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

Parents,[1] on behalf of,

Petitioner,

Date Issued: March 17, 2012

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,
Respondent.

OSSE
STUDENT HEARING OFFICE
2012 MAR 20 PM 3:58

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is an year old female, who is currently a grade student attending School A. The student's current individualized education program (IEP) lists Other Health Impairment (OHI) as her primary disability and provides for her to receive five (5) hours per week of specialized instruction inside of the general education setting and five (5) hours per week of specialized instruction outside of the general education setting, 120 minutes per month of behavioral support services outside of the general education setting, sixty (60) minutes per month of occupational therapy outside of the general education setting, and 180 minutes per month of occupational therapy inside of the general education setting.

On January 10, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to implement the student's behavioral intervention plan (BIP) and classroom accommodations, and refusing to issue an independent functional behavioral assessment (FBA). As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, that DCPS issue an authorization for an independent FBA, following the completed FBA a meeting be held to review the FBA and create a BIP, and compensatory education.

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

On January 20, 2012, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that DCPS has appropriately provided the student's educational program and the student's IEP Team made the parents requested changes to the student's FBA.

On February 2, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement as to all issues. However, at the Resolution Meeting, the Respondent agreed to issue an authorization for an independent FBA. The parties also agreed that the 45-day timeline would begin on February 10, 2012, after the expiration of the 30-day resolution period and ends on March 25, 2012.

On February 15, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issue, relief sought and related matters. The Hearing Officer issued the Prehearing Order on February 15, 2012. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. Neither party disputed the issue as outlined in the Order.

On March 7, 2012, Petitioner filed Disclosures including twenty-six (26) exhibits and six (6) witnesses.[2] On March 6, 2012, Respondent filed Disclosures including fourteen (14) exhibits and seven (7) witnesses.

The due process hearing commenced at approximately 9:21 a.m. on March 14, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2006. At 9:15 a.m., the scheduled time to begin the due process hearing, the Petitioners, Petitioners' attorney and DCPS representative were present. The Respondent's attorney arrived at approximately 9:20 a.m. The Petitioner elected for the hearing to be closed.

Petitioner's exhibits 1-26 were admitted without objection. Respondent's exhibits 1-13 were admitted without objection. The hearing officer did not admit Respondent's Exhibit 14 because the notes were developed during settlement negotiations. The Respondent argued that the document provided evidence of the date DCPS provided authorization for an independent FBA. However, this information is also contained in Petitioner's Exhibit 2 and Respondent's Exhibit 13.

At the close of Respondent's case, the Respondent moved for a Directed Verdict. The Hearing Officer declined to grant the motion, taking the grounds for the motion under advisement to be resolved herein on the entire record. The hearing concluded at approximately 4:04 p.m. following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

[2] A list of exhibits is attached as Appendix B. A list of witnesses is included in Appendix A.

ISSUE

The issues to be determined are as follows:

1. Whether DCPS denied the student a FAPE by failing to implement her BIP from October 6, 2011 through present and by failing to implement testing accommodations and the classroom accommodations of repetition and explanation of directions/instructions, checking periodically for understanding and providing her with classroom notes as required by her IEP from August 22, 2011 through present?
2. Whether DCPS denied the student a FAPE by delaying its authorization for an independent educational evaluation (IEE), specifically an independent FBA, from December 16, 2011 until February 2, 2012?

