

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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STUDENT HEARING OFFICE
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<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>February 28, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Olekanma Ekekwe, Esq.</p> <p>Counsel for DCPS: Kendra Berner, Esq.</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 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.”).

II. PROCEDURAL BACKGROUND

On January 15, 2009, counsel for Parent and Student (“Petitioner’s counsel”) filed a Due Process Complaint Notice (“Complaint”) against the District of Columbia Public Schools (“DCPS”), alleging that DCPS denied Student a free appropriate public education (“FAPE”) by (1) failing to conduct evaluations as requested by Parent, (2) failing to provide appropriate educational services to Student, (3) failing to provide appropriate related services to Student, and (4) failing to provide an appropriate placement.

The Student Hearing Office (“SHO”) set January 27, 2009 as the prehearing conference date and provisionally scheduled the due process hearing for February 18, 2009 at 11:00 a.m. However, after consultation with the parties, the hearing officer rescheduled the prehearing conference for February 6, 2009.

On January 26, 2009, DCPS filed District of Columbia Public School’s Response to Petitioner’s Due Process Complaint. In its Response, DCPS asserted that (1) the Complaint failed to state when a request for a clinical evaluation was made, but a comprehensive psychological evaluation was completed in August 2008 and the evaluation report was reviewed by the IEP team on September 18, 2008; (2) that Student has a current IEP, which Parent agreed with and signed on September 18th, the IEP is appropriate and being implemented, and Student is making progress; (3) Student is receiving speech/language services one hour per week, and her behavior is being addressed through accommodations in the general education classroom; and (4) Student’s current DCPS placement is an appropriate placement for Student.

The hearing officer convened the prehearing conference on February 6, 2009, as scheduled, and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Petitioner’s counsel clarified that, with respect to its first three claims, (1) Petitioner is requesting clinical and occupational therapy (“OT”) evaluations only, and Petitioner contends that the psychological evaluation previously administered to Student did not address the behavior issues Student is experiencing in school; (2) Petitioner contends Student is not getting the correct services in a general education 3rd grade class because the school calls Parent daily to come sit with the child; and (3) Petitioner asserts that Student also requires OT and psychological services. In addition to the defenses asserted in its Response, DCPS further asserted that a clinical evaluation does not provide much more that is educationally relevant than the comprehensive psychological evaluation.

Thereafter, Petitioner stipulated that comprehensive psychological and speech/language evaluations were previously conducted for Student, and the evaluation reports were issued on

September 15, 2008 and July 7, 2008, respectively. When each party representative stated an expectation of presenting 4 witnesses, the hearing officer determined that the scheduled hearing should be extended by an additional hour to accommodate the testimony. Hence, the hearing was reset for 11:00 a.m. to 2:00 p.m. on February 18, 2009.

By their respective disclosure statements filed on or about February 12, 2009, DCPS disclosed seven potential witnesses and six documents labeled DCPS-01 through DCPS-06, and Petitioner disclosed four potential witnesses and six documents (hereinafter referred to as Petitioner's Exhibits 1 through 6).

The hearing officer convened the due process hearing on February 18, 2009, as scheduled, and the parties' respective documents were admitted into the record without objection.² Petitioner also requested the admission of Student's report cards from first grade, second grade, and second grade summer school. DCPS objected to the admission of the undisclosed documents, but the hearing officer admitted them over DCPS's objection, on the ground that they are business records issued by DCPS itself during the normal course of the school year.

III. ISSUE(S)

1. Did DCPS fail to conduct clinical and OT evaluations upon request?
2. Did DCPS fail to provide appropriate educational services to Student?
3. Did DCPS fail to provide appropriate related services to Student?
4. Did DCPS provide Student with an inappropriate placement?

