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Student Hearing Office
August 19, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: August 16, 2013

Hearing Officer: Peter B. Vaden

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the "Petitioner" or "MOTHER"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq*., and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("DCMR"). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools' ("DCPS") has denied Student a free appropriate public education ("FAPE") because its January 12, 2012 and June 6, 2013 Individualized Education Programs ("IEP") do not meet Student's alleged need

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

for placement in a therapeutic small classroom setting and because DCPS allegedly did not conduct a functional behavioral assessment requested by the parent.

Student, an AGE girl, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 27, 2013, named DCPS as respondent. The parties met for a resolution session on July 11, 2013 and were unable to reach an agreement. On July 17, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was reconvened before the undersigned Impartial Hearing Officer on August 13, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by ES PRINCIPAL and by DCPS COUNSEL.

Petitioner testified and called as witnesses, EDUCATIONAL ADVOCATE and AUDIOLOGIST. DCPS did not call any witnesses. Petitioner's Exhibits P-1 through P-24 were admitted into evidence without objection. DCPS' Exhibits R-1 through R-12 were admitted without objection. At the conclusion of Petitioner's case-in-chief, counsel for DCPS made a motion for a directed finding against the Petitioner on the grounds that she had not established a *prima facie* case of denial of FAPE. I took the motion under advisement. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

This issues to be determined in this case are:

– Whether DCPS' January 12, 2012 IEP was inappropriate because it failed to provide Student a full time special education placement in a therapeutic, small classroom setting;

– Whether DCPS' June 6, 2013 IEP is inappropriate because it fails to provide Student a full time special education placement in a therapeutic, small classroom setting; and

– Whether DCPS denied Student a FAPE by failing to conduct a functional behavioral assessment requested by Parent and by failing to develop a Behavior Intervention Plan.

For relief, Petitioner seeks an order that Student be placed full-time in a small, therapeutic classroom setting, outside of general education, and that she be provided a full-time dedicated aide. Petitioner also requests that DCPS be ordered to complete its functional behavioral assessment (FBA) of Student and to implement its behavior intervention plan (BIP). Petitioner also seeks an award of compensatory education to compensate Student for DCPS' alleged denial of FAPE under the January 12, 2012 IEP.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE girl, resides with Mother in the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education and related services under the primary disability classification, Multiple Disabilities (MD) based upon concomitant impairments of Hearing Impairment and Intellectual Disability ("ID"). Exhibit P-3.

3. For the 2012-2013 school year, Student was assigned to CLASSROOM at CITY

ELEMENTARY SCHOOL. Exhibit R-5. Student has attended City Elementary School since she was 3 years old. Testimony of Mother.

4. Student has been followed for several years by HOSPITAL HEARING AND SPEECH CENTER for bilateral hearing loss, which is conductive in nature for a least one ear. She is prescribed a hearing aid for use in and out of school. However the hearing aid was lost in February 2013. Due to insurance issues, Mother has not been able to obtain a permanent replacement hearing aid for Student. Exhibit P-16; Testimony of Mother. Without the hearing aid, Student's hearing loss in both ears is moderate to severe. Testimony of Audiologist.

5. In a Psychological Reevaluation Report dated May 28, 2013, DC SCHOOL PSYCHOLOGIST reported that Student's cognitive functioning falls within the Very Poor or Extremely Below Average range as indicated by her inability to perform tasks within the standardized procedures. DC School Psychologist recommended that Student's cognitive and academic abilities do not suggest that placement in a general education setting is the most appropriate setting for her and that Student presents as a child who would benefit from a placement designed for children with ID, that allows her to receive assistive services to address her hearing impairment also. Exhibit P-10.

6. Student's January 11, 2012 IEP at City Elementary School provided that Student should receive the following special education and related services

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Specialized Instruction	Outside Gen. Education	1/11/2012	1/10/2013	22.63 hr per wk
Specialized Instruction	Outside Gen. Education	1/11/2012	1/10/2013	2 hr per wk

Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Audiology	Outside Gen. Education	1/11/2012	1/10/2013	90 min per mon
Speech-Language Path.	Outside Gen. Education	1/11/2012	1/10/2013	4 hr per mon
Occupational Therapy	Outside Gen. Education	1/11/2012	1/10/2013	240 min per mon
Physical Therapy	Outside Gen. Education	1/11/2012	1/10/2013	120 min per mon

The January 11, 2012 IEP stated Student did not require the support of a dedicated aide. Exhibit P-8.

