Owens, Tawanda (OSSE)

From: admin@dcsho.i-sight.com
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To: Cwhouck1@gmail.com; Washington, Maya (DCPS); HearingOffice, Student (OSSE); Due, Process (OCTO); mskotler1@gmail.com
Cc: Massey, Kimm (OSSE); Merced, Deusdedi (OSSE-Contractor)
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** This email was sent by Kimm Massey [mailto: Kimm.Massey@dc.gov] **

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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

OSSE
STUDENT HEARING OFFICE
2012 NOV 26 AM 8:28

[redacted], on behalf of
[redacted]

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

Hearing Officer: Kimm Massey, Esq.

Case No: 2012-0622

Room No.: 2006

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a [redacted], who presently attends [redacted] at a DCPS elementary school. On September 10, 2012, Petitioner filed a Complaint against DCPS, alleging that DCPS denied Student a free appropriate public education ("FAPE") by (1) failing to have a person qualified to interpret the results of Student's Developmental Optometry Evaluation present at Student's July 24, 2012 individualized education program ("IEP") meeting; (2) failing to properly revise Student's IEP on July 24, 2012 by failing to include Vision Therapy as either a related service or a supplemental aid or service; (3) failing to provide equal access to the aids, benefits, and services (including the general curriculum and extracurricular activities) provided to non-disabled peers; and (4) failing to fully implement Student's IEP by failing to provide ESY during SY 11/12. As relief for these alleged violations of IDEA, Petitioner requested an MDT meeting to revise the July 24, 2012 IEP to include vision therapy as a related service or supplemental aid or service; that DCPS fund vision therapy for one calendar year, as set forth in written treatment plans to be provided by the treating optometrist and/or vision therapist; and that DCPS implement Parent's compensatory education plan.

On September 17, 2012, DCPS filed its Response, which primarily asserted the following defenses: (1) DCPS's Vision Program Director participated in the July 24, 2012 meeting to interpret the evaluation results; (2) the team determined that the IEP should not include vision therapy and other interventions, including assistive technology, were included in the IEP instead; (3) vision therapy is a medical treatment that does not qualify as an other related service under IDEA; and (4) with respect to ESY, the Office of the State Superintendent of Education

("OSSE") Department of Transportation, not DCPS, is responsible for providing transportation and Petitioner's counsel did not inform DCPS that there was an issue with transportation until the final week of ESY.

The parties concluded the Resolution Meeting process by participating in a resolution session on September 28, 2012. No agreement was reached, but the parties agreed not to shorten the 30-day resolution period. Therefore, the 45-day timeline began on October 11, 2012 and will end on November 24, 2012, which is the HOD deadline.

On October 10, 2012, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer determined that Petitioner would be allowed to file a brief regarding whether vision therapy is a related service or a medical treatment and relevant case law on the subject in general, and DCPS would be allowed to file a brief regarding whether transportation is OSSE's function in the context of this case. The hearing officer set Friday, October 26, 2012, which was one week before the 5-day disclosure deadline, as the deadline for the briefs and indicated that parties could file responsive briefs if desired. The hearing officer issued a Prehearing Order on October 15, 2012.

On October 25, 2012, Petitioner submitted its brief regarding vision therapy. In its brief, Petitioner noted that a previous hearing officer ruled that DCPS was obligated under IDEA to provide Student with a developmental optometry evaluation but did not rule whether vision therapy is a related service. Petitioner asserted, however, that vision therapy is a related service and has been recognized as such by both the U.S. Department of Education and other jurisdictions. Petitioner also asserted that vision therapy is required under Section 504 of the Rehabilitation Act.

On October 26, 2012, DCPS submitted its brief regarding the provision of transportation services to children in the District of Columbia. In its brief, DCPS asserted that its responsibility with respect to transportation is limited to making a transportation request, at which point the responsibility shifts to OSSE's Department of Transportation to manage school bus transportation for students enrolled in DCPS and DC Public Charter Schools. In support of this argument, DCPS relied upon plans and orders issued in the case of *Petties v. D.C.*, 881 F. Supp. 63 (D.D.C. 1995) to demonstrate that DCPS has not had responsibility for the transportation of students in the District of Columbia since 2003.