IV. FINDINGS OF FACT

1. Student is now in _____ grade, and she has been attending her current DCPS educational placement since kindergarten. Student began having behavior problems in school approximately 3 to 4 months into her kindergarten year. Her behavior problems escalated in 1st grade, in that she fought her classmates, disrespected her teacher, and failed to follow the rules. Parent became concerned during Student's 1st grade year because Student's worksheets and test scores, as well as the teacher's comments on Student's report case, indicated that Student was not performing academically on grade level. Parent asked for help with Student and for testing to determine Student's true academic level. No testing was done, but Student was admitted into a tutoring program that is run by the school.³

² DCPS initially objected to the admission of Petitioner's Exhibit 5, on the ground that it was incomplete. However, once Petitioner provided copies of the full Exhibit, DCPS withdrew its objection.

³ Testimony of Parent.

2. A new principal began working at Student's school at the beginning of Student's second grade year, and Parent told the new principal that Student had been struggling academically for two years and was not performing on grade level. The principal advised waiting until Student received her first report card before taking any action. Once the first report card was issued, Student's teacher agreed with Parent that Student was below grade level academically and she had behavior issues. The teacher set up meetings with the special education coordinator ("SEC") and the counselor for Parent in April and May of 2008. The school agreed to test Student and advised Parent that the testing would likely run into summer and be completed the following school year.⁴
3. Student's initial academic evaluation, which consisted of a Woodcock Johnson III Test of Achievement ("WJ-III") was administered on May 30, 2008 when Student was nearing completion of the second grade. Student's scores on the mathematics subtest were in the deficient range for calculation and applied problems, and in the below average range for math fluency. Student's scores on the reading subtest were in the deficient range for passage comprehension and word attack, and in the below average range for letter-word identification and reading fluency. Student's scores on the written language subtest were in the below average range for spelling and writing fluency. Student's scores on the oral language subtest were in the average range for story recall and story recall delayed, but in the below average range for picture vocabulary. The evaluator stated that Student's math and reading abilities were of concern because she was more than a grade level behind in all areas, in math she showed only basic skills of addition, and in reading her phonics were particularly weak. The evaluator recommended specialized instruction in reading and in math for Student.⁵
4. Student's initial speech/language evaluation was administered on June 23, 2008. Based on Student's performance on the assessments administered, the evaluator concluded that speech/language intervention services were warranted for Student because she presented with a moderate expressive language delay, a mild receptive language delay, and mild delays in expressive and receptive vocabulary.⁶
5. Student's initial comprehensive psychological evaluation was administered in August and September of 2008 after Student had begun third grade. Student was on medication for ADHD at the time of the evaluation. The evaluator used the following assessment procedures: review of records, clinical observation and interview, classroom observations, Reynolds Intellectual Assessment Scales, Comprehensive Test of Nonverbal Intelligence, and Connors Teacher and Parent Rating Scales. Based on the results of these assessments, the evaluator concluded that Student "is able to function within the local classroom provided there is structure, consistent behavior management techniques employed and redirection." The evaluator recommended the following for Student: Continued involvement in community mental health program for student and family members; Employment of behavior management techniques with the classroom

⁴ Testimony of Parent.

⁵ DCPS-03.

⁶ Petitioner's Exhibit 4.
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with feedback given to the home and a defined place where Student can go to de-escalate with appropriate guidance; Classroom accommodations to include repeated and restated directions, use of manipulatives, and extra time; involvement in a structured youth group; and creative outlet for emotions and feelings, such as journaling or art expression.⁷

