

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

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

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving a student who is not eligible for services.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on December 11, 2013 in regard to the Student. This Hearing Officer was appointed to preside over this case on December 12, 2013.

A Response was filed by the District denying this contention on December 31, 2013. This Response was untimely filed. A resolution meeting was held on January 16, 2014. This meeting did not result in an agreement. The resolution period ended on January 10, 2014.

On January 29, 2014, this Hearing Officer held a prehearing conference.

A prehearing conference order issued on February 3, 2014 outlining the issues in the case and summarizing the rules to be applied in this hearing.

A hearing date was held on February 10, 2014. This was a closed proceeding.

Petitioner entered into evidence exhibits 1-18; Respondent entered into evidence exhibits 1-6. Petitioner presented as witnesses: Petitioner; Witness D, a psychologist; and Witness B, an advocate. Respondent presented Witness A, a general education teacher; and Witness C, a special education coordinator.

Respondent was unable to call a remaining witness relating to speech and language therapy. Respondent therefore sought a continuance, which was not opposed by Petitioner. Respondent filed its first continuance motion on February 10, 2014. A hearing date was tentatively set for February 28, 2014. Thereafter, on February 18, 2014, Petitioner indicated that she would not be seeking to call any additional witnesses but wanted to submit a post-hearing memorandum of law. Petitioner then sought a continuance on this basis and to allow the IHO time to write the HOD through a motion dated February 20, 2014. There was no opposition from Respondent. This IHO issued an order granting the continuance on February 21, 2014. The HOD had been due on February 24, 2014. The continuance extended the time to write the HOD to March 6, 2014.

Petitioner submitted a post-hearing brief on February 19, 2014. Respondent submitted a post-hearing brief on February 21, 2014.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400

et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

ISSUES

As identified in the Prehearing Conference Summary and Order, the issues to be determined are as follows:

1. Did DCPS inappropriately determine the Student to be ineligible for services during the November 20, 2013 IEP meeting? If so, did DCPS deny the Student a FAPE?
2. Did DCPS fail to assess the Student in all areas of suspected disability in connection to the IEP meeting of November 20, 2013? If so, did DCPS deny the Student a FAPE?
3. Did DCPS fail to provide the Student with an appropriate IEP and BIP in connection to the IEP meeting of November 20, 2013? If so, did DCPS deny the Student a FAPE?

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. The Student currently attends School A. (P-8-1; Testimony of Petitioner)
2. The Student is currently ineligible for services. (P-8-1)
3. The Student has some issues with writing and telling time. (Testimony of Petitioner)

4. The Student has mastered all of his kindergarten skills, is working on his first grade skills. (Testimony of Witness A)

5. The Student has a “little” trouble with math. (Testimony of Petitioner)

6. The Student had _____ surgeries during the time period between birth and three months. It can be difficult to understand him. (Testimony of Petitioner)

7. Student has never had an FBA or BIP. (Testimony of Witness B)

8. With respect to most classwork, the Student did not have any problems.
(Testimony of Witness A)

9. The Student did not have trouble understanding what was being said in class, but he did have to listen carefully. (Testimony of Witness A)

10. The Student is a bit fidgety in class. (Testimony of Witness A)

11. The Student is eager to please his teachers. (Testimony of Witness A)

12. The Student may get upset in class when he does not get his way. (P-7-3)

13. Sometimes, a teacher may have to repeat things to him more than once.

(Testimony of Witness C)

14. The Student may get upset or frustrated when others cannot understand him. (P-6-3)

15. The Student’s articulation issues were severe in 2010, when the Student scored a standard score of 55 on the CAAP Consonant Inventory, with a percentile rank of less than one.
(P-12-1)

16. At the time, the Student’s scores were low average in terms of receptive and expressive language on the PLS-4. (P-12-3)