On October 31, 2012, DCPS also submitted a Response to Petitioner's brief regarding vision therapy. In its responsive brief, DCPS argued that vision therapy is medical in nature and can only be provided by a licensed physician, and because vision therapy is a medical service, it does not qualify as an other related service under IDEA.

By letter dated November 1, 2012, DCPS disclosed nine documents (Respondent's Exhibits 1-9). By letter dated November 2, 2012, Petitioner disclosed thirty-seven documents (Petitioner's Exhibits 1-37).

The hearing officer convened the due process hearing on November 9, 2012.[1] As a preliminary matter, the hearing officer indicated her concern that claim #3 regarding failure to provide Student with "equal access" was a claim arising under section 504, which is beyond the hearing officer's jurisdiction, although the hearing officer can determine whether Student requires additional accommodations under IDEA. Petitioner stated that it was withdrawing claim #3 from consideration in this case, and that it was also withdrawing its request for compensatory education.

Thereafter, DCPS's disclosed documents were admitted without objection. Petitioner's Exhibits 1-3, 5-7, 12-13, pages 1-12 of 14, 15-17, 26, 29-30, 32, and 34-36 were admitted without objection; Petitioner's Exhibits 4, 8-11, 18, 20-21, 26-28, 31, and 33 were admitted over objection; Petitioner's Exhibits 22-25 were conditionally excluded; and Petitioner's Exhibits 14 (pages 13-17), 19, and 37 were withdrawn by Petitioner.

Petitioner then presented its opening statement and testimonial evidence, and DCPS presented its opening statement and testimonial evidence, at which point the time reserved for the hearing had already elapsed. Therefore, it was determined that the parties would file written closing statements, with Petitioner filing its closing on November 14 and DCPS filing its closing on November 16. Both parties timely filed their written closing statements.

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

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS deny Student a FAPE by failing to have present at Student's July 24, 2012 IEP meeting a person qualified to interpret the results of Student's developmental optometry evaluation?

2. Did DCPS deny Student a FAPE by failing to include vision therapy as either a related service or a supplemental aid on Student's July 24, 2012 IEP?

3. Did DCPS deny Student a FAPE by failing to provide ESY during Summer 2012?

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

FINDINGS OF FACT[2]

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 [redacted] who presently attends [redacted] at a DCPS elementary school.[3]

2. Student's current IEP is dated July 24, 2012. The IEP identifies Student's primary disability as specific learning disability ("SLD"), and it requires Student to receive 12 hours per week of specialized instruction, 120 minutes per month each of occupational therapy and speech-language pathology, transportation services, ESY, assistive technology consisting of a laptop PC and handwriting slant board, and the following Other Classroom Aids and Services: laptop that can be taken home; reinforcement for wearing glasses; homework with mazes, word searches, dot to dots; directions given in same location in the classroom; dark, bold 14 point font print with lots of white spaces between sentences; bold or raised line paper; visual overlays with black lines to assist in visual tracking while reading; no sharing of books, handouts or other visually presented materials; no copying from board or texts – send documents electronically to assistive device; use of large square graph paper with bold (sic); clear desk/classroom of extraneous materials; visual presentation of directions paired with oral directions; opportunities for hand-on learning, manipulatives; black felt under manipulatives so they are easier to see; break tasks into small steps; be sure to gain attention prior to giving directions; and use of graphic organizers in the classroom.[4]

3. Student's previous IEP is dated November 3, 2011. This IEP also identifies Student's primary disability as SLD and requires Student to receive 12 hours per week of specialized instruction, and 120 minutes per month each of occupational therapy and speech-language pathology. However, this IEP indicates that Student did not require ESY services or transportation services, and this IEP does not include any of the Other Classroom Aids and Services included in the current IEP.[5]

4. Both the July 24, 2012 and November 3, 2011 IEPs include the following accommodations to be afforded Student in the classroom and on Statewide assessments: reading of test questions; repetition of directions; simplification of oral directions; write in test books; calculators; adaptive or special furniture; location with minimal distractions; preferential seating; small group testing; flexible scheduling; extended time on subtests; and breaks during a subtest.[6]

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[2] To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.
[3] *See* Complaint at 1; testimony of Parent.
[4] Petitioner's Exhibit 14; Respondent's Exhibit 4.
[5] Petitioner's Exhibit 2.
[6] Petitioner's Exhibit 14 at 10 and Petitioner's Exhibit 2 at 10; Respondent's Exhibit 4 at 10.

