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STUDENT HEARING OFFICE
2011 DEC 18 AM 9: 53

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,[1] through the Parent,	)	
Petitioner,	)	Date Issued: December 18, 2011
v.	)	Hearing Officer: Virginia A. Dietrich
District of Columbia Public Schools	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

Background

Petitioners, the mother and father of year old Student, filed a due process complaint notice on October 7, 2011 alleging that the District of Columbia Public Schools ("DCPS") had denied Student a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"). At the time of the alleged violations, Student was a child with Multiple Disabilities with an Individualized Education Program ("IEP") that prescribed 5 hours/week of specialized instruction inside the general education setting (inclusion) and related services that included occupational therapy and speech-language pathology.

For a six-week period that commenced at the beginning of the 2011-2012 school year, Student attended Kindergarten at a DCPS school. Petitioners alleged that during those six weeks, Student was denied a FAPE by DCPS' failure to provide Student with all of his occupational therapy ("OT") services; by DCPS' failure to provide Student with all of the accommodations listed in the IEP; and by DCPS' failure to conduct a neuropsychological reevaluation upon the request of Petitioners. Petitioners also alleged that during the Extended School Year ("ESY") in July 2011, DCPS denied Student a FAPE by failing to provide Student with some of his required speech-language services and with instruction geared towards his achievement of IEP speech-language goals. For relief, Petitioners sought placement in a private school, retroactive to 10/03/11, and compensatory education in the form of instructional tutoring for missed related services.

[1] Personal identification information is provided in Appendix A.

DCPS asserted that Student's IEP had been implemented with respect to services and accommodations and that Student had been making progress towards meeting his IEP goals prior to Petitioners withdrawing him from public school and unilaterally placing him at a private school. DCPS also asserted that DCPS was not required to conduct a neuropsychological reevaluation upon the request of Petitioners because Student did not meet the criteria that DCPS used in determining that a neuropsychological evaluation was warranted; i.e., a traumatic brain injury or placement in a residential setting.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The due process complaint was filed on 10/07/11. This Hearing Officer was assigned to the case on 10/11/11. A resolution meeting took place on 10/18/11, at which time the parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period expired on 11/06/11, the 45-day timeline to issue a final decision began on 11/07/11, and the final decision was due on 12/21/11.

The due process hearing was a closed hearing that took place on 12/05/11 and 12/06/11. Petitioners were represented by Roberta Gambale, Esq. and DCPS was represented by Daniel McCall, Esq. Neither party objected to the testimony of witnesses by telephone. Petitioners participated in the hearing in person.

Petitioners presented the following seven witnesses: Student's mother ("Mother"); Student's father ("Father"); Student's grandmother; an educational advocate who qualified as an expert in special education programming and planning; an educational advocate; a clinical psychologist; and the Associate Head of School at School. DCPS presented the following three witnesses: Occupational therapist; Principal at School and special education teacher ("SET")/compliance case manager at

Petitioners' disclosures dated 11/28/11, containing a witness list and Exhibits P-1 through P-47, were admitted into evidence without objection. Petitioners' Exhibits P-48 through P-50 were admitted into evidence during Petitioners' rebuttal case, over the objection of DCPS.

DCPS' disclosures dated 11/28/11, containing a witness list and Exhibits DCPS-01 through DCPS-11, were admitted into evidence without objection.

Hearing Officer Determination

Parties agreed to the following stipulation of fact:

1) A notice of unilateral placement from Petitioners was received by DCPS on 09/20/11.

At the conclusion of Petitioners' case in chief, DCPS moved for a directed finding, arguing that Petitioners had not provided sufficient evidence to support a decision in favor of Petitioners on all of the issues presented. DCPS' motion was denied on the record, with explanation.

