achievement-II, Behavior Rating Inventory of Executive Function, Connors-3rd Edition (parent form); May 2013 DIBELS data, and analysis of other unspecified data as of May 2013.

¹⁵ Testimony of OT Expert (School).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*; Testimony of Special Education Teacher.

²⁰ Testimony of OT Expert (School).

²¹ P-2-8.

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18. The comprehensive psychological evaluation from June of 2013 concluded that at that time: (1) the Student's reading skills were below basic, (2) his writing skills were nonexistent, (3) the Student fell short of the mark in mathematics when required to subtract, and that (4) the Student's high levels of inattention and inconsistent motivation hindered his ability to access the curriculum.²² The Student exhibited problems with his executive functioning, which would put him at risk for problems forming relationships with other students, adhering to the rules of the classroom, turning in homework, and acquiring foundational academic skills.²³ The evaluation recommended that the MDT consider the category of OHI for the Student, due to his symptoms associated with ADHD.²⁴

19. The MDT reviewed the Student's DCPS administered June 2013 comprehensive psychological evaluation for the first time approximately a year after it was completed, on June 17, 2014.²⁵

The Student's Behavior in School

20. As a first grader during the 2012-2013, the Student exhibited significant behavioral problems.²⁶ The Parent would often sit in class with the Student in an effort to encourage the Student to remain focused on his school work. This strategy, however, was ineffective.²⁷

21. During the 2013-2014 the Student's behavior in school improved. He was not suspended or sent home earlier due to behavioral concerns at any point during the 2013-2014 school year.²⁸ In May of 2014, the school informed the Petitioner that the Student had pulled down his pants in the bathroom in front of other students; however, no disciplinary action was taken against the Student.²⁹

22. Throughout the 2013-2014 school year, the Student's teachers used interventions to address his inattention. They moved his seat nearer the teacher and used frequent prompting. They used the proximity technique, standing near him when he needed to be redirected. A year older, the Student was more mature.³⁰ Additionally, the Student was diagnosed with, and began taking medication for, ADHD in January 2014.³¹ The Student's Term 3 report card indicates that, while the Student continues to require reminders to remain on task, he is able to work with teacher redirection. For the first three terms of the 2013-2014 school year, the Student's report

²² P-5.

²³ P-5-6.

²⁴ P-5-8.

²⁵ Testimony of Educational Advocate; Testimony of Special Education Teacher.

²⁶ Testimony of Special Education Teacher; Testimony of Petitioner.

²⁷ Testimony of Petitioner.

²⁸ Testimony of Special Education Teacher; Testimony of Petitioner.

²⁹ Testimony of the Petitioner.

³⁰ Testimony of Special Education Teacher.

³¹ Testimony the Petitioner.

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cards indicate that he requires frequent prompting in the areas of “Work habit, personal and social skills.”³²

23. Neither the Petitioner, her educational advocate, nor anyone else on behalf of Petitioner requested a functional behavioral assessment or behavioral intervention plan for the Student during the 2013-2014 school year.³³

24. Neither the Petitioner, her educational advocate, nor anyone else on behalf of Petitioner raised concerns about the Student participating with his peers at lunch, recess, art, health or music.³⁴ The Student enjoys and benefits from being with his non-disabled peers.³⁵

The Student’s Academic Performance

25. The Student’s November 14, 2013 and February 7, 2014 IEP Progress Reports indicate that the Student progressed in or mastered his mathematics, reading and speech and language IEP goals.³⁶

26. On his report card during the first three terms of 2013-2014, the Student earned approximately nine “3s” (meets expectations for this grade level), two “2s” (approaches expectations for this grade level) and three “1s” (is performing significantly below grade level). The Student received a “1” in the area of writing and language in Term 2 (went to a “2” in Term 3) and a “1” in mathematics in Terms 2 and 3.³⁷

27. The Student’s second grade DIBELS test scores showed significant progress in reading fluency and accuracy and retail from the beginning of the year to the end of the year. By the end of the year, he had scored at or above his goal score on each of these measures.³⁸

28. The Woodcock-Johnson was administered to the Student in March 2013 and May 2014, and the Student demonstrated progress in mathematics. In March 2013, the Student’s mathematics calculation score was “4.” In May 2014, his mathematics calculation score was “9.”³⁹

VI. CONCLUSIONS OF LAW

“Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).

³² R-4.

³³ Testimony of Educational Advocate.

³⁴ *Id.*.

³⁵ Testimony of Special Education Teacher.

³⁶ R-6.

³⁷ R-4.

³⁸ R-5.

³⁹ Testimony of Special Education Teacher.

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Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. 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. 34 C.F.R. 300.513(a).

I. Whether the IEP DCPS developed for the Student on March 13, 2014 denied the Student a free and appropriate public education ("FAPE") by inappropriately classifying the Student.