5. On November 10, 2010, DCPS administered a confidential Initial Psychological Evaluation report for Student. Although Student obtained overall cognitive scores in the Very Low, Mild to Borderline range, those scores did not represent Student's true cognitive potential because she obtained higher scores in various verbal cognitive areas. Instead, Student's wide range of cognitive scores from Average to Very Low evidenced strengths and weaknesses associated with Learning Disabilities. With respect to academic skills, Student's skills in reading, math, and writing were in the kindergarten to 1st grade range. The evaluation revealed that Student learns best through oral and verbal strategies, and she has difficulties learning concepts and academic information presented within a non-verbal context. Hence, her scores dropped to the Very Low, Moderate level when she had to use visual-motor skills.[7]

6. On February 21, 2012, Student received an independent Occupational Therapy evaluation. The evaluation revealed that Student "demonstrates difficulties in the areas of sensory processing, visual perception, visual motor integration, fine motor precision, fine motor integration, manual dexterity, upper limb coordination, and handwriting. Most of [Student's] visual perceptual and visual motor skills fell in the 'Well Below Average' range. [Student's] difficulty with visual motor tasks impact[s] her accuracy when copying from the board, copying from a text, forming letters, and forming and copying shapes involved in math. [Student's] decreased fine motor speed and dexterity will contribute to decreased speed of written communication including handwriting, as well as keyboarding. [These] delays are indicative of a student in need of therapeutic services and academic assistance. [Student] would benefit from a team approach to education, in that her deficits are significant, and do not fall in one particular area. . ."[8]

7. In Spring 2012, DCPS amended Student's then current IEP, dated November 3, 2011, to add ESY.[9]

8. On July 10, 2012, Student received an independent Developmental Vision Evaluation. Student's eyes and surrounding structures revealed no evidence of disease or abnormality. Her visual acuity is 20/20 with her right eye, and nearly 20/20 with her left eye (uncompensated). Student has moderate farsightedness with a small amount of astigmatism, but compensatory lenses allow her to see more clearly and comfortably. The evaluation further revealed that Student has deficits in eye movement control, eye teaming ability, eye-hand coordination, visual form perception, visual thinking, visual motor integration, oral reading and primitive reflexes. The developmental optometrist who conducted the evaluation rendered an array of diagnoses, including convergence insufficiency, based on these deficits, prescribed Individualized Optometric Vision Therapy for Student, and also recommended the following for Student: glasses for full-time wear; an auditory processing evaluation; a slant board or slanted desk when possible; sitting in an

[7] Petitioner's Exhibit 1; Respondent's Exhibit 7.
[8] Petitioner's Exhibit 5, page 56.
[9] Petitioner's Exhibit 8.

ergonomically correct position with proper chair and table height; working in a well-lighted area with clear worksheets that contain larger text and images; increased space between questions on printed material and use of copies with only one image per page and related questions on that same page; extra time for visually oriented assignments; and reduced complexity for tasks with a visual component.[10]

9. Convergence insufficiency is a binocular (two-eyed) vision disorder in which the eyes do not work at near easily. This condition can cause blurred vision, eyestrain, inability to concentrate, squinting when reading, and having trouble remembering what was read, which are symptoms of which Student complains. Often words appear to move around the page and the person experiences double vision. In some individuals with convergence insufficiency, the vision in one eye shuts down because the brain ignores one eye to avoid double vision even though both eyes are open and healthy and capable of sight. This is a neurologically active process caused suppression, which causes a loss of binocular vision and depth perception. Student exhibits suppression, which takes energy, effort and focus away from the tasks she's trying to perform.[11]

