

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],¹

Date Issued: December 13, 2011

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

OSSE
STUDENT HEARING OFFICE
2011 DEC 13 PM 12:00

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on September 29, 2011.

A response to the complaint was filed on October 6, 2011. A prehearing conference was held on October 12, 2011 and a prehearing order was issued on that date. A resolution meeting was held on October 19, 2011. No agreements were reached and the 45 day hearing timeline began on October 29, 2011.

The due process hearing was convened and held on December 7, 2011, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The due date for this HOD is December 13, 2011. This HOD is issued on December 13, 2011.

¹ Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the Independent Hearing Officer (IHO) are:

- (1) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it did not provide the Student an evaluation sufficiently comprehensive to identify all of his special education and related service needs, specifically a neuropsychological assessment and functional behavioral assessment (FBA)?
- (2) Whether the Respondent denied the Student a FAPE when it did not permit the Petitioner's Education Advocate to observe the Student in the classroom?
- (1) Whether the Respondent denied the Student a FAPE when it did not offer or provided the Student an individualized education program (IEP) reasonably calculated to provide educational benefit because it lacked behavioral support services in the March 22, 2010 and February 22, 2011 revisions?

The substantive requested relief at the time of hearing is:²

- (1) A neuropsychological assessment.
- (2) An FBA.
- (3) Permission for the Petitioner's advocate to observe the Student in class.
- (4) An IEP team meeting to discuss the evaluations and observation.

The Respondent has not denied the Student a FAPE based on any of the allegations herein.

² The Petitioner wishes to "hold in abeyance" her request for compensatory education. Given the determination in this matter this request is moot as to the issues herein.

IV. EVIDENCE

Seven witnesses testified at the hearing, four for the Petitioner and three for the Respondent.

The Petitioner's witnesses were:

- 1) Valerie Foster, Educational Advocate (V.F.)³
- 2) The Student's Mother, Petitioner (P)
- 3) The Student's Grandmother,
- 4) Natasha Nelson, Clinical Psychologist (N.N.) (Providing expert testimony in clinical psychology.)

The Respondent's witnesses were:

- 1) Halima Odom, Progress Monitor (H.O.)
- 2) Special Education Teacher
- 3) Principal

Four exhibits were admitted into evidence of 19 disclosures from the Petitioner. The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 4	September 27, 2011	Email chain ending from Lumumba-Umoja to Mendoza
P 8	March 2, 2011	Final Eligibility Determination Report
P 9	November 28, 2011	Comprehensive Psychological Evaluation
P 13	August 18, 2010	Educational Evaluation

All five of the Respondent's disclosed exhibits were admitted into evidence. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	August 30, 2011	Non-Public Supplemental Withdrawal Form

³ V.F. was not a credible witness. She had little first-hand knowledge of the Student and testified under oath that she had previously seen document P 4 and that it was a document about the Student. P 4 has the name of a student blacked out. It seemed odd to the IHO that the Student's name would be redacted from a document generated by the Petitioner's Counsel's law firm and upon close inspection the name of the student could be seen despite being blacked out. The IHO stated the name of the student identified in P 4 on the record and it is not disclosed here in a public document. The IHO noted on the record that the clear discrepancy in between V.F.'s testimony and P 4 rendered her entire testimony in question.

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 2	February 24, 2011	IEP (and meeting notes of February 22, 2011)
R 3	March 3, 2010	IEP (and meeting notes of March 3, 2010)
R 4	June 14, 2011	IEP Progress Report – Annual Goals
	January 20, 2011	IEP Progress Report – Annual Goals
	October 25, 2010	IEP Progress Report – Annual Goals
	June 13, 2010	IEP Progress Report – Annual Goals
	April 19, 2010	IEP Progress Report – Annual Goals
	November 20, 2009	IEP Progress Report – Annual Goals
R 5	November 30, 2011	Transcript
	November 30, 2011	Letter of Understanding

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. To the extent the findings of fact do not reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are not credited. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. 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. Student is a significantly cognitively impaired Student who attends a senior high school in the District of Columbia.⁴ Last school year the Student attended at (a non-public school).⁵
2. Due to significant problems during birth, including loss of oxygen to his brain, the Student has been recommended repeatedly for a neurological testing, as early as age two, but the

⁴ Testimony (T) of P, T of G.J., P 8, P 9, P 13, R 1, R 2, R 3, R 5.

⁵ T of E.J., R 1.