The three issues to be determined in this Hearing Officer Determination are as follows:

Issue #1 – Whether DCPS denied Student a FAPE by failing to implement Student's 06/14/11 IEP and by failing to provide Student with a placement that could implement the IEP since the beginning of the 2011-2012 school year; specifically, (a) by providing Student with only 30 minutes of occupational therapy ("OT") services instead of one hour of OT services, and (b) by failing to provide Student with the accommodations listed in his IEP, i.e.; back-jack, frequent breaks/snacks, extended time to complete assignments, visual/picture cues, preferential seating, periodic check ins, one-on-one assistance, fidget object, pencil grip, massage brush and positive reinforcement chart; all of which led to daily health problems at home and school, and performance problems in the classroom.

Issue #2 – Whether DCPS denied Student a FAPE by failing to conduct a reevaluation when Petitioners requested it on 08/31/11; specifically, by failing to conduct a neuropsychological reevaluation that was requested by Petitioners on the basis of a recommendation in a prior neuropsychological evaluation and based upon Student's seizure disorder and medications that impacted his academic abilities.

Issue #3[2] – Whether DCPS denied Student a FAPE by failing to provide related services in accordance with Student's IEP and a Hearing Officer Determination, during ESY in July 2011; specifically, by failing to provide all required speech-language services and by failing to provide instruction geared towards Student making progress towards achievement of speech-language IEP goals.

For relief, Petitioners requested a finding that Student was denied a FAPE on each of the issues presented; that DCPS fund Student's placement at School for the 2011-2012 school year, with transportation, retroactive to 10/03/11; that DCPS fund an independent neuropsychological evaluation; and that an award of compensatory education be made in the form of instructional tutoring for missed speech-language services during ESY (excluding the first week of ESY) and for missed occupational therapy services during the 2011-2012 school year.

[2] Petitioners withdrew the allegation that DCPS failed to provide transportation services during the first week of ESY which caused Student to be absent for ESY services. This allegation against DCPS was dismissed with prejudice; Petitioners acknowledged that the Office of the State Superintendent of Education was responsible for providing transportation services during that period of time.

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. On 03/21/11, Petitioners first sought placement of Student at School, a private school, via a due process complaint. Petitioners' request for placement at School was denied in a Hearing Officer Determination ("HOD") dated 06/04/11.[3] That Hearing Officer determined that Student did not require separate schooling or removal from the regular education environment; however, the Hearing Officer determined that specific accommodations were necessary in order for Student to be educated in the least restrictive environment, which was the general education setting.[4] In June 2011, when Student was in pre-Kindergarten, his academic skills were at the Kindergarten level; thus, Student's disability did not impact his ability to meet State standards at that time.[5]

#2. As a result of the HOD, Student's IEP was modified on 06/14/11 to include specific accommodations and the HOD specified that the IEP team should determine in the IEP the frequency, location and duration of each supplementary aid and service.[6] Most of the accommodations were based on the results of a 01/07/10 neuropsychological evaluation and when these accommodations were provided to Student in pre-Kindergarten, Student did well in school and Petitioners were pleased with Student's educational progress.[7] Student's major medical issue of fatigue was factored into the development of Student's 06/14/11 IEP.[8]

#3. Per the 06/04/11 HOD, the 06/14/11 IEP included the following accommodations inside the general education setting: back support for the entire time that Student participated in any floor time activity; visual cues when presented information orally, as reinforcement; multi-step directions; repetition of directions; positive redirection when presenting off-task behaviors or as needed; extended time for the completion of tasks; shortened assignments when needed; a therapeutic pencil grip to assist with Student's OT needs; a fidget object for sensory stimulation in order to help Student maintain focus; preferential seating near the teacher and periodic checks for understanding; and a positive behavior chart in order to reinforce following directions and staying on task.[9] The IEP did not specify the frequency or duration of any of these accommodations.[10] Student's IEP indicated that Student would continue to benefit from a full-inclusion model for Kindergarten,[11] that Student's disability was not so severe or problematic so as to require separate schooling or removal from the regular education environment, and that a segregated special education day school was not the least restrictive environment for Student.[12]

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[3] P-4.
[4] P-4-15.
[5] P-4-12.
[6] P-4-17.
[7] Mother.
[8] Mother.
[9] P-5-12.
[10] P-5.
[11] P-5-12.
[12] P-5-13.