10. Parent is concerned that Student's vision issues create tracking problems with her reading so she is reading well below grade level, and she has problems with focusing visually, with clumsiness, looking in one direction when she should be looking in another, dropping things, bumping into things, reaching for things but missing them, and similar problems. Student began wearing glasses during Summer 2012. The glasses help Student to see words more clearly, but she still drifts when reading, which means she may be reading at the top of a page and then will skip down several paragraphs or to the bottom of the page.[12]

11. At Student's July 24, 2012 IEP team meeting, DCPS's Program Director for Vision Services interpreted Student's developmental vision evaluation report so that the team could understand the report. The team was of the opinion that Student did not need vision therapy because accommodations would work for Student in the educational setting and allow her to access the curriculum. Moreover, as Student had already made progress, the team did not feel that Student could not make progress without vision therapy.[13]

12. DCPS's Program Director has a Masters of Education in Secondary Transition/Special Education and a Certificate of Educational Administration, as well as approximately 20 years of experience in the field of special education. The Program Director has extensive experience programming for and implementing vision services. She also has experience distinguishing between visual perception and visual acuity problems. She was trained by and continues to be mentored by a Vision Specialist, she is a member of the American Council for the Blind, and she manages

[10] Petitioner's Exhibit 13; testimony of developmental optometrist.
[11] Petitioner's Exhibits 13 and 28; testimony of developmental optometrist.
[12] Testimony of Parent.
[13] Testimony of Program Director.

federal quota funds for blind and visually impaired students through the American Printing House for the Blind in her role as *ex officio* Trustee for the District of Columbia. The Program Director understands the educational implications of Student's developmental vision evaluation and was able to interpret at the due process hearing a substantive sentence that was plucked out of the evaluation and read to her out of context. However, the Program Director incorrectly believes that vision therapy can only be provided by a medical doctor.[14]

13. The accommodations listed in Student's current IEP will keep her from falling farther behind.[15]

14. Eye glasses alone do not improve convergence – the ability to bring the eyes together to see something up close, and ocular motor skills – jumping from one point to another. Although eye glasses occasionally can improve depth perception, Student's depth perception did not improve with her eyeglasses.[16]

15. Technology can relieve some of Student's visual issues, but it may also create other issues. For example, reading from an electronic device will make words bigger and give more space between the words, which makes it easier to track words, but then it's harder for the eyes to maintain focus and the letters on screen don't have the same crispness as ink on paper so it's harder to read for a long time in that format.[17]

16. On August 1, 2012, the optometrist who conducted Student's developmental vision evaluation prepared a writing stating that Student requires intensive vision therapy consisting of three 50-minute sessions per week at a cost of $150 per session for an initial period of three months.[18]

17. Vision therapy is a series of activities designed to enable a person to use their eyes more efficiently as a team and to develop the various types of visual skills that they either do not have or had and lost due to injury, stroke or other cause. The therapy retrains the person to make more accurate assessments of space and recalibrates the brain's system of understanding space. It helps to create new pathways in the brain. The underlying problems are a brain processing issue, not a physical problem where the eyes cannot physically perform certain tasks.[19]

18. Medical doctors do not provide vision therapy. Ophthalmologists are medical doctors who have received a medical degree, while optometrists have completed a doctoral program of optometry and have received a Doctorate degree in Optometry. An optometrist may provide vision therapy, but normally vision therapy is provided by a vision therapist who is not an optometrist or ophthalmologist and has received either

[14] Testimony of Program Director; Respondent's Exhibit 9; Petitioner's Exhibit 33.
[15] Testimony of developmental optometrist.
[16] Testimony of developmental optometrist.
[17] Testimony of developmental optometrist.
[18] Petitioner's Exhibit 15.
[19] Testimony of developmental optometrist.

a high school diploma, an associate degree, or a bachelor's degree. Vision therapists can only work under the supervision of an optometrist, and there is no license for vision therapists. The College of Optometrists and Vision Development oversees the certification of vision therapists. To become certified, a vision therapist must work with patients for two years with a minimum of 2000 patient contact hours and complete an evaluation.[20]

19. Vision therapy is somewhat controversial and it is questionable whether vision therapy is effective. Some studies show that vision therapy can be effective, while other studies question the efficacy of vision therapy.[21]

20. DCPS presently does not provide vision therapy to any of its students because DCPS considers vision therapy to be a medical service, not a related service.[22] DCPS does not have any vision therapists on staff.

