

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
November 6, 2014

STUDENT¹)
through the Parent)
)
Petitioner,)
)
v.)
)
District of Columbia Public Schools)
)
Respondent(s).)

Date Issued: November 5, 2014

John Straus, Hearing Officer

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of the Student, filed a due process complaint notice on August 22, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) by the District of Columbia Public Schools (“DCPS”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged that DCPS denied the Student a FAPE by failing to determine the student is a student with Other Health Impairment (“OHI”) under the IDEA at the February 6, 2014 meeting.

DCPS denied that Student was denied a FAPE. This student is not eligible under IDEA. DCPS asserted that the Student has been found eligible under another statutory scheme and accommodation process and the parent failed to provide the necessary written notification to DCPS. According to DCPS, on or about December 5, 2013, the parent informed the Vice Principal that the child had been diagnosed with ADHD. The student was in child study, a Response to Intervention (“RTI”) process, for referral to student support and 504. A 504 meeting was held February 6, 2014 where the parent provided the report. DCPS alleges the parent agreed to a 504 plan after the RTI process was completed.

Subject Matter Jurisdiction

¹ Personally identifiable information is provided in Appendix A.

Subject matter jurisdiction is conferred pursuant to the 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; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on August 22, 2014. DCPS filed a response to the complaint on September 3, 2014 and made no challenges to jurisdiction. The response was filed one day late. DCPS explained that the response was filed late because the complaint was sent to DCPS 4:33 PM on a Friday and that a prior written notice was previously issued to the parent.

Neither Petitioner nor Respondent waived the resolution meeting. A resolution meeting took place on September 12, 2014, at which time parties agreed to keep the resolution period open. The 30-day resolution period ended on September 21, 2014, the 45-day timeline to issue a final decision began on September 22, 2014. A prehearing conference took place on September 12, 2014. A Prehearing Order was issued on September 12, 2014. The Hearing Officer Determination is due November 5, 2014.

The due process hearing was a closed hearing that took place on October 16, 2014.

Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person.

The Petitioner’s Disclosure Statement, filed and served on October 9, 2014, consisted of a witness list of four (4) witnesses and documents P-01 through P-17. The Petitioner’s documents P-1 through P-4 and P-9 were admitted into evidence over objection. All other documents presented by the Petitioner were admitted into evidence without objection. DCPS’ Disclosure Statement, filed and served on October 9, 2014, consisted of a witness list of four (4) witnesses and documents R-1 through R-13. DCPS’ documents were admitted in to evidence without objection.

The Petitioner presented the following four witnesses in her case in chief: (1) the Petitioner, (2) the Student, (3) an Educational Advocate and (4) School Psychologist. DCPS presented three witnesses: (1) Special Education Teacher (“SET”), (2) Director of Student Support Services (“SSS Director”); and (3) Social Worker (“SW”).

The sole issue to be determined in this Hearing Officer Determination are as follows:

Whether DCPS denied Student a FAPE by failing to determine the student is a student with OHI under the IDEA at the February 6, 2014 meeting.

The Petitioner requested the following relief:

- (1) The Hearing Officer to determine the student is a student with an OHI under the IDEA;
- (2) Within 10 calendar days, Respondent to convene a meeting to develop an IEP with goals in reading, writing and math and 15 hours in an inclusion setting; and
- (3) The Hearing Officer to order reason compensatory education to redress the lack of special education services from February 6, 2014 to June 19, 2014

Findings of Fact²

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 is a resident of the District of Columbia. The Petitioner is the Student's mother. The Student attends a Public Charter School.³
2. The student received a D+ in English II, D- in Geometry, C- in World History & Geography, D in Chemistry, a C in Spanish II, B- in Physical Education and a C in Beginning Woodwind during the 2012-2013 school year. The student did not understand the material in her classes. She retook English II during the summer of 2013 and failed.⁴
3. The Student was absent eleven times during the 2012-2013 school year with four excused absences. She was tardy eighteen times with three excused tardy days. The student's first class was Geometry so she would have missed Geometry class the most.⁵
4. On December 6, 2013, the student received a psychiatric assessment. The evaluation included an interview with the Petitioner that indicates the Student has difficulty focusing and has a very short attention span which does not seem to allow the Student to function appropriately both at home and especially at school. The Student is failing about four classes. Her teachers report that the Student cannot focus and is easily distracted. The Petitioner shared that the Student appears to have short term memory problems and easily forgets what she has been asked to do. The Student indicated that certain lessons are difficult for her to understand. The evaluator stated the student is a Student with Attention Deficit Hyperactivity Disorder ("ADHD") which had not been diagnosed before.⁶

² Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. 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, 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 Petitioner

⁴ P-11, Student

⁵ R-13

⁶ P-10, R-7, School Psychologist

5. The student's teachers reported the following during the 2013- 2014 school year:

English II-The Student is failing due to not completing written work. She missed major assignments or turned them in extremely late and did not complete homework. She will need to complete work in class and home in order to improve her results. The student is a capable reader, but she does not complete reading homework or written work. She is polite and focused during class but does not complete her work.