#4. Student, age 6, began Kindergarten at on 08/22/11 and attended for a six-week period that ended on 09/30/11, when Petitioners withdrew him from school and unilaterally placed him at School, a private day school.[13] When Student began school at he was a child with Multiple Disabilities with an IEP dated 06/14/11 that prescribed 5 hours/week of specialized instruction inside the general education setting, 60 minutes/week of occupational therapy services outside of general education, 30 minutes/week of physical therapy services outside of general education, 240 minutes/month of speech-language pathology services outside of general education, and the various accommodations listed in the preceding Finding of Fact.[14]

#5. Petitioners registered Student at on the Friday before the start of the 2011-2012 school year, and as a result, the IEP did not become available to the staff at via the computer database until the first day of school on 08/22/11.[15] On the first day of school, Father informed the school that Student needed a back-jack for back support during floor activities[16] and the back-jack was provided to Student by DCPS by the end of the first week of school.[17] During the first week of school, when the back-jack was not available, Student leaned against the leg of a wooden easel or against the wall for back support, which caused him to sit about 4-6 feet behind the edge of the semi-circle of students seated on the floor.[18] When Student had the use of the back-jack during floor activities, he sat in the row of 3-4 students closest to the teacher and either in the middle or on the edge of the row.[19]

#6. Fidget objects were not provided to Student during OT services because he didn't need them.[20] Fidget objects were available to Student in the general education classroom if Student asked the teacher for them,[21] but fidget objects were not provided to Student because Student didn't ask for them and Student didn't appear to need them.[22] Student could sit quietly, keep focus on the teacher, not touch other students, he was never observed to have a problem with fidgeting, and Student was not observed to be a sensory seeker or avoider.[23] A pencil grip was not provided to Student by the occupational therapist, and the occupational therapist instructed teachers not to use the pencil grip because it was counterproductive in that it would not allow Student to strengthen his hand-grip when using a pencil.[24]

#7. A massage brush was used at Student's previous school (NCRC) in the afternoons to stimulate Student and get him focused.[25] Student wanted Petitioners to use the massage brush at

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[13] SET, Principal at Petitioners, P-1.
[14] P-5.
[15] Principal at
[16] Father.
[17] SET, Principal at
[18] P-50, Father.
[19] SET.
[20] Occupational therapist.
[21] Occupational therapist.
[22] SET, occupational therapist.
[23] SET, occupational therapist.
[24] Occupational therapist.
[25] Mother.

home, but they never did.[26] A massage brush was not used by the occupational therapist at because her training and knowledge of its use indicated to her that the brush was contraindicated for any student with a central nervous system disorder, and Student had seizures, which was a central nervous system disorder.[27] The occupational therapist and special education teacher, by personal observation and by report, never saw a need for brushing to be used in the classroom to stimulate Student to help him refocus.[28]

#8. While in the classroom at Student received the following accommodations from both the general education and special education teacher: multi-step directions, information that was broken down into small chunks with repetition, frequent breaks, and fidget objects that were available for Student's use. Student was asked to repeat directions one at a time to ensure understanding, he was given additional time to complete tasks, he was given shortened assignments, a behavior incentive chart was developed and used and was successful in helping Student navigate the school, behavior incentive charts were developed by both the special education and general education teachers, Student was able to get snacks from the nurse initially and then snacks were available to Student in his backpack; and all of these accommodations worked very well for Student.[29] The only accommodations listed in Student's 06/14/11 IEP that were not used were the massage brush, fidget objects and pencil grip; and it was a team decision not to use those accommodations.[30] Student did not display any health or performance problems at school except for complaints of a stomachache[31] that was explained by Student's medical doctor to be a possible response to anxiety over being in a new school, but there was nothing physically wrong with Student's stomach.[32] Student adjusted fairly well at and received academic benefit while he attended.[33]