21. To qualify for vision services in DCPS, a student must have visual acuity worse than 20/70 in the better eye with best correction, loss of field vision, a cortical vision impairment, or a syndrome or condition likely to result in permanent blindness. Student does not qualify for vision services under DCPS's standards because her visual acuity is just fine with glasses and she does not meet any of the criteria for vision services. Student may have other issues that are affecting her educational performance that are not vision-related under DCPS's definition, as issues with visual perception, memory, cognition are all related to brain functioning, as opposed to a physical problem with the eyes.[23]

22. On August 29, 2012, DCPS provided Parent with a laptop to be taken home for Student's use. The laptop was intended to address (1) Student's impairment in eye coordination that causes her eyes not to work together and makes it difficult for Student to keep her place while reading and in transcribing from the board by illuminating and enlarging text so that it will be easier for Student to keep her place; and (2) Student's fine motor issues by allowing Student to type text instead of writing it.[24]

23. Student has made academic progress since she began at her current DCPS school in SY 11/12, despite her cognitive limitations. DCPS has provided Student with a laptop, a slant board, vision blockers and a magnifying glass, and reading techniques such as highlighting and limiting the amount of text. Student's teachers and related service providers report that she is doing well and making progress.[25]

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[20] Testimony of developmental optometrist.
[21] Testimony of developmental optometrist; testimony of Program Director; *see, e.g.,* Petitioner's Exhibit 38.
[22] Testimony of Program Director.
[23] Testimony of Program Director.
[24] Respondent's Exhibits 2-3.
[25] Testimony of SEC; testimony of occupational therapist; *see also* Petitioner's Exhibits 3 and 12; Respondent's Exhibit 6.

24. Student's occupational therapist has been working with Student since SY 10/11, when Student was not attending a DCPS school and Parent was bringing her to the current DCPS school weekly for OT services. With respect to OT, Student's needs are improved handwriting skills, improved visual motor skills, which affects precision with writing and making shapes, and visual perceptual skills, which affects copying from the board to paper with punctuation and capitalization. Student can navigate the school, take care of her physical needs, and she always tries to complete tasks to the best of her ability. Student accommodates for her deficit in scanning ability by turning her head to scan. Student's handwriting has improved vastly, although she still needs verbal cues for spacing, and her attention has improved. She can also now do 24-piece puzzles that previously were a challenge for her. However, Student's lower cognitive skills impact her handwriting, fine motor and visual motor skills.[26]

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. Alleged Failure to Have Appropriate Qualified Person at IEP Meeting

Under IDEA, a disabled child's IEP Team must include, *inter alia*, an individual who can interpret the instructional implications of evaluation results. 34 C.F.R. § 300.321(a)(5). This particular team member does not have to be an individual who is qualified to conduct a particular assessment, because such an individual "does not necessarily have the skills or knowledge to assist the IEP Team in determining the special education, related services, and other supports that are necessary in order for the child to receive FAPE." Comment to the Regulations, Section 300.321(a)(5), at Federal Register, Vol. 71, No. 156, p. 46670 (August 14, 2006).

In the instant case, Petitioner argues that DCPS's Program Director for Vision Services was not qualified to interpret the instructional implications of Student's developmental vision evaluation report at Student's July 24, 2012 meeting. Petitioner points to the Program Director's mistaken belief that vision therapy services must be provided by a medical doctor, as well as her testimony that Student needs only accommodations and modifications and the Program Director acknowledgment that she has not had vision therapy training as evidence that the Program Director was unqualified to interpret the instructional implications of Student's evaluation.