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 is a student with disabilities as defined by 34 CFR §300.8. (Petitioner's Exhibit 11; Doctor's Testimony)
2. The student is diagnosed with attention deficit and hyperactivity disorder (ADHD), combined type, and an anxiety disorder. The displays disorganized, distractible and anxious behaviors. (Petitioner's Exhibit 10; Respondent's Exhibits 2 and 9; Doctor's Testimony; Mother's Testimony; Grandmother's Testimony)
3. The student's October 31, 2011 IEP prescribes five (5) hours per week of specialized instruction outside of the general education setting, five (5) hours per week of specialized instruction inside of the general education setting, 120 minutes per month of behavioral support services outside of the general education setting, sixty (60) minutes per month of occupational therapy outside of the general education setting, 180 minutes per month of occupational therapy inside of the general education setting; classroom accommodations of graphic organizers, chunking assignments, repetition and explanation of directions/instructions, check periodically for understanding, provide classroom notes; and the statewide assessment accommodations of repetition of directions, calculators, small group testing, breaks between subtests and extended time on subtests. (Respondent's Exhibit 6)
4. The student's March 28, 2011 IEP includes the additional assessment accommodations of dictated response to examiner, scribe, preferential seating and test administered at best time of day for student. (Petitioner's Exhibit 16)
5. The student has an "assigned testing site" for statewide tests. The student receives the assessment accommodation of small group testing in math, language arts and social studies. There are approximately twenty-four (24) students in the child's Spanish class. The student takes Spanish assessment in the regular class so therefore does not receive the assessment accommodation of small group testing in Spanish

however does receive the assessment accommodation of repeated directions in Spanish. The student's teachers modify assessments for the student and give the student multiple opportunities to retake assessments. (Petitioner's Exhibits 9 and 12; Respondent's Exhibits 3 and 12; Student's Testimony)

6. School A is implementing the classroom accommodations of graphic organizers, repetition and explanation of directions/instructions and check periodically for understanding. School A is not implementing the classroom accommodation of provide classroom notes. (Petitioner's Exhibit 12; Respondent's Exhibit 3; Student's Testimony; Advocate's Testimony)
7. Academically, the student is on grade level and is progressing. However, the student's October 6, 2011 and October 31, 2011 IEP Teams discussed the student's low grades in science and math, respectively, because of low assessment scores and disorganization. (Petitioner's Exhibits 10, 12 and 22; Respondent's Exhibits 3, 6 and 8)
8. On the student's October 28, 2011 progress report, the student received the grade letter B in math, the grade letter C- in language arts, the grade letter B- in Spanish, the grade letter B- in science, the grade letter B+ in social studies and the grade letter A in physical education. The math teacher made the comments that the student has good participation and is a pleasure to have in class. The language arts teacher made the comments that the student has excessive tardiness, cuts class and does not do homework. The Spanish teacher made the comments that the student takes excellent initiative and is a pleasure to have in class. The science teacher made the comments that the student needs more study and is a pleasure to have in class. The social studies teacher made the comments that the student has excessive tardiness and has good participation. The physical education teacher made the comments that the student has excellent behavior and good participation. (Respondent's Exhibit 8; Student's Testimony)
9. The student attends after-school tutoring three (3) days per week. (Petitioner's Exhibit 12; Mother's Testimony; Grandmother's Testimony; Student's Testimony)
10. Due to the student's inattentiveness and distractibility, the student forgets to turn in assignments and is frequently tardy to language arts, social studies and physical education. When the student is tardy, she is "a few minutes" late to class but is not able to complete the "warm-up" assignment. (Petitioner's Exhibits 10 and 12; Respondent's Exhibits 2, 3, 9 and 11; Student's Testimony; Advocate's Testimony; Mother's Testimony)
11. The student's IEP Team considered the use of positive behavioral interventions and supports and other strategies to address the student's behavior. Specifically, the student's special education teacher met with her to develop a "locker plan" to assist her with arriving on time to class; the IEP Team decided to have the school social worker "check-in" more often with the student and to monitor the locker plan; the IEP Team discussed having a staff member escort the student from class to class; the special education coordinator invited the student's parents and the parent's advocate to observe the student to assist with identifying appropriate strategies for the student; the special education coordinator suggested a personal timer for the student to use; and School A implemented a "self-monitoring chart" for the student. The locker plan was met with minimal success and there was inconsistent execution of the staff

escort. None of the strategies discussed by the student's IEP Team or in other meetings were formalized into a BIP or included in the student's IEP. (Petitioner's Exhibits 6, 10, 12 and 14; Respondent's Exhibits 2, 3 and 10; Student's Testimony; Advocate's Testimony; Grandmother's Testimony; Mother's Testimony)