17. At the time, the Student was distractible in the therapy room. (P-4-2)

18. The Student's Full Scale IQ scores on the WPPSI-III were an 88 in January, 2011. (P-13-1)
19. During the 2012-2013 school year, the Student went to School B PCS. (P-10)
20. At School B PCS, the Student was eligible for services as a student with a speech or language impairment. The Student received 45 minutes of speech and language pathology per week. (P-10-4; Testimony of Petitioner)
21. No other services were provided to the Student at School B PCS. (P-10-2)
22. An IEP meeting was held on September 5, 2013 for the Student. The related services of speech-language pathology were recommended for 60 minutes per month. No other services were recommended. (P-4-1; P-9-7)
23. At this meeting, an increase in speech and language therapy hours was recommended by the current therapist.
24. At this meeting, the team did not feel the Student displayed any particularly serious behavioral issues.
25. At this meeting, it was determined that a triennial evaluation was required for this student based on testing data, teacher and related services reports. (P-3-3)
26. At this meeting, Petitioner did not express any concerns and indicated that the Student has made steady growth since services were initiated. (P-4-1)
27. At this meeting, the speech and language service provider recommended that the service hours be increased for speech and language therapy and that a consent for evaluation be completed. The parent signed the consent. (P-4-1)
28. In September, 2013, speech and language therapy was designed to be focused on improving the Student's ability to communicate messages. This would help the Student

participate in the “flow and content” or grade level curriculum instruction, and allow the Student to communicate better socially with his peers and unfamiliar listeners. (P-4-2)

29. At the time, the Student needed “intensive” support to make progress on his IEP goals. (P-4-2)

30. At the time, the Student was determined to qualify for ESY services. (P-4-3)

31. At the time, the IEP team determined that an assessment was needed. (P-4-3)

32. The Student went to School C at the start of the 2013-2014 school year, for first grade. (Testimony of Petitioner)

33. The Student was able to handle most classwork at School C without any problems. (Testimony of Witness A)

34. In the Student’s general education classroom, there were about 20 children. (Testimony of Witness A)

35. At School C, the Student has thrown objects, screamed and yelled. (Testimony of Petitioner)

36. A speech and language assessment was conducted by Evaluator A as reflected by a report . The assessment indicated that the Student’s speech is difficult to understand when the context was unknown. (P-6-3)

37. The assessment did not include any teacher input. (P-6-3)

38. Evaluator A tested the Student on the Goldman-Fristoe Articulation-2 test. The test revealed a standard score of 87, which was in the borderline average range. (P-6-4)

39. The Student’s speech intelligibility was rated to be 80 percent for the familiar listener with known context. The intelligibility was significantly less when the context was unknown. (P-6-4)

40. Receptive and Expressive language scores were in the average range for this Student on the Peabody Picture Vocabulary Test-4 and Expressive Vocabulary Test-2. (P-6-5)

41. The Student's oral language skills were in the average range on the Comprehensive Assessment of Spoken Language. (P-6-6)

42. The evaluator concluded that the Student's decreased speech intelligibility could lead to a communication breakdown in the classroom which could lead to frustration, low self-esteem, difficulty in communicating wants and needs and difficulty in developing friendships. (P-6-8)

43. The evaluator indicated that teacher input was missing from the assessment, and that educational impact could not be assessed. (P-6-8)

44. An IEP meeting was held to review the assessment on November 20, 2013. (P-8-1)

45. At the time of the IEP meeting, the Student had difficulty identifying numbers and counting with understanding. (P-8-3)

46. At the time of the IEP meeting, the Student's pre-academic reading skills were delayed. He demonstrated difficulty identifying letters and demonstrating an understanding of explanations. (P-8-3-4)

47. At the meeting were Petitioner, Witness C, a psychologist, a social worker, a general education teacher, a social worker, Witness A, a general education teacher, and a compliance expert. (R-3-2)

48. By notice dated November 20, 2013, the Student was deemed ineligible because of the speech and language assessment dated October 10, 2013. (P-3-1)

49. As of January 7, 2014, the Student went to School A. (Testimony of Petitioner)

50. During the Student's first grade year, frequent prompting has been necessary for following directions, working with others, using time wisely, following rules, listening while others were speaking. (P-11-1)

51. During the first grade year, in regard to Building Words, Sight Words, Categorizing words, and picture phrase math, the Student's progress has been slow. (R-5-5)

52. I found all the witnesses credible in this proceeding.

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 burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Schaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

The IDEA defines "child with a disability" as: "a child evaluated in accordance with Sects. 300.304 through 300.311 as having...a serious emotional disturbance, ... an other health impairment, a specific learning disability, ... or multiple disabilities, and who, by reason thereof,

needs special education and related services." 20 U.S.C. § 1401 (3) (A); 34 C.F.R. §300.8 (a).