#9. Petitioners' advocates' opportunity to observe Student at was limited to a one hour observation on 09/29/11, at which time Student was observed participating in circle time for 5-7 minutes with the use of the back-jack and then he was observed for the rest of the hour receiving one to one assistance from the special education teacher with no breaks in instruction. During that time, Student was able to complete the assignment with the assistance of the special education teacher.[34] Petitioners also had a limited opportunity to observe Student at school. Mother observed Student in the classroom on 3-4 occasions of 5-10 minute intervals; popping her head into the class and looking around. Father observed Student in the classroom several times during first week of school for approximately 5-10 minutes each time except for 35-40 minutes on the first day, and then once or twice after that, but at no times after early September 2011.[35]

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[26] Mother, Father.
[27] Occupational therapist.
[28] SET, occupational therapist.
[29] SET.
[30] *Id.*
[31] Brooks.
[32] Mother.
[33] SET, Principal at
[34] Expert in special education programming and placement, educational advocate.
[35] Father.

#10. Student did not receive OT services during the first two weeks of school in August 2011 because class schedules were being confirmed and everyone was settling in. The non-receipt of any related services during the first two weeks of school was typical for the start-up of the school year. During September 2011, Student received 1 hour of direct OT services during 4 of the 5 weeks that month; he was unavailable on 09/21/11 to receive services.[36] During the four weeks that Student received OT services at he received the following accommodations with no observed health problems or complaints of illness: multi-step directions, one to one assistance, breaks if needed, and a snack when Student requested one. Student never showed fatigue or slouching and when Student was given behavioral incentives, he accomplished tasks in the normal time frame. Student's attention span was normal for a Kindergarten student. Student made overall progress in achieving his occupational therapy IEP goals during the four weeks that he received OT services.[37]

#11. Attention and memory are major issues for seizure disorders, and frequent testing is necessary in order to determine the necessary classroom modifications and accommodations for Student due to his young age and seizure disorder.[38] The accommodations listed in Student's IEP were based on the results of a 01/07/10 neuropsychological evaluation, but the neuropsychological evaluation contained very limited academic skills testing due to Student's young age at the time, which was age 4. The accommodations enabled Student to achieve at his appropriate age level within the general education setting at his pre-school.[39] There was no evidence in the record that Student was achieving below State standard levels from June 2011 through September 2011. Student had not experienced any seizures in the past two years and his academic progress during the 2011-2012 school year at was good and he received educational benefit.[40] In early September 2011, Petitioners requested that DCPS conduct a neuropsychological reevaluation of Student based on the recommendation of the 01/07/10 neuropsychological evaluation and based on the existence of Student's seizure disorder. DCPS refused, stating that the reevaluation was not warranted because Student did not have a traumatic brain injury or Student was not slated for residential placement.[41] To date, a neuropsychological evaluation has not been completed by DCPS.[42]

#12. Student's 06/14/11 IEP prescribed that Student should receive 1 hour/week of speech-language pathology services during ESY in July 2011.[43] Student had three speech-language IEP goals to work on during ESY and Student received instruction on and made progress towards two of the goals. The third goal, i.e., that Student would initiate conversation during a structured small group activity in the classroom in 4/5 trials, was not introduced during ESY.[44]

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[36] Occupational therapist, DCPS-05.
[37] Occupational therapist.
[38] Clinical psychologist.
[39] P-4.
[40] SET, Principal at
[41] SET, Mother.
[42] SET.
[43] P-5-15.
[44] DCPS-04.

#13. On 09/20/11, Petitioners gave written notice to DCPS of their intent to unilaterally place Student at School for the remainder of the 2011-2012 school year and Student began attending School on 10/29/11, where he now receives full-time special education services and OT and PT consultation services. Student is not receiving direct OT and PT services at School because those services are not funded. Student is performing well at School and is making academic progress.[45] School is not an inclusive school and does not provide instruction within the general education setting; it is a full-time out of general education special education school.[46]

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:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"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,* 44 IDELR 150 (2005).