6. Petitioner was unable to reach its expert psychologist during the due process hearing. As a result, Petitioner failed to present expert psychological/psychiatric testimony concerning Student's needs with respect to behavior management.
7. Student also received a developmental evaluation on August 19, 2008 through the neurodevelopmental pediatric program at Children's Hospital ("Children's"). The physicians, who administered the examination to Student, diagnosed her with ADHD with oppositional defiance, noting that her problems include behavioral and attention problems with a possible learning and/or speech disability. The physicians started Student on a trial of pharmaceutical management in the form of Metadate CD at 20 mg daily, and Parent was instructed "to have a teacher evaluate [Student] with the Conner Scale after a one week trial of the medication and after one week without the medication, with the teacher being blinded to whether [Student] is on medication." The physicians educated Parent on how Student is to take the medication and further explained to Parent that the side effects of the medication include headache, stomachache, and loss of appetite.⁸
8. Student was determined eligible for special education and related services as an other health impaired ("OHI") student on September 18, 2008. Student's initial IEP, which was developed on September 18, 2008, requires Student to receive 7.5 hours per week of specialized instruction in the academic areas of math, reading and written expression, and 1 hour per week of speech-language services. The IEP also requires Student to receive numerous accommodations, including repetition of directions, having appropriate behavior defined, and simplification of oral directions. In addition, Student continues to participate in tutoring 2 to 3 times per week during aftercare at school.⁹
9. Student remains in a general education third grade class. Her behavior has improved since she has been on medication, but she still has behavior problems and her teacher routinely calls Parent or Parent's uncle to speak to Student on the phone or come up to the school to sit with Student. Student has also made some progress in math. It is unclear whether or to what extent Student has progressed in reading because Parent is of the opinion that Student is still struggling with reading, while Student's current teacher believes Student has made progress with her reading. Student's report card for the current school year reveals that she received a grade of "below basic" in Reading/English Language Arts and Mathematics for the second advisory.¹⁰

⁷ Petitioner's Exhibit 3.

⁸ Petitioner's Exhibit 5.

⁹ Petitioner's Exhibit 2; Testimony of Parent.

¹⁰ Testimony of Parent; testimony of teacher; Petitioner's Exhibit 6.

10. As far as Parent can determine Student's current teacher attempts to deal with Student's behavior by taking away Student's recess and calling Parent or the uncle. The teacher acknowledges that she calls the uncle often because Student seems to listen to him. The teacher also calls Parent often; oftentimes, however, Parent does not return the teacher's calls.¹¹
11. Parent has stated to Student's teacher and at Student's IEP meeting her concern that maybe Student should not be in a class with regular education students because she is not on the same academic level and the pressure of trying to keep up may be causing the behavior problems.¹²
12. Parent has not requested a new MDT meeting since Student's initial meeting in September 2008, nor has Parent requested that DCPS administer any additional evaluations to Student. However, Parent has requested additional testing at Children's Hospital because Student's behavior is still problematic, even with the medication. Parent has also requested an OT evaluation through Children's Hospital and through her insurance case worker, but Parent never requested an OT evaluation from school because she did not know the school offered OT evaluations. Parent is new to the special education process and is not familiar with the way the system works.¹³ However, Parent now has counsel, and counsel failed to request an MDT meeting to discuss Student's progress, and also failed to advise the school in writing of Parent's concerns, prior to filing the Complaint in this matter.
13. The SEC at Student's school has not communicated with Parent, Petitioner's counsel, or counsel's legal assistant since the September 2008 Eligibility/IEP meeting for Student, nor has she received any requests for additional evaluations or to reconvene Student's MDT meeting. The SEC has no direct interaction with Student. Once the SEC received the instant Complaint, the SEC spoke with Student's current teacher, who advised the SEC that Student has difficulty in the classroom on days when she has not taken her medicine. Parent acknowledges that Student skipped the medicine on 3 to 4 days due to Parent rushing in the morning, and on a few more days when her insurance changed. On the days when Student missed her medicine, Student's teacher contacted parent and asked her to bring the medicine to school.¹⁴
14. Petitioner's counsel's legal assistant conducted an hour-long observation of Student in school on February 9, 2009. Student was away from class receiving speech services when the assistant first arrived. When Student returned, the class was reading. Student did not appear to know what was going on and she did not write in the workbooks the other students were using. There were 25 students in the class, and they were separated into 5 groups of 5 students each. In the legal assistant's opinion, the teacher maintained order by keeping a high level of structure. She operated like a drill sergeant, and none of

¹¹ Testimony of Parent; testimony of teacher.