"Emotional Disturbance" is defined as "a condition [1] exhibiting one or more of the following characteristics [2] over a long period of time and [3] to a marked degree that [4] adversely affects a child's educational performance: (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; B), an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 C.F.R. §300.8 (c) (4) (i) (emphasis added); 5-E DCMR 3001.1

As the above statutory criteria make clear, IDEA does not require a school district to provide special education and related services to every student who may struggle academically. Only certain children with defined disabilities are eligible for IDEA's benefits. See, e.g., Alvin Indep. School Dist. v. A.D., 503 F.3d 378 (5th Cir. 2007)(student achieved passing grades despite procedural issues). Moreover, it is not sufficient for a child merely to be diagnosed with a specified medical or psychological condition. There must also be a demonstrated adverse effect on the child's educational performance, such that the child needs special education and related services to receive an educational benefit. 34 C.F.R. §§300.8(c)(4)(i), (c)(9)(ii); see N.C. v. Bedford Central School District, 51 IDELR 149 (2d Cir. 2008)(behavioral problems stemmed from drug use); N.G. v District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008)(child's depression affected his schoolwork).

1. Emotional Disturbance.

"Emotional Disturbance" is defined as "a condition [1] exhibiting one or more of the following characteristics [2] over a long period of time and [3] to a marked degree that [4]

adversely affects a child's educational performance: (A) an inability to learn that cannot be explained by intellectual, sensory, or health factors; B), an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (C) inappropriate types of behavior or feelings under normal circumstances; (D) a general pervasive mood of unhappiness or depression; (E) a tendency to develop physical symptoms or fears associated with personal or school problems." 34 C.F.R. §300.8 (c) (4) (i); 5-E DCMR 3001.1

The record establishes that the Student had some behavioral issues in class, including throwing objects, raising his voice, and getting frustrated when others do not understand him. However, these qualities have not lasted for a long period of time and/or to a marked degree. Moreover, there is no showing from this record how these issues have adversely affected the Student's educational performance. I credit the credible testimony of Witness A, who indicated that the Student had been understanding most of the work School C without any special education supports in the classroom. I deduce from this statement that general education interventions are sufficient to work to allow this Student to learn during the 2013-2014. Additionally, there is nothing in the record to indicate that the Student was unable to form appropriate relationships with teachers or peers. There is also nothing in the record to indicate that the Student has not displayed a pervasive mood of unhappiness, or depression, or any physical symptoms. Under the circumstances, I find that Petitioner has not shown that the Student should be classified as a Student with an emotional disturbance.

2. Speech or Language Impairment.

A Speech or Language Impairment is defined as "a communication disorder such as stuttering, stuttering, impaired articulation, voice impairment, or language impairment that

adversely affects a child's educational performance." 34 C.F.R. Sect. 300.8(c)(11); 5-E DCMR Sect. 3001.1.

To this IHO, the record does establish that the Student has an articulation problem that adversely affects his educational performance. At the September, 2013 IEP meeting, the Student's related service provider recommended an increase in speech and language therapy. Moreover, the report of Evaluator A indicates that the Student's speech was difficult to understand in an unfamiliar context and that this decreased speech intelligibility could lead to a communication breakdown in the classroom which could lead to frustration, low self-esteem, difficulty in communicating wants and needs and difficulty in developing friendships.

However, the record also indicates that the Student only needs the related service of speech-language pathology to address this issue. The record indicates that, with speech-language pathology, the Student was able to understand the work and made academic progress during the 2012-2013 and 2013-2014 school year. This first grader has mastered his kindergarten skills and is now working on appropriate first grade skills. In the District of Columbia, "if it is determined, after an appropriate evaluation under the provisions of this Chapter, that a child has one of the disabilities identified in this section, but only needs a related service and not special education instruction, the child is not a child with a disability. . . ." 5-E DCMR Sect. 3001.1 Petitioner has not shown that the Student requires anything other than the related service of speech-language pathology to address his articulation issues. Accordingly, Petitioner has not shown that the Student should be classified as a Student with a speech or language impairment.