12. The acting principal, assistant principal and teachers spoke with the student's mother and grandmother to discuss strategies to address the student's behaviors outside of formal IEP Team meetings. (Mother's Testimony; Grandmother's Testimony)
13. On October 31, 2011, the student's IEP Team agreed to conduct an FBA for the student. (Respondent's Exhibit 2; Advocate's Testimony)
14. At the student's December 20, 2011 IEP Team meeting, the student's parents disagreed with the FBA conducted by DCPS and requested an IEE, specifically an independent FBA. School A refused to provide the IEE and instead, offered to have a DCPS special education psychologist conduct a revised FBA and referred the parents to the Procedural Safeguards based on their disagreement. DCPS provided the authorization for the IEE/FBA on February 2, 2012. (Petitioner's Exhibits 2 and 4; Respondent's Exhibit 13; Advocate Testimony; Mother's Testimony)

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:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Board of Education v. Rowley*, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991). The IEP is the primary vehicle for ensuring that a disabled child's educational program is individually tailored based on the child's unique abilities and needs. *See* 20 U.S.C. §1414(d); 34 CFR §§300.320-300.324. Designing an appropriate IEP is necessary but not sufficient. The public agency must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP. *See O.O. v. District of Columbia*, 573 F. Supp. 2d 41 (D.D.C. 2008).

The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20 U.S.C. § 1415. The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) 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 (iii) caused a deprivation of educational benefit.

Under the IDEA, the parents of a child with a disability have the right to obtain an IEE if the parent disagrees with an evaluation obtained by the public agency. 34 CFR §300.502(b)(1). The IEE must be conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. *See* 34 CFR §300.502(a)(3)(i). Upon request, without unnecessary delay, the public agency must either file a due process complaint to request a hearing to show that its evaluation is appropriate or ensure that an IEE is provided at public expense, unless the LEA demonstrates in a hearing that the evaluation obtained by the parent did not meet the LEA's criteria. *See* 34 CFR §300.502(b)(2).

In the present case, the student's IEP Team met on December 20, 2012 to review the FBA conducted by DCPS. At the meeting, the student's parents expressed their disagreement with the FBA and requested an IEE. DCPS offered to make amendments to the FBA based on the parental concerns. On January 3, 2012, DCPS offered to have a DCPS special education psychologist conduct a revised FBA and provided a copy of the procedural safeguards to the parents.

While School A attempted to address the parental concerns with the FBA, the law requires DCPS to, without unnecessary delay, provide the IEE or file a due process complaint. Offering to have another examiner that is employed by the public agency conduct the evaluation is not sufficient. DCPS did not provide the IEE until February 2, 2012, after the parents filed a due process complaint. It is particularly disturbing that DCPS put the burden of filing the due process complaint on the parent when it is clear that the public agency bore this responsibility.

From August 22, 2011, the student continually displayed distractible and anxious behaviors. While School A attempted behavioral interventions and supports and other strategies to address the student's behavior, the student continued to be tardy to her language arts, social studies and physical education classes; distracted in class; and fail to turn in assignments. The unnecessary delay in providing an IEE after the parent's request represents a procedural violation. *See Taylor v. District of Columbia*, No. 09-175, (D.D.C. Mar. 16, 2011). Although the IEE has not yet been completed, this procedural violation impeded child's right to FAPE and caused a deprivation of educational benefit in that the delay from December 20, 2011 to February 2, 2012 will delay an appropriate BIP to be developed to address the student's behaviors by approximately forty-four (44) days.