¹² Testimony of Parent.

¹³ Testimony of Parent.

¹⁴ Testimony of SEC; Testimony of Parent.

the students were talking.¹⁵

15. Student's teacher is of the opinion that Student is an ideal student when she is on her medication, but when Student is not on her medication, she cannot stay in her chair, constantly turns and twists in her chair, and calls her classmates outside of their names. In the teacher's opinion, everything turns on whether Student has received her medicine. However, on the day of the due process hearing, the teacher reported that Student was having a very bad day and had not taken her medication, but Parent testified that Student had been given her medicine that day. Moreover, Parent sometimes overdoses Student by giving her two doses of the medicine per day because it wears off before the school day is over and she wants to avoid the incessant calls from the teacher.¹⁶
16. Everyone in the Student's current classroom, including Student, has a behavior chart. As for Student, she gets a sticker on the behavior chart if she does well on a given day. At the end of the month, she gets a prize out of a basket. Although everyone in the class has a behavior chart, the teacher will give special incentives for Student. For example, one time the teacher gave Student five dollars. However, the teacher is not aware of any specific behavior plan for Student.¹⁷
17. The special education teacher comes in approximately 3 days per week to work with Student, and he also pulls Student out of class approximately two additional days per week.¹⁸
18. There are a total of 26 students in Student's current classroom. One other student has been identified as ADHD and is taking medication, and approximately 15 other students in the class have significant behavior problems but have not been identified. There are a total of 6 special education students in the class.¹⁹

V. CONCLUSIONS OF LAW

At issue in this case is whether DCPS failed to conduct clinical and OT evaluations upon request, failed to provide appropriate educational services to Student, failed to provide appropriate related services to Student, and/or provided Student with an inappropriate placement. As the party seeking relief in this action, Petitioner bears the burden of proof. See 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

1. Alleged Failure to Conduct Clinical and OT Evaluations Upon Request

IDEIA permits a parent to request either an initial evaluation or a reevaluation. See 34 C.F.R. §§ 300.301, 300.303. In this case, however, the evidence demonstrates that since DCPS conducted

¹⁵ Testimony of legal assistant.

¹⁶ Testimony of teacher; Testimony of Parent.

¹⁷ Testimony of teacher.

¹⁸ Testimony of teacher.

¹⁹ Testimony of teacher.

the initial evaluation of Student, which consisted of academic, speech/language, and comprehensive psychological evaluations, Parent has not requested a new MDT meeting or additional evaluations for Student. Indeed, Parent explicitly testified during the due process hearing that she never requested that DCPS conduct an OT evaluation for Student. While the evidence also tends to prove that Parent is new to, and not totally familiar with, the special education process, Parent is now represented by counsel and there is no evidence of record that Petitioner's counsel ever requested on Parent's behalf, or ever directed Parent to request, an MDT meeting or additional evaluations for Student. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS failed to conduct clinical and OT evaluations upon request.

2. Alleged Failure to Provide Appropriate Educational Services to Student

Petitioner has charged DCPS with failing to provide appropriate educational services to Student. The evidence in this case proves that Student's academic performance was below grade level at the time of her May 2008 educational evaluation, that Student recently began receiving specialized instruction pursuant to her September 2008 IEP, and that Student received below basic grades in Reading/English Language Arts and Math a few months later for the second advisory of the current school year. Noticeably missing from the administrative record, however, is any expert testimony tending to prove that Student requires more than the 7.5 hours per week of specialized instruction she presently is receiving to make sufficient academic progress. Nor do any of Student's evaluations recommend that she receive more than 7.5 hours of specialized instruction per week. Moreover, although it is unclear whether and to what extent Student has made progress in reading, the evidence proves that she has made progress in math since she began receiving specialized instruction. Under these circumstances, it is possible that Student simply has not been receiving specialized instruction long enough to make noticeable progress in all academic areas. In any event, given the lack of any expert evidence to the effect that Student requires more specialized instruction than she presently is receiving, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS has failed to provide appropriate educational services to Student.