3. Other Health Impairment.

“Other health impairment” is an appropriate classification if a Student has limited strength, vitality or alertness with respect to the educational environment which adversely affects a child's educational performance. This classification requires identification of chronic or acute health problems such as: Asthma;, Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder; Diabetes; Epilepsy; a heart condition; Hemophilia; Lead poisoning; Leukemia; Nephritis; Rheumatic fever; or Sickle cell anemia. 34 C.F.R. Sect. 300.8(c)(9); 5-E DCMR 3001.1

There is nothing in the record to suggest that the Student lacks strength, vitality or alertness. While Witness A indicated that the Student was a little bit more fidgety than average, there is also nothing in the record to suggest that the Student has a chronic or acute health problem such as Attention Deficit Disorder or that any such condition affects the Student's academic performance. Petitioner has not shown that the Student should be classified as a Student with Other Health Impairment.

4. Failure to Assess.

An LEA is required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities. The LEA should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child, and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors,

in addition to physical or developmental factors. 28 U.S.C. Sect.1414(b)(2); 34 C.F.R. Sect.300.304(b).

The LEA must also ensure that the assessment and evaluation materials that are utilized to assess the child are selected and administered so as not to be discriminatory on a racial or cultural basis; are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; are used for purposes for which the assessments or measures are valid and reliable; are administered by trained and knowledgeable personnel; and are administered in accordance with any instructions provided by the producer of such assessments. The LEA is further required to ensure that the child is assessed in all areas of suspected disability and that the chosen assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. 28 U.S.C. Sect.1414(b)(3); 34 C.F.R. Sect.300.304(c).

Petitioner argues that Respondent should have conducted an FBA of the Student, an occupational therapy assessment of the Student, and a Comprehensive Psychological Assessment of the Student (including a parent inventory, social history, Conners Rating Scale). Petitioner also contends that the speech and language assessment of the Student was incomplete.

The Official Comments to the 2006 Part B Regulations indicate: "it makes a great deal of sense to attend to behavior of children with disabilities that is interfering with their education or that of others, so that the behavior can be addressed, even when that behavior will not result in a change in placement." 71 Fed. Reg. 46721 (2006)

The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of that behavior. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C.

2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the District failed to provide an FBA/BIP for a Student, court stated that “the quality of a student’s education is inextricably linked to the student’s behavior”); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended) .

The record does not establish that the Student required an FBA prior to the IEP meeting in question. While the Student did exhibit some behavioral issues in class, the record indicates that the general education teacher in the classroom was able to manage the behavior and that the Student was able to progress academically. Compare Long, 780 F. Supp.2d at 61 (teacher commented at IEP meeting that behavior was impacting on the Student’s performance in the classroom, and Student was engaged in fights). While the Petitioner testified otherwise, Petitioner presents no corroborative testimony to support the notion that the Student needed an FBA. There is also no evidence in the record to support the contentions that the Student’s behavioral issues in the classroom warranted an FBA. Since Petitioner was not in the classroom, and the Respondent’s witness (Witness A) was, I find that Petitioner has not met her burden on this issue.

Petitioner’s claim that the Student requires an occupational therapy assessment is similarly without merit. While there is some testimony in the record from Petitioner to the effect that the Student has writing issues, there is no testimony or evidence from any other individual – including an occupational therapist – to support the view that the Student required an occupational therapy assessment here. I will note that the report from Petitioner’s expert (P-17) does not mention the need for an occupational therapy assessment.

Petitioner also claims that the Student requires a more comprehensive psychological assessment. However, the IEP meeting included the Student's teachers, who were able to report on the Student's present levels of performance. Additionally, a psychological assessment of the Student was completed in 2011. This assessment included an IQ measure, a developmental inventory, a classroom observation, and a teacher interview. Petitioner also contends that there was no parent interview or social history in the psychological assessment. However, the Petitioner was at the IEP meeting to discuss her viewpoint on the Student's educational needs. The record also does not support the need for a Conners Rating Scale. Nothing in the record provides this IHO with a specific reason why the lack of a Conners Scale made a substantive difference here. Kruvant v. District of Columbia, 99 Fed. App'x. 232, 233 (D.C. Cir.2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error).

Finally, Petitioners claim that the speech and language assessment by Evaluator A was incomplete because there was no teacher input. However, there was teacher input at the IEP meeting, where the Student's eligibility determination was made. To this IHO, the record does not establish how the lack of teacher input in the speech and language assessment would have changed the result here.

Accordingly, I find that Respondent conducted a proper assessment of the Student here.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, Petitioner's claims are hereby dismissed with prejudice.

Dated: March 6, 2014

Michael Lazan
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: March 6, 2014

Michael Lazan
Impartial Hearing Officer