In the present case, the Petitioner has not alleged that the IEP is not reasonable calculated to enable the child to receive some educational benefit but rather that the student's IEP has not been appropriately implemented. Specifically, the Petitioner alleges that DCPS failed to

implement the student's BIP and failed to implement testing accommodations and the classroom accommodations of repetition and explanation of directions/instructions, checking periodically for understanding and providing the student with classroom notes as required by the student's IEP. The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

Pursuant to 34 CFR §300.324(a)(2)(i), in the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other behavioral strategies, to address that behavior. The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (quoting *Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)).

The student's IEP includes specialized instruction and behavioral support services to address her ADHD behaviors. When the student's IEP Team recognized that the student was having difficulty adjusting to middle school, the IEP Team scheduled a meeting. Prior to the October 6, 2011 meeting, the student's special education teacher met with her to develop a "locker plan" to assist her with arriving on time to class. At the October 6, 2011 meeting, the IEP Team decided to have the school social worker "check-in" more often with the student and to monitor the locker plan. The locker plan was met with minimal success. At the student's October 31, 2011 meeting, the IEP Team discussed having a staff member escort the student from class to class. There was inconsistent execution of the staff escort. Additionally, at the October 31, 2011 IEP Team meeting, the special education coordinator invited the student's parents and the parent's advocate to observe the student to assist with identifying appropriate strategies for the student. Also at the October 31, 2011 meeting, the IEP Team agreed to have an FBA conducted for the student and the results of the FBA were discussed at a December 20, 2011 IEP Team meeting. At the December 20, 2011 meeting, the IEP Team did not agree on a BIP for the student. Despite the lack of agreement on a BIP, School A discussed providing a "self-monitoring chart" for the student. This intervention began in late January 2012. In addition to the formal IEP Team meetings, the acting principal, assistant principal and teachers spoke with the student's mother and grandmother to discuss strategies to address the student's behaviors. None of the strategies discussed by the student's IEP Team or in other meetings were formalized into a BIP.

The Petitioner alleges that DCPS has denied the student a FAPE because it failed to implement her BIP. However, the Petitioner failed to prove that the student had a BIP. While the student's IEP Team developed several interventions and strategies to address her behavior, none of these interventions or strategies was formalized into a BIP or included in the student's IEP. Additionally, while the interventions and strategies were largely unsuccessful, possibly due in part to the lack of consistent implementation, the student's IEP Team continued to meet to identify appropriate interventions to support the child and conducted an FBA to determine the function of the child's behavior.

The Petitioner also alleged that DCPS failed to implement testing accommodations for the student. The student's March 28, 2011 and October 31, 2011 IEPs list the assessment accommodations of repetition of directions, calculators, small group testing, breaks between subtests and extended time on subtests. The student's March 28, 2011 IEP also includes the assessment accommodations of dictated response to examiner, scribe, preferential seating and test administered at best time of day for student.

The student testified that she has an "assigned testing site" for statewide tests and for regular testing she usually takes in class or, at times, takes tests with another teacher. The student testified that she takes science and Spanish tests in class and math, language arts and social studies tests out of class. There are approximately twenty-four (24) students in the child's Spanish class. The Petitioner did not present evidence as to the number of students in the child's science class. The student also testified that she is given extra time to study during assessments and that the Spanish teacher repeats directions. During the October 6, 2011 IEP Team meeting, the team discussed how teachers modify assessments for the student and give the student multiple opportunities to retake assessments. There was no other evidence presented regarding testing accommodations.

The Hearing Officer concludes that the student was not given the assessment accommodation of small group testing in her Spanish class. However, the Petitioner failed to prove that the student has suffered harm from DCPS' failure to provide small group testing in her Spanish class. As of October 28, 2011, the student was receiving the letter grade B- in Spanish. Although on October 6, 2011 and October 31, 2011 the student's IEP Team discussed low grades for the student in science and math, respectively, because of low assessment scores, there was never a concern raised as to the student's achievement in Spanish. Therefore, the failure of DCPS to provide the assessment accommodation of small group testing to the student in her Spanish class did not constitute a denial of FAPE.