On the other hand, DCPS argues that the Program Director was indeed qualified to interpret the instructional implications of Student's developmental vision evaluation results and points to the Program Director's post-secondary education and her extensive experience in special education in general, and vision services programming in specific, in support of its position. DCPS also notes that the hearing officer accepted the Program Director's testimony as the testimony of an expert in the programming and implementation of vision services.

[26]Testimony of occupational therapist.

A review of the evidence in this case confirms that DCPS's Program Director for Vision Services has a Master's degree in special education and approximately 20 years of experience in the field as well. The Program Director has extensive experience programming for and implementing vision services. She also has experience distinguishing between visual perception and visual acuity problems, she understands the educational implications of Student's developmental vision evaluation, and she was able to interpret the evaluation report at Student's July 24, 2012 IEP team meeting so that the team could understand the report. Although the Program Director mistakenly believes that vision therapy services must be provided by a medical doctor and she has not been trained to provide vision therapy, these factors do not prevent her from serving as an individual who can interpret the instructional implications of Student's developmental vision evaluation results pursuant to 34 C.F.R. § 300.321(a)(5), because such an individual does not have to be qualified to administer the assessment at issue or to provide the related service recommended in the assessment. As a result, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim.

2. Alleged Denial of FAPE by Failing to Include Vision Therapy Services on IEP

The FAPE required by IDEA is tailored to the unique needs of a disabled child by means of the IEP. Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, a school district satisfies IDEA's requirement to provide a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id; see also,* 34 C.F.R. § 300.17 (IDEA defines FAPE to mean special education and related services that, *inter alia*, are provided at public expense and in conformity with an IEP).

IDEA does not require a school district to maximize the potential of each handicapped child; instead, IDEA requires only that a school district provide a basic floor of opportunity consisting of access to specialized instruction and related services that are individually designed to provide educational benefit to the handicapped child. *Rowley, supra.* In this regard, "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34(a).

IDEA requires a disabled child's IEP to include, *inter alia*, a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining annual IEP goals, to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and nondisabled children. 34 C.F.R. § 300.320(a)(4). Moreover, IDEA charges the disabled child's IEP Team with the responsibility of developing, reviewing and revising the IEP, although the team must consider, *inter alia*, the parent's concerns, the results of initial and/or recent evaluations, and the academic, developmental and functional needs of the child in doing so. *See* 34 C.F.R. § 300.324(a)(1)(iii).

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to include vision therapy services on her July 24, 2012 IEP, because Student has a visual impairment, the vision therapy is needed to remediate Student's disabling conditions even if she does not have a visual impairment, and vision therapy is a related service under IDEA. DCPS disagrees, arguing that vision therapy is not required to provide Student with access to the general education curriculum, vision therapy is a medical service that does not qualify as a related service under IDEA, and Student does not qualify as a student with a visual impairment.

The evidence in this case reveals that Student received an independent developmental vision evaluation on July 10, 2012, and DCPS convened Student's IEP team to review the evaluation results on July 24, 2012. At the IEP meeting, the team determined that Student is making progress, and that she does not need vision therapy because accommodations will work for her in the educational setting and allow her to access the curriculum. As a result, the team added assistive technology consisting of a laptop PC and a handwriting slant board, as well as an exhaustive list of Other Classroom Aids and Services to Student's July 24, 2012 IEP. These assistive technology devices and Other Classroom Aids and Services were not listed on Student's previous IEP. Several of the additions to Student's July 24, 2012 IEP were recommended in her July 10, 2012 independent developmental vision evaluation. DCPS has since provided Student with the laptop and slant board, as well as vision blockers and a magnifying glass. Student also began wearing glasses in Summer 2012. There is no assertion in the instant action that DCPS is not providing Student with the Other Classroom Aids and Services listed in the current IEP. Student's teachers and related service providers report that she is making progress.