American Literary Traditions-The student has struggled academically in class. She completed 40% of classwork and 60% of homework. The student is frequently distracted in class and has trouble remembering to submit assignments. When the student is off task, she often distracts other members of the class. While the student responds well to being redirected, she needs to be reminded to be on task numerous times throughout the class period.

Spanish III-The student participates well in class, but her average remains low due to missing homework, occasional assignments left incomplete, and low test scores.

However, she is able to answer questions posed to her in Spanish if she has been exposed to the vocabulary about 70% of the time. She completes her homework about 2 out of 5 days per week.

Biology-The student failed the class the first semester due to lack of homework completion, a lack of focus and low assessment scores.

US History-The student's struggles to complete homework and struggles to complete quality work. In class, she is reticent to speak. She is sometimes distracted, looking into space, but is seldom off-task talking to peers. She does not always follow along with the pace of the class. The Student is intimidated by writing assignments, often delaying her start. Once she gets started, she is quick to give up when she encounters a problem. She does not stay with problems for a long period of time. On a couple of occasions the Student has come after school to get help. However, she has done so inconsistently that it is difficult to assess the benefits of tutoring.

-During the first semester, the Student had a hard time completing homework assignments, asking questions and staying focused in class. In quarter two, she showed improvement by completing her homework assignments, but she missed out on points

because she was reading the directions. She also maintained a low quiz and test average.⁷

6. On February 6, 2014, the 504 team reviewed the psychological assessment, a reading test and the DC CAS. The team also reviewed the teacher's reports. The student's teacher noted the Student struggles with focusing and distracting peers in class. She also struggles with completing and turning in work. The Petitioner stated the Student does not understand the homework. The team noted the Student failed Spanish II, English II, US History, Biology, American Literary Traditions and Algebra in the first semester. The student failed Geometry and Chemistry during the 2012-2013 school year and retook the classes over the summer with passing grades. The team noted the student scored in the 43rd percentile of the Fall 2013 the reading test and that she historically scored in this range. The team further noted the student scored in the 53rd percentile in the Winter 2014 NWEA math test and that historically she has fluctuated in the 20/30 to 70s percentile range. The team noted the student has been absent once during the 2013-2014 school year and nine times during the 2012-2013 school year. The team noted the student's ADHD substantially limits major life activity. The ADHD affects her executive functioning in the classroom which impacts her ability to learn. The ADHD also impacts her ability to focus and stay on task in class and finish assignments within the required time limits. The Student is "shifty, has difficulty focusing and does not respond well to directions." The team determined the student is a student with ADHD under section 504 of the Rehabilitation Act. The team developed a 504 plan that requires the Student's teachers to provide multiple directions-visual cue or individual check in, print out notes when possible, preferential seating away from distractions and near positive peers, chunking long assignments with due dates and check ins and non-verbal cues to stay on task. The Social Worker is required to provide a homework system for the Student. The parent agreed to implement the 504 plan to see whether the student would receive benefit from the plan.⁸
7. The student received a C- in Spanish II, D- in English, F in U.S. History & Geography, C- in Biology II, D- in American Literary Traditions, D- in Algebra II and an A in Choir during the 2013-2014 school year.⁹
8. The student was absent 12 times during the 2013-2014 school year with nine excused absences. She was tardy to school 50 times with one excused tardy. The first period class was Spanish II so the student missed Spanish II the most.¹⁰

⁷ P-7, R-2

⁸ P-5, P-6, P-8, R-5, R-6, R-8, Parent, SSS Director

⁹ P-12, R-12

¹⁰ R-13

9. The student's grades during the 2014-2015 are the same as her grades during the last two years. The class test scores are going down. There are 15 to 20 students in her classes this year, so she stays after school until 5:00 or 6:00 to do her work. However, the student has two excused absences and has been tardy to school on eight occasions.¹¹
10. On September 22, 2014, the student received the San Diego Quick Assessment, which is a criteria based assessment. The assessment indicate the student's independent reading level is on the fifth grade level. The student also read a seventh grade level reading passage and completed word math problems and calculations.¹²
11. The student's advocate recommends the student receive 2.5 hours of tutoring per week due to the fact that the Student did not receive specialized instruction after the 504 team met on February 6, 2014.¹³

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:

"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).

DCPS denied the Student a FAPE by failing to determine the student is a student with OHI under the IDEA at the February 6, 2014 meeting

The Student has a diagnosis of ADHD from a physician, dated December 6, 2013. The reports states the Student has difficulty focusing and has a very short attention span which does not seem to allow the Student to function appropriately both at home and especially at school. However, the physician alone does not determine whether a student is a student with a disability under the IDEA. The IEP team, not a student's physician, makes the determination as to whether the student is eligible for special education and related services under the IDEA. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632 (7th Cir. 2010).