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).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to implement Student's 06/14/11 IEP, and by failing to provide Student with a placement that could implement his IEP since the beginning of the 2011-2012 school year; specifically, (a) by providing Student with only 30 minutes of OT services instead of one hour of OT services, and (b) by failing to provide Student with the accommodations listed in his IEP, i.e.; back-jack, frequent breaks/snacks, extended time to complete assignments, visual/picture cues, preferential seating, periodic check ins, one-on-one assistance, fidget object, pencil grip, massage brush and positive reinforcement chart; all of which led to daily health problems at home and school, and performance problems in the classroom.

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[45] P-1-1, Associate Head of School at School.
[46] Associate Head of School at School.

Hearing Officer Determination

Pursuant to 34 C.F.R. 300.323(c)(2), DCPS must ensure that as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. Related services include occupational therapy and speech-language pathology. 34 C.F.R. 300.34(a).

It is well established that not every failure to provide services according to a student's IEP amounts to an IDEA violation, but a material failure to implement an IEP violates the IDEA. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811, 822 (9th Cir. 2007). A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. A showing of educational harm is not required. *See Department of Education, State of Hawaii v. R.F. by Pauline F.,* 57 IDELR 197 (2011).

Petitioners failed to meet their burden of proof on the entirety of this issue. Although Petitioners proved that DCPS failed to provide Student with 1 hour/week of OT services during the first two weeks of the 2011-2012 school year, Student was not observed to have any physical or emotional problems as a result of the receipt or non-receipt of OT services, Student was making overall progress in achieving his OT goals, the amount of services missed was not a material failure to implement the IEP because the amount of OT services offered was substantially more than the amount of services missed, Petitioners did not present any evidence that two hours of missed OT services caused any educational harm to Student, Petitioners did not present any evidence that was unable to provide the required amount of OT services, and Petitioners withdrew Student from the public school just four weeks after OT services began and before the two hours of OT services could be made up by DCPS. Moreover, Student is currently not receiving any direct OT services at the private school that Petitioners unilaterally placed him at. Petitioners failed to meet their burden of proof on this aspect of the issue.

The evidence presented by Petitioners on the allegation that Student was denied a FAPE due to the non-receipt of the accommodations listed in his IEP was insufficient for the Hearing Officer to conclude that Student had been denied a FAPE for following reasons: (1) Petitioners' opportunity to observe Student in class, as well as the educational advocates' opportunity to observe Student in class, was very limited and did not comprise more than four hours of time during Student's six weeks of attendance at the public school; (2) during the time that either Petitioners or the advocates observed Student in school, Student was either receiving one-to one instruction from the special education teacher or sitting in or near the circle during floor activities with the necessary back supports provided by either the back-jack or the leg of a large wooden easel: (3) there was credible testimony by the occupational therapist and the special education teacher that during all observed instruction in the classroom, Student received the accommodations that he needed and if accommodations were not provided it was because Student did not demonstrate the need for them or it was a therapeutic team decision not to provide them; (4) there was no evidence in the record that Student had any health or performance problems in school except for a stomachache which was explained by Student's medical doctor possibly to be caused by anxiety over being in a new school, but it was of no physical origin, and not related in any way to the lack of accommodations; (5) the IEP did not state the frequency and duration with which the accommodations were to be used and (6) there was no evidence that

Student had performance problems in the classroom. A common sense approach would be to provide the accommodations as needed, as determined by the educational providers who worked closest with Student. And even if the Hearing Officer were to conclude that one or more of Student's accommodations was not provided as required by the IEP and that DCPS had violated the IDEA, Petitioners failed to offer any evidence that the lack of accommodations created any educational harm to Student or that Student was deprived of an educational benefit.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to conduct a reevaluation when Petitioners requested it on 08/31/11; specifically, by failing to conduct a neuropsychological reevaluation that was requested by Petitioners on the basis of a recommendation in a prior neuropsychological evaluation and based upon Student's seizure disorder and medications that impacted his academic abilities.

Once a child has been fully evaluated, a decision has been rendered that a child is eligible for services under the Act, and the required services have been determined, any subsequent evaluation of a child would constitute a reevaluation. *34 C.F.R. 300.303 Comments, page 46640, Federal Register Rules and Regulations.* "Evaluation" means procedures to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. 34 C.F.R. 300.15.