The Petitioner also argued that DCPS has not implemented the student's classroom accommodations of repetition and explanation of directions/instructions, checking periodically for understanding and providing her with classroom notes. The student testified that her Spanish teacher repeats directions/instructions and that her language arts teacher "sometimes" repeats directions/instructions and will repeat directions/instructions when asked. The student testified that her Spanish, language arts, social studies and science teachers check for understanding. While the student testified that her math and art teachers do not specifically asks if she understands assignments, they do walk around and check her work. The student's IEP contains the classroom accommodation of "checking periodically for understanding" but does not specify that the periodic checking can be achieved solely by the teacher asking the student if she understands. The student testified that she does not get classroom notes in any of her classes.

With regard to other evidence presented by Petitioner related to classroom accommodations, the Hearing Officer did not find the Grandmother's testimony that she "feels" the student is not getting the needed support from instructors, the Mother's testimony that she "feels" that accommodations are lacking or the Advocate's testimony based on approximately three (3) hours twenty (20) minutes of observation compelling. The Hearing Officer concludes that Petitioner met her burden only with regard to DCPS failing to make available the classroom

accommodation of providing the classroom notes to the student. While the student is making progress, the student's parents spend significant time assisting her with her homework and have arranged for her to receive after-school tutoring three (3) times per week. The Hearing Officer is persuaded by the argument that had the student's parents not provided this additional assistance, she would not be progressing in the same manner. The failure of DCPS to provide any other classroom accommodations was not a material failure because the classroom accommodations provided in the student's classes did not fall significantly short of the accommodations listed in the student's IEP. *See Van Duyn v. Baker School District,* 481 F.3d 770, 47 IDELR 182 (United States Court of Appeals, 9th Circuit (2007)).

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . 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 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003).

In the instant matter, Petitioner has established that the student was denied a FAPE when DCPS: (1) failed to provide an IEE after the parent's request; and (2) failed to implement the accommodation of providing classroom notes to the student. As a result of these failures to provide a FAPE, the student was harmed in that there is a delay of approximately forty-four (44) days in her IEP Team reviewing the independent FBA in order to develop an appropriate BIP. During this delay, the student continues to be tardy, and miss instruction, specifically for her language arts and social studies classes. Additionally, the student was harmed by struggling academically in language arts, math and science, the struggle which was heightened by the failure of DCPS to provide classroom notes. While the Petitioner requested 120 hours of compensatory education or the funding of a summer program for the denials of FAPE, the Hearing Officer finds this request excessive. Each time the student was tardy to class and missed instruction, she was tardy by "a few minutes." Further, while the student has struggled academically in language arts, math and science, she is making progress in all classes.[3]

ORDER

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

1. Within 15 calendar days of the receipt of the independent FBA, DCPS hold an IEP Team meeting to discuss the results of the FBA and develop a BIP based on the results of the FBA;

2. That the Respondent fund a total of fifteen (15) hours of independent one-on-one tutoring for the student, with ten (10) hours of the tutoring specifically in the area of

[3] The Hearing Officer notes that the student's progress is attributed, in part, to the private tutoring supplied by the student's parents.

language arts, and the remaining five (5) hours of the tutoring in the areas of math and science, at a rate not to exceed $65.00 per hour, to be completed by August 27, 2012;

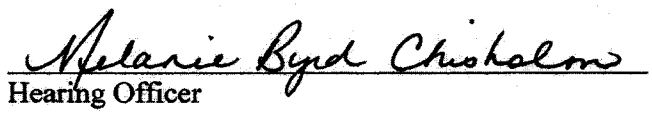
3. All other relief sought by Petitioner herein is **denied;**

4. The Respondent's Motion for Directed Verdict is **denied.**

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 17, 2012



Hearing Officer