According to the Petitioner, the Student's March 13, 2014 IEP denied the Student a FAPE because it classified the Student's disability as speech and language impairment when he should have been classified as OHI. DCPS conducted a comprehensive psychological evaluation for the Student back in June 2013 that would lend support to the Student being reclassified as OHI. Additionally, the Student was diagnosed by Children's Hospital with ADHD in January 2014 and was prescribed medications for the condition. DCPS neglected to review the comprehensive psychological evaluation until approximately an entire year after it was conducted. Notwithstanding this delay, and even prior to the reclassification to OHI, the Student made academic and behavioral progress in the 2013-2014 school year. Further, even when the MDT reclassified the Student as OHI in June 2014, the Student's IEP goals and objectives did not change, and neither the Petitioner nor her advocate raised concerns about the goals or objectives.

Once a eligible for special education services, it is not the student's disability classification that is significant as to whether the student has been denied a FAPE. A student's entitlement under the IDEA is to FAPE and not to a particular label. 34 C.F.R. §111(d) ("Nothing in the Act requires that children be classified by their disability so long as each child who has a disability that is listed in § 300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.") Services provided to the student must be based on the student's individual needs, not his or her disability classification. *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006). *See, also, Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE); *M.M. v. Lafayette School Dist.*, 2012 WL 398773, 17 (N.D.Cal.2012).

Here, accommodations were being provided to the Student throughout the school year in response to his propensity toward being easily distracted. The Student made both academic and behavioral progress with these accommodations. The Student may not have reached his full academic potential; however, such is not the level of academic progress IDEA requires. *See A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*,

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458 U.S. at 198. The Student made more than mere “trivial” progress;⁴⁰ thus the Petitioner did not meet her burden to prove that DCPS denied the Student a FAPE as to this issue.

II. Whether the IEP DCPS developed for the Student on March 13, 2014 denied the Student a FAPE by providing the Student an insufficient level of services.

Petitioner alleges that the March 13, 2014 IEP provided the Student an insufficient level of services because it should have included a least 15 hours per week, up to full time, special education hours outside the general education setting. However, the evidence demonstrates that the Student was able to access his education under the IEP that called for 2.5 hours of special education outside the general education setting. Academic progress is significant factor in determining whether an IEP is reasonably calculated to provide a student with educational benefit. *See Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 45 (D.D.C.2006). *See also Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 81 (D.D.C.2004).

IDEA mandates that children with disabilities be educated in their least restrictive environment. *See J.N. v. District of Columbia*, 677 F.Supp.2d 314, 324 (D.D.C.2010) and *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 35 (D.D.C.2012). In this instance, the child has not recently demonstrated significant behavioral concerns in his general education environment. Rather, the evidence shows the Student received educational benefit throughout the 2013-2014 school year, including under the challenged March 13, 2014 IEP. The record does not support a conclusion that the services provided in the March 13, 2014 IEP were insufficient. Therefore, Petitioner did not meet her burden to prove that DCPS denied the Student a FAPE as to this issue.

III. Whether the IEP DCPS developed for the Student on March 13, 2014 denied the Student a FAPE by providing for occupational therapy consultation, rather than providing for direct occupation therapy.

“Special education” refers to “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability,” and includes related services. 34 C.F.R. §300.39 (a)(1) & (a)(2). IDEA classifies occupational therapy as a “related service.” 34 C.F.R. §34(a). The relevant inquiry is whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201.

The evidence in this case shows that by the time the March 13, 2014 IEP was put into place, the Student had mastered a number of his OT goals from the previous school year when the comprehensive psychological evaluation was conducted. The record does not reflect any particular OT skills the Student needed to acquire by the March 13, 2014 IEP. Nonetheless, the Student’s occupation therapy consultation time was augmented in the March 13, 2014 IEP, to guard against regression. Based on the evidence, the Student made progress with the consultative OT services provided in the Student’s general education classroom. Therefore,

⁴⁰ *See Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

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Petitioner did not meet her burden to prove that DCPS denied the Student a FAPE as to this issue.

IV. Whether DCPS denied the Student a FAPE by failing to appropriately implement the Student's IEP by failing to provide the Student 2.5 hours per week of specialized instruction outside of the general education setting.

No evidence was offered that the Student is not receiving the 2.5 hours per week of specialized instruction outside the general education setting; therefore, Petitioner did not meet her burden to prove that DCPS denied the Student a FAPE as to this issue.

Summary

Petitioner did not her burden of proof that the March 13, 2014 IEP denied the Student a FAPE by inappropriately classifying the Student, providing the Student an insufficient level of services, providing for consultative OT rather than direct OT, or by failing to provide the Student with 2.5 hours of specialized instruction per week, outside the general education setting between the time the IEP was finalized and the filing of the DPC on April 17, 2014. Even if the relevant time period extended to the date of the DPH, the conclusion would be the same, because the Student was able to access his education and received educational benefit during this time.

All relief requested by the Petitioner in the complaint is denied.

This complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED

Date: July 1, 2014

/s/ NaKeisha Sylver Blount
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 U.S.C. §1415(i).