Pursuant to 34 C.F.R. 300.303(a), a public agency must ensure that a reevaluation of each child with a disability is conducted...(1) if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance of the child warrant a reevaluation; or (2) if the child's parent or teacher requests a reevaluation. A reevaluation my occur not more than once a year, unless the parent and the public agency agree otherwise, and must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary. 34 C.F.R. 300.303(b).

There is no condition precedent to be met by a parent requesting a reevaluation. A school's failure to comply with the parent's request clearly violates the language of the regulation. *Cartwright v. Dist. of Columbia,* 267 F.Supp.2d 83 (D.D.C. 2003). Therefore, DCPS must ensure that the neuropsychological reevaluation that Petitioners requested in early September 2011 is completed. *See Herbin v. District of Columbia,* 43 IDELR 110 (U.S. District Court, District of Columbia (2005)). The determination of whether or not DCPS denied Student a FAPE by failing to comply with Petitioners' request for a neuropsychological reevaluation is made on a case by case basis. *Id.*

The IDEA includes no specific deadline for conducting a reevaluation. In the absence of an applicable state deadline, the issue comes down to what is reasonable under the circumstances. *Smith v. District of Columbia,* 55 IDELR 291 (D.D.C. 2010). The more current an evaluation and IEP determination, the less likely that a delay in responding to the reevaluation request will be prejudicial or injurious." *Herbin.* In the present case, there was not merely a delay in DCPS conducting the reevaluation, there was a flat out refusal to do it. The last neuropsychological evaluation had been completed more than one year ago. Absent an Order from the Hearing Officer, the neuropsychological reevaluation would never by conducted by

DCPS because according to DCPS, Student did not meet their criteria for when a neuropsychological evaluation is warranted.

There was evidence from both sides that the lack of a neuropsychological reevaluation either harmed or did not harm Student. In favor of DCPS' position that there was no harm, were the facts that: (1) Petitioners' request for a neuropsychological reevaluation was made only three months after it was determined that Student was not below State standards; (2) Student had not suffered a seizure for the past two years; (3) Student did well and received academic benefit at for the short time that he attended; (4) Student was achieving well and receiving academic benefit at School; and (5) there was no evidence in the record that Student's IEP with the accommodations could not provide him with educational benefit.

In favor of Petitioners' position that there was harm caused by the non-completion of a neuropsychological reevaluation, were the facts that: (1) attention and memory are major issues for seizure disorders and testing is necessary to determine the necessary modifications and accommodations for Student who has a seizure disorder; (2) the most current neuropsychological evaluation was almost two years old, did not contain a lot of academic skills testing and was conducted while Student was in the pre-school setting; and (3) it had already been demonstrated at that three of the accommodations that had been deemed necessary by a prior Hearing Officer Determination and added to Student's IEP were already inappropriate or not necessary for Student at

Petitioners right to a neuropsychological reevaluation is guaranteed by the IDEA and without a favorable Hearing Officer Determination on this issue, Petitioners would be denied this right under the IDEA and the resulting right to participate in educational decision making regarding their child. DCPS' refusal to conduct a neuropsychological reevaluation constituted the denial of a FAPE. Student's educational needs needed to be re-assessed in view of the strong correlation between the results of the neuropsychological evaluation and the determination of the accommodations that Student needed, coupled with Student's young age and the fact that the prior neuropsychological evaluation did not contain a lot of academic skills testing. Petitioners met their burden of proof on this issue. The remedy is to order DCPS to fund the independent neuropsychological evaluation that Petitioners requested.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to provide related services in accordance with Student's IEP and a Hearing Officer Determination ("HOD"), during ESY in July 2011; specifically, by failing to provide all required speech-language services and by failing to provide instruction geared towards Student making progress towards achievement of speech-language IEP goals.