7. Student's IEP Progress Report for the period ending June 14, 2012 reported that Student had "Mastered" her goals to follow one-step directions and to use a consistent lead hand/assist hand pattern of movement and that Student was "Progressing" on all of her other IEP Annual Goals. Exhibit R-12.

8. Student's IEP was revised on November 13, 2012 IEP. The November 13, 2012 IEP provided that Student should receive the following special education and related services

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Specialized Instruction	Outside Gen. Education	11/13/2012	11/12/2013	24.63 hr per wk

Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Audiology	Outside Gen. Education	11/13/2012	11/12/2013	90 min per mon
Speech-Language Path.	Outside Gen. Education	11/13/2012	11/12/2013	4 hr per mon
Occupational Therapy	Outside Gen. Education	11/13/2012	11/12/2013	4 hr per mon
Physical Therapy	Outside Gen. Education	11/13/2012	11/12/2013	120 min per mon

The November 13, 2012 IEP provided for an FM Device as Assistive Technology for Hearing and stated Student did not require the support of a dedicated aide. Exhibit R-6.

9. Student's 2012-2013 classroom at City Elementary School included 3-4 children

with hearing impairments and 4-5 children who were non-disabled. The classroom was staffed with two teachers and a teaching assistant. Testimony of Mother.

10. At the beginning of the 2012-2013 school year, Mother felt that Student was making great strides. Until she lost her hearing aid in February 2013, Student was making progress in school. After Student lost her hearing aid, Mother felt that her progress stopped. Testimony of Mother.

11. Student's IEP Progress Report for the period ending June 20, 2013 reported mixed results – Progressing on a majority of annual goals, but No Progress on 4 goals. Exhibit R-11.

12. Student's IEP was revised on June 4, 2013. The June 4, 2013 IEP provided that Student should receive the following special education and related services

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Specialized Instruction	Outside Gen. Education	06/04\2013	06/03/2014	24.75 hr per wk

Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Audiology	Outside Gen. Education	06/04\2013	06/03/2014	60 min per mon
Speech-Language Path.	Outside Gen. Education	06/04\2013	06/03/2014	4 hr per mon
Occupational Therapy	Outside Gen. Education	06/04\2013	06/03/2014	4 hr per mon
Physical Therapy	Outside Gen. Education	06/04\2013	06/03/2014	120 min per mon

The June 4, 2013 IEP also provides for an FM system as an Assistive Technology device for Hearing and states that Student does not require the support of a dedicated aide. Exhibit P-3.

13. At the June 4, 2013 IEP meeting, Student's IEP team discussed that Student would benefit from small classroom size with intensive specialized instruction to address her

deficits in core academic areas as well as related services to address hearing, speech and motor skills. Exhibit R-3.

14. On May 1, 2013, Petitioner's Counsel requested comprehensive special education evaluations for Student to include, but not be limited to an FBA and a BIP. Exhibit P-5. DCPS conducted a psychological evaluation on May 13, 2013 (Exhibit P-10), a Speech-Language Evaluation in May 2013 (Exhibit P-14), an Audiological Review on May 29, 2013 (Exhibit P-15), and an FBA in June 2013 (Exhibit R-9). On July 18, 2013, City Elementary School developed a Behavior Intervention Plan for Student based upon the June 2013 FBA report. Exhibit R-10.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Hinson ex rel. N.H. v. Merritt Educational Center*, 579 F.Supp.2d 89, 95 (D.D.C.2008) (Plaintiff, as the party challenging the IEP, had the burden of proof to show that the plan was inappropriate, citing *Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).)

Analysis

1. IS DCPS' JANUARY 12, 2012 IEP INAPPROPRIATE BECAUSE IT FAILED TO PROVIDE STUDENT A FULL TIME SPECIAL EDUCATION PLACEMENT IN A THERAPEUTIC, SMALL CLASSROOM SETTING?

2. IS DCPS' JUNE 6, 2013 IEP INAPPROPRIATE BECAUSE IT FAILS TO PROVIDE STUDENT A FULL TIME SPECIAL

EDUCATION PLACEMENT IN A THERAPEUTIC, SMALL CLASSROOM SETTING?

"The question of whether a public school placement is appropriate rests on '(1) whether DCPS has complied with IDEA's administrative procedures and (2) whether or not the IEP . . . was reasonably calculated to provide some educational benefit to [the student.]'" *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010), quoting *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 80 (D.D.C.2004). In this case, Petitioner has not raised a procedural issue with the development of Student's IEPs. Therefore, I move directly to the second prong of the inquiry.