3. Alleged Failure to Provide Appropriate Related Services to Student

A school system fulfills its obligation to provide a FAPE by providing personalized instruction to a disabled child with sufficient support services to permit the child to benefit educationally from that instruction. *See Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). The State educational agency must prohibit State and LEA personnel from requiring a child or parents to obtain a prescription for a controlled substance as a condition of attending school, receiving an evaluation, or receiving services. *See* 20 U.S.C. § 1412(a)(25)(A); 34 C.F.R. § 300.174(a).

The evidence in this case proves that Student has been diagnosed with ADHD with oppositional defiance, and she presently is on a trial of pharmaceutical management for the ADHD. Although the physicians, who prescribed the ADHD medication, instructed Parent to have a teacher evaluate Student with the Conner Scale after one week with the medication and after one week without it, with the teacher having no knowledge of whether or not Student is on the medication on a given week, there is no evidence that such evaluations have taken place. Moreover, although Student's behavior has improved since she has been on medication, she still has so

many behavior problems that her teacher routinely calls Parent or Parent's uncle for help with Student. Student's teacher is of the opinion that everything turns on whether Student has received her medication because she is an ideal student when on her medication. However, the evidence is clear that the medication has not totally resolved Student's behavior issues, and Parent has resorted to overdosing Student by giving her a double dose of medication to prevent it from wearing out before the school day ends. Student has a behavior chart in her current class, as does every other Student in the class. However, Student's current school has not put any specific behavior plan in place to address her ongoing behavior issues, and Student's IEP makes no provision for her to receive psychological counseling services designed to address her behavior issues.

Based on the evidence outlined above, the hearing officer concludes that Petitioner met its burden of proving that DCPS has failed to provide Student with appropriate related services designed to address her ADHD with oppositional defiance by failing to provide her with a behavior plan and psychological counseling services designed to address her ongoing behavior issues, and instead relying primarily upon a medication regimen that has been prescribed on a trial basis and that clearly does not fully resolve her behavior issues. As a result, the hearing officer will order DCPS to conduct a functional behavior assessment ("FBA") and develop a behavior intervention plan ("BIP") for Student, to begin providing Student with one hour of psychological counseling services per week, and to reconvene Student's MDT during the month of April 2009 to determine whether and to what extent Student's behavior has improved as a result of the BIP and psychological counseling services, as well as whether and to what Student may benefit from additional evaluations and/or additional related services designed to address her behavior issues.

4. Alleged Inappropriate Placement

Petitioner indicated at the due process hearing that it did not intend to pursue its inappropriate placement claim at this time. As a result, the hearing officer declines to address the inappropriate placement claim herein.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proving that DCPS has failed to provide Student with appropriate related services designed to address her ADHD with oppositional defiance, but Petitioner failed to meet its burden of proof on the remaining claims asserted in this case.

VII. ORDER

1. Within 15 calendar days of the issuance of this Order, DCPS shall complete an FBA and a BIP for Student. DCPS shall also begin implementing Student's BIP within three school days of its completion.

2. Beginning during the week of March 9, 2009, DCPS shall begin providing Student with no less than one hour of psychological counseling services per week. DCPS is free to provide Student with more than one hour of psychological counseling services per week if it feels Student will benefit from same, but DCPS shall not provide Student with less than one hour of such services per week beginning the week of March 9, 2009.
3. Student's current IEP is hereby revised to include the BIP and psychological counseling services ordered above.
4. During the month of April 2009, DCPS shall reconvene Student's IEP meeting to determine whether and to what extent Student's behavior has improved as a result of her new BIP and psychological counseling services, as well as whether and to what Student may benefit from additional evaluations and/or additional related services designed to address her behavior issues.

/s/ Kimm H. Massey, Esq.

Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 28th day of February, 2009.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).