Petitioners failed to meet their burden of proof on the entirety of this issue. Student's 06/14/11 IEP prescribed that Student would receive 1 hour/week of speech-language pathology services during ESY in July 2011 and Student missed ESY during the first week due to transportation problems through no fault of DCPS. There were no service trackers in the record for the Hearing Officer to examine and Mother's testimony, which was inconsistent and based on review of the service trackers, was not credible. Student may have missed some speech-language services during ESY, but Petitioners failed to establish the quantity. IEP progress

reports indicate that Student did receive some speech-language services and was making progress towards achieving his IEP speech-language goals. Petitioners failed to establish the quantity of speech-language services missed during ESY; therefore, Petitioners failed to establish that DCPS violated the IDEA by committing a material failure to implement Student's IEP. Student was not denied a FAPE.

Student had three speech-language IEP goals to work on during ESY in July 2011 and Student made progress towards two goals. The third goal, i.e., that Student would initiate conversation during a structured small group activity in the classroom in 4/5 trials, was not introduced. There was no evidence in the record as to why this particular goal was not introduced when the others were and the Hearing Officer cannot infer that the reason was negligence or DCPS' willful failure to provide services. The Hearing Officer determines that failure to introduce one particular speech-language goal during three weeks of ESY does not constitute a material failure to implement the IEP when other speech-language goals were introduced, and Petitioners offered no evidence that failure to introduce this particular speech-language goal resulted in educational harm to Student.

Summary

After only six weeks of schooling at a public elementary school in the District of Columbia at the beginning of the 2010-2011 school year, Petitioners withdrew Student from school and unilaterally placed him at the separate special education private school that Petitioners had sought DCPS funding for as far back as March 2011. The evidence in the record not only supported, but mandated[47] Student's placement in an inclusion program with accommodations where Student would have access to his non-disabled peers; not the separate full-time special education school that Petitioners again seek DCPS funding for. Student's current IEP cannot be implemented at School and the record does not support a finding that Student requires placement in a full-time separate special education school in order to receive educational benefit. Student received educational benefit from the educational services he received for the six weeks that he attended the public school. In June 2011, Student was able to meet State standards and there was no evidence in the record that by the end of September 2011, when Student was withdrawn from public school, he had fallen below State standards or needed full-time special education services.

Petitioners failed to prove that the majority of the accommodations specified in Student's IEP were not provided to Student by DCPS or not provided in a timely manner, and the few accommodations that were not provided, were not provided for therapeutic reasons; i.e., Student did not display the need for them in the classroom. Moreover, Student's IEP did not specify the frequency or duration of the accommodations. Student was not denied an educational benefit from the non-receipt of specific accommodations and Student was not denied a FAPE.

Petitioners also failed to prove that Student was denied a FAPE as a result of missed speech-language services during ESY. The amount of alleged missed speech-language services could not be credibly quantified and no harm from the lack of services was shown. Petitioners did prove that DCPS failed to provide Student with a total of two hours of OT services during the

[47] 06/14/11 HOD.

first two weeks of August 2011, and this constituted a violation of the IDEA; however, no harm was shown as a result of the missed services. Student made overall progress in achieving his occupational therapy IEP goals and over time, Student's resistance to completing tasks improved with the use of incentive awards. Petitioners' abrupt withdrawal of Student from the public school prevented DCPS from making up the two hours of OT services that had not been provided to Student at the start of the school year. Lastly, failure to introduce one of three speech-language goals during three weeks of ESY was not a material failure to implement the IEP. Student was not denied a FAPE.

Petitioners' request for placement and funding at School is denied. There was no evidence in the record that the least restrictive environment where Student's educational needs could be met was a separate, full-time special education school; in fact, the evidence was to the contrary. As recently as June 2011, a Hearing Officer Determination found that Student's needs could be met in the general education curriculum with the appropriate accommodations. The majority of those accommodations had been provided to Student in the general education setting at during the first two weeks of the 2011-2012 school year and Student had benefited from his participation in instruction there.

ORDER

(1) DCPS shall provide Petitioners with a letter of funding for an independent neuropsychological evaluation, at market rate, within 10 business days of the date of this Order.

All other relief requested by Petitioners is **DENIED.**

IT IS SO ORDERED.

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).

Date: December 18, 2011

/s/ Virginia A. Dietrich
Hearing Officer