The appropriateness of an IEP is judged prospectively, at the time the IEP was implemented, not by the effectiveness of the program in hindsight. Thus, the Hearing Officer must ask whether the IEP was appropriately designed and implemented so as to convey a meaningful benefit to the child. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56 (D.D.C. 2008). The IDEA's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).) The minimum standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity," 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 IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other

children. *Id.* at 198 (internal quotations and citations omitted.) Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

Petitioner asserts that Student has been denied a FAPE by DCPS' January 12, 2012 and June 6, 2013 IEPs because neither IEP specified that Student's placement must be a therapeutic, small classroom setting. While Petitioner had the burden of proving that Student's placement at City Elementary School was inappropriate, she presented no evidence in support of this claim. Student has in fact been placed in a small classroom, outside of the general education setting, with a very low student-to-teacher ratio. Petitioner's only expert, Audiologist, testified that she was not equipped to evaluate Student's classroom setting. *Cf. Jalloh ex rel. R.H. v. District of Columbia*, 535 F.Supp.2d 13, 24 (D.D.C.2008) (Parent presented no evidence in support of claim.) Moreover, Mother testified that during the 2012-2013 school year, Student was progressing, in fact, was making "great strides," in her education setting until she lost her hearing aid in February 2013.[2] Mother's observation of progress is supported by the school's IEP progress reports which indicate that Student was progressing on her annual IEP goals in spring 2012 and over the 2012-2013 school year. Academic progress is one of the "yardsticks" used by courts to assess the validity and sufficiency of an IEP. *See, e.g., Smith v. District of*

[2] Petitioner has not alleged that DCPS should be responsible for providing replacement hearing aids for Student. This is presumably because Student requires a hearing aid at all times – not just when she is in school. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46581 (August 14, 2006). ("As a general matter, public agencies are not responsible for providing personal devices, such as eyeglasses or hearing aids that a child with a disability requires, regardless of whether the child is attending school. However, if it is not a surgically implanted device and a child's IEP Team determines that the child requires a personal device (*e.g.*, eyeglasses) in order to receive FAPE, the public agency must ensure that the device is provided at no cost to the child's parents.")

Columbia, 846 F.Supp.2d 197, 201 (D.D.C. 2012); *Hunter v. District of Columbia*, 2008 WL 4307492, 10 (D.D.C. Sept. 17, 2008), citing *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir.1998) ("An appropriate public education under IDEA is one that is likely to produce progress, not regression.") (citations omitted). Accordingly, I find that Petitioner has not met her burden of proving that when developed, DCPS' January 12, 2012 and June 6, 2013 IEPs were not reasonably calculated to provide educational benefits to Student. *See, e.g., Presely v. Friendship Public Charter School*, 2013 WL 589181, 9 (D.D.C. Feb. 7, 2013). DCPS prevails on this issue.

3. DID DCPS DENY STUDENT A FAPE BY FAILING TO CONDUCT A FUNCTIONAL BEHAVIORAL ASSESSMENT REQUESTED BY PARENT AND BY FAILING TO DEVELOP A BEHAVIOR INTERVENTION PLAN?

Petitioner also claims that DCPS failed to conduct an FBA of Student requested through her attorney. On May 1, 2013, Petitioner's Counsel requested DCPS to conduct evaluations of student, including a Functional Behavioral Assessment (FBA). In response to that request, DCPS completed comprehensive evaluations of Student, including an FBA, in May and June 2013 and developed a Behavior Intervention Plan in July 2013. The IDEA does not set a time frame within which an LEA must conduct a reevaluation after receiving a request from a student's parent. *See Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). In light of the lack of statutory guidance, *Herbin* concluded that "[r]eevaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting *Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone*, 21 IDELR 1127, 1129 (1995)). *See, also, Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010). In this case, DCPS conducted the FBA requested by Petitioner and developed a BIP within 78 days. I find that this was a

reasonable period of time and certainly not an undue delay. DCPS prevails on this issue.

DCPS' Motion for Directed Finding

At the August 13, 2013 due process hearing, Respondent DCPS made a motion for a directed finding against Petitioner, which I took under advisement. In light of my conclusions of law in this decision, I deny DCPS' motion.

ORDER

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

1. All relief requested by the Petitioner in this matter is denied; and

2. Respondent DCPS' motion for a directed finding is denied.

Date: August 16, 2013

s/ Peter B. Vaden
Peter B. Vaden, 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).