Petitioner has never obtained such testing.⁶ In 2010 and again in November 2011, a neuropsychological assessment was recommended by psychologists to rule out attention deficit hyperactivity disorder.⁷ N.N. also recommends a neuropsychological assessment to better understand the Student's reading fluency and decoding.⁸

3. The Student performs at an extremely low grade level for his age (15).⁹ His disabilities – learning disorder NOS and cognitive disorder NOS – limit his ability to understand mathematical concepts, limit his decoding and comprehension reading (which also affects his writing), and have stunted his learning and performance of daily living skills.¹⁰ His adjustment disorder with mixed anxiety and depressed mood have impacted his learning to cope with undesirable situations.¹¹
4. The Student had been determined eligible for special education and related services under the definition of mental retardation (referred to locally as intellectual disability).¹² The Student has higher adaptive functioning than a child meeting the definition might have, however, and so may be misidentified.¹³
5. The Student's IEP, revised in March 2010, included an annual goal to improve social emotional skills by engaging in appropriate verbal exchanges with peers with minimal verbal assistance and modeling four out of five opportunities and verbally interacting appropriately in a game setting with one or more peers in four out of five opportunities.¹⁴ He received 30 hours per week of specialized instruction out of the general education setting from a special

⁶ T of P.

⁷ P 9, P 13.

⁸ T of N.N., P 9.

⁹ T of G.J., P 9, P 13, R 2, R 3.

¹⁰ R 2, P 9.

¹¹ R 2, P 9.

¹² R 2, R 3.

¹³ P 9, P 13, T of N.N.

¹⁴ R 3.

education teacher in order to help him reach, in part, this goal.¹⁵ No separate behavioral support services were provided.¹⁶

6. Math performance. As of February 2011, the last time the IEP was revised, the Student could perform basic math computations including adding and subtracting multi-digit numbers without regrouping.¹⁷ He could add three digit numbers with regrouping and do simple 2-step word problems (adding and subtracting up to 20) with picture or manipulatives.¹⁸
7. Reading and Writing performance. As of February 2011 the Student could decode unfamiliar words phonetically and recognizes Dolch sight words up to 2nd grade levels.¹⁹ He could identify characters from a passage and was able to read fluently late 4th grade texts.²⁰ The Student could keep chronological order when summarizing what he had read if he could refer back to the passage, but he needed moderate to maximum assistance to pull out the critical details.²¹ He could complete tasks involving chronological order with minimal assistance and was working on understanding elements of cause and effect.²² He was using the computer to type answers to writing prompts.²³
8. Adaptive/Daily Living Skills performance. As of February 2011 the Student was able to complete his classroom clean up assignment with minimal prompting.²⁴ He knew and could describe most pedestrian and safety signs and was working on acknowledging a variety of signs.²⁵ He was able to use a map to navigate the Metro.²⁶ He was showing basic

¹⁵ R 3, R 4.

¹⁶ R 3.

¹⁷ R 2.

¹⁸ R 2.

¹⁹ R 2.

²⁰ R 2.

²¹ R 2.

²² R 2.

²³ R 2.

²⁴ R 2.

²⁵ R 2.

understanding of nutrition and was working to understand how nutrition could affect his medical condition.²⁷ The Student was learning basic concepts of money management.²⁸

9. Emotional, Social, and Behavioral performance. As of February 2011 the Student was able to recognize facial expressions.²⁹ The Student was typically respectful to others and could recognize their emotions.³⁰ He could interact appropriately with peers with aid of verbal reminders and could remove himself from a situation where he found himself getting upset and control his emotions about 80% of the time.³¹ He was learning to codeswitch and tailor his words, tone, and language use to the intended audience.³²

10. The Student's IEP, last revised in February 2011, includes an annual goal addressing the Student's emotional, social, and behavioral development.³³ The goal is for the Student to improve his social emotional skills by engaging in appropriate verbal exchanges with peers with minimum verbal assistance and modeling four out of five opportunities, identifying when he is getting upset and removing himself from the situation or finding a peaceful remedy for it in five out of five opportunities, and using appropriate language and tone when making a request or interacting with different peers and adults in various settings in the community and school in four of five opportunities.³⁴

11. The IEP includes 30 hours per week of specialized instruction outside of the general education setting, several classroom accommodations, and extended school year services.³⁵

²⁶ R 2.

²⁷ R 2.

²⁸ R 2.

²⁹ R 2.

³⁰ R 2.

³¹ R 2.

³² R 2.

³³ R 2.

³⁴ R 2.

³⁵ R 2.