ADHD is not a specific disabling condition under the IDEA, although a student with ADHD may be eligible as "other health impaired," by reason of the condition. A student with ADHD may also be eligible under Section 504 (or the Americans with Disabilities Act) if the disorder substantially interferes with a major life activity such as learning or effectively

¹¹ P-13, R-13, Student, SSS Director

¹² P-9, Educational Advocate

¹³ P-15, Educational Advocate

participating in school activities. The U.S. Department of Education Office of Special Education Programs (“OSEP”) determined that school districts were obligated to assume the responsibility for the identification of a student with suspected ADHD. *Letter to Harkness*, 35 IDELR 94 (OSEP 2001). In this case, the 504 team, not the IEP team, reviewed the psychological assessment and an academic achievement assessment and noted that the ADHD affects her executive functioning in the classroom which impacts her ability to learn, focus and stay on task in class and finish assignments within the required time limits. The student’s teacher noted the Student struggles with focusing and distracting peers in class and completing and turning in work. As a result she failed several classes. Therefore, the team determined the student is a student with ADHD under section 504 of the Rehabilitation Act and developed a 504 plan.

Other Health Impairment is one of the disability categories under the IDEA.¹⁴ Under 34 C.F.R. § 300.8(c)(9),

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to 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, sickle cell anemia, and Tourette syndrome; and adversely affects a child's educational performance. [emphasis added]

ADHD may qualify as disabling conditions under the IDEA. However, the student is not a "child with a disability" unless those conditions have an adverse impact on educational performance. *C.B. v. Department of Educ. of the City of New York*, 52 IDELR 121 (2d Cir. 2009). Here, the Petitioner argues that the Student’s ADHD has an adverse impact on her educational performance because the Student has failed her classes and has performed poorly on some criteria referenced academic achievement assessments. Although the teachers stated the reasons for the Student’s poor academic performance turning in assignments very late, missing major assignments and homework and arriving late to school; the student is also being distracted in class, looking into space, working at a slower rate than classmates and often stopping work and needs direction to re-focus. Her ADHD may even contribute to late assignments and late arrivals. Therefore, the Hearing Officer finds by a preponderance of the evidence that the student is a student with OHI under the IDEA.

Pursuant to 34 C.F.R. § 300.111(a), DCPS must ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are identified,

¹⁴ Pursuant to 34 C.F.R. § 300.8(a)(1), in order to qualify as a "student with a disability" under the IDEA, the student must meet the definition of one or more of the categories of disabilities which include: mental retardation, a hearing impairment, a speech or language impairment, a visual impairment, a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities; and need special education and related services as a result of his disability or disabilities. The list of disabling conditions in 34 C.F.R. § 300.8 is exhaustive. See, e.g., *Letter to Fazio*, 21 IDELR 572 (OSEP 1994); *Letter to Anonymous*, 21 IDELR 64 (OSEP 1994). However, the list of specific impairments included within the definition of each of the categories of disabilities, particularly OHI, is not meant to be exhaustive. *Letter to Fazio*, 21 IDELR 572 (OSEP 1994).

located, and evaluated.¹⁵ In this case, while the team met to determine whether the student is a Student with ADHD under section 504; the evidence does not support that the Student was determined eligible under any other statutory scheme. While academic progress may indicate a child's need for special education services, academic progress alone is not the determinative factor. DCPS should draw upon information from a variety of sources in order to make an eligibility determination. 34 C.F.R. § 300.306 (c)(1); *G.D. v. Wissahickon Sch. Dist.*, 56 IDELR 294 (E.D. Pa. 2011); and *Lauren G. v. West Chester Area Sch. Dist.*, 60 IDELR 4 (E.D. Pa. 2012). Because ADHD can adversely affect a student's educational performance in many ways, an LEA's evaluation must be conducted in accordance with applicable IDEA guidelines,¹⁶ even though ADHD is not a specifically identified disability under the IDEA.

The hearing officer finds a procedural violation by failing to evaluate the student to determine whether the student is a student with a disability under the IDEA. Pursuant to 34 C.F.R. § 300.513(a)(1), in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE; 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 caused a deprivation of educational benefit. In this case, the student was denied a right to FAPE by the team's failure to consider whether the student is a student under the IDEA. Therefore, the Hearing Officers finds that the student was denied a FAPE. The Petitioner met her burden of proof.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

The evidence demonstrates that the student was denied a FAPE by DCPS failing to determine the student is a student with an Other Health Impairment from February 6, 2014 to the date the due process complaint was filed. Consequently, the student is entitled to compensatory services.

¹⁵ Pursuant to 34 C.F.R. § 300.306(a), upon completion of the administration of assessments and other evaluation measures a group of qualified professionals and the parent of the child determines whether the child is a child with a disability and the educational needs of the child; and the public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

¹⁶ Pursuant to 34 C.F.R. § 300.503(a), written notice must be given to the parents of a child with a disability a reasonable time before the DCPS proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

ORDER

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

1. Within 10 school days of entry of this order, DCPS shall convene the IEP team to develop an IEP for the Student in accordance with 34 CFR §§ 300.320 through 300.324.
2. For everyday of delay by the Petitioner, DCPS shall have one day to convene the meeting;
3. DCPS shall fund 2.5 hours per week of one to one independent tutoring services for 20 weeks to redress the lack of specialized instruction from February 6, 2014 to August 22, 2014.
4. No further relief is granted.

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: November 5, 2014

/s/ John Straus

Hearing Officer