Based on this evidence, the hearing officer is not persuaded that DCPS denied Student a FAPE by failing to add vision therapy to her current IEP. Student's IEP team met to review Student's developmental evaluation and revised Student's IEP to include assistive technology and an array of other classroom aids and services to address the deficits revealed by the evaluation results. Student was making progress before the items were added to her IEP, and from all indications she continues to make academic progress. Hence, it would appear that DCPS is providing Student with personalized instruction and sufficient support services to permit Student to benefit educationally from that instruction. Nothing more is required. *See Rowley, supra* (school district need only provide basic floor of opportunity and is not required to maximize disabled child's potential). The fact that Student's independent evaluator recommended vision therapy does not change this outcome, as IDEA charges Student's IEP team with the task of reviewing and revising Student's IEP after taking into account recent evaluation data, and the evidence in this case demonstrates that the team did just that, even though it ultimately rejected the evaluator's recommendation. *See Smith ex rel. H.S. v. D.C.*, 112 LRP 12071 (D.D.C. 3/8/12) (student with cognitive limitations who made slow but steady progress received FAPE without items recommended in evaluation, because even though student might have made greater improvements with recommended items, the fact that he made progress without them showed they were not necessary for Student to receive FAPE, and district had no duty to maximize potential).

The hearing officer also notes that the assistive technology and other classroom aids and services were added to Student's IEP after the end of SY 11/12 and prior to the start of SY 12/13, and Student also began wearing glasses for the first time during Summer 2012. Petitioner filed its

Complaint a few weeks after the start of SY 12/13, and as of the time of the due process hearing in this case, SY 12/13 had been in session for only approximately two and one-half months. Hence, it would appear that Petitioner has not yet allowed sufficient time to pass to determine the effectiveness of the assistive technology and other classroom aids and services that are now being provided to Student, together with her new glasses, and whether additional support and/or related services are indeed required. Under these circumstances, and based on the evidence outlined above, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim.[27]

3. Alleged Denial of FAPE by Failing to Provide ESY

IDEA provides that each public agency must ensure that extended school year services are available as necessary to provide FAPE. 34 C.F.R. § 300.106(a)(1). However, extended school year services must be provided only if a child's IEP Team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. 34 C.F.R. § 300.106(a)(2).

In the instant case, Petitioner has alleged that DCPS failed to fully implement Student's IEP by failing to provide ESY during SY 11/12. DCPS does not dispute that Student did not attend ESY during SY 11/21; however, DCPS asserts that Student did not attend ESY because OSSE failed to provide Student with the necessary transportation services, and DCPS further asserts that Parent failed to notify DCPS of the lack of transportation services until one week before the end of ESY.

A review of the evidence in this case demonstrates that Petitioner has failed to present any proof whatsoever tending to demonstrate that Student suffered educational harm as a result of her failure to attend ESY. As a result, the hearing officer concludes that even though the parties do not dispute that Student did not attend ESY during Summer 2012 as required by her IEP, Petitioner has failed to meet its burden of proof on this claim. *See e.g., Suggs v. District of Columbia,* 679 F.Supp.2d 43, 49-50 (D.D.C. 2010) (to succeed on an IDEA claim a party must prove that the school district denied the child a FAPE by depriving him of educational benefits to which he is entitled).

ORDER

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

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[27]The hearing finds it unnecessary to determine whether Student has a visual impairment, despite the parties' arguments regarding that issue, because that determination will not change the outcome of the case. *See e.g., J.D. and B.D. ex rel. K.D. v. Crown Point Sch. Corp.* 112 LRP 10192 (N.D. Ind. 2/24/12) (student's receipt of FAPE was not contingent on his disability label but whether his IEP addressed his unique needs and conferred meaningful benefit). Similarly, as the hearing officer has determined that DCPS did not deny Student a FAPE by failing to include vision therapy on her IEP, the hearing officer finds it unnecessary to determine, under the factual circumstances of this case, whether vision therapy is a related service or a medical service.

1. All claims and requests for relief in Petitioner's September 10, 2012 Complaint are **DENIED** and **DISMISSED WITH PREJUDICE.**

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: 11/24/2012

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