Separate specific behavioral support services are not included.³⁶ The Student's academic achievement is assessed using the alternate assessment.³⁷

12. The Student was making significant progress toward all of his annual goals as of June 2011.³⁸

He is currently doing well and may have reached his behavioral goal as he is polite in class and is experiencing few behavioral problems in class.³⁹ He did skip a class three or four times this school year due to anxiety over the class, and this was resolved and is not a continuing problem.⁴⁰

13. The Petitioner did not participate in the IEP meetings for the Student when the IEP was reviewed and revised in March 2010 or in February 2011.⁴¹ The Student's grandmother did participate in these meetings.⁴² Neither the Petitioner, grandmother, nor the Petitioner's Education Advocate requested or participated in an IEP team meeting following the February 2011 IEP team meeting.⁴³ The Advocate testified that she reviewed the Student's education records and no complaint was made that access to records was not provided.⁴⁴

14. The Petitioner observed the Student in class in October 2011 for about three hours.⁴⁵ She believes the Student looked bored in class.⁴⁶ The Petitioner was concerned whether the Student was in the correct class and whether he was beyond the second to third grade level.⁴⁷ Because she is not an educator, the Petitioner wanted her advocate to observe the Student's

³⁶ R 2.

³⁷ R 2.

³⁸ R 4.

³⁹ T of G.J.

⁴⁰ T of P, T of G.J.

⁴¹ T of P, R 2, R 3.

⁴² T of E.J., R 2, R 3.

⁴³ T of P, T of E.J., T of V.F.

⁴⁴ T of V.F., Due Process Complaint filed September 29, 2011.

⁴⁵ T of P.

⁴⁶ T of P.

⁴⁷ T of P.

class.⁴⁸ The Principal of the School would not allow a lay advocate to enter the class to observe the Student.⁴⁹ This was due to the recent changes made at the school to improve student performance and a recent episode where a lay advocate had contributed to a disruption at the school.⁵⁰

VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the 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." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., 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); 34 C.F.R. § 300.516(c)(3).

2. In conducting an evaluation of a student the Respondent must ensure that:

the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

34 C.F.R. § 300.304(c)(6), D.C. Mun. Regs. 5-E3005.9(h).

3. A denial of FAPE requires substantive harm or, when a violation is procedural: the effect must be to impede the child's right to FAPE; to significantly impede the parent's opportunity

⁴⁸ T of P.

⁴⁹ T of

⁵⁰ T of

to participate in the decision making process regarding provision of FAPE to the child; or cause a deprivation of educational benefit. 34 C.F.R. § 300.513(a), *See Lesesne v. District of Columbia*, 447 F. 3d 828, 834 (D.C. Cir. 2006) (“...even assuming that DCPS violated its procedural obligations, an IDEA claim is viable only if those procedural violations affected the student’s *substantive* rights.” (emphasis in original)).

4. Doctors have been advising the Petitioner to obtain a neuropsychological assessment of the child since he was an infant. The Petitioner has never obtained one. The Petitioner now wants the Respondent to provide and pay for such an assessment. The Respondent may believe it is important to do such an assessment now, or in the future, but the Petitioner has not shown the Student’s progress and involvement in the general education curriculum or toward IEP goals is such that additional data must currently be collected for educational programming. Dr. Nelson, in her recent assessment, recommended a neuropsychological assessment in order to better understand the Student’s disability including his executive functioning and reading fluency and decoding. It is likely true that such an assessment would help with that understanding. However, the Petitioner has not shown that the Student’s educational and functional performance is such that changes in his IEP are required, and therefore that current evaluation data is insufficient to identify all of his special education and related service needs. Likewise, the Petitioner has not shown an FBA is required, since the Student’s behavior is not significantly impacting his educational progress. The Petitioner reports the Student looked bored in class. This is hardly evidence that additional assessments are necessary or that the educational program is deficient. The Student’s Grandmother testified the Student did well last school year. This indicates that if the Student were having problems currently (which the evidence does not show) it may not be the result of his disability. While

the Student is functioning at a very low level, he is significantly cognitively impaired and assessed academically based on the District of Columbia Alternate Assessment. He missed a few classes this school year and that attendance issue was resolved. Neither a neuropsychological assessment nor FBA have been shown to be necessary at this time to identify the Student's special education and related service needs.

5. One of the purposes of the IDEA is to ensure the rights of children with disabilities and their parents are protected. 34 C.F.R. § 300.1(b). The role of parents in the identification, evaluation, educational placement of the child, or the provision of FAPE to the child is enabled through several provisions of the law encompassing notice, the right to be heard, and the access to information about their Student. *See e.g.*: 34 C.F.R. §§ 300.301, 300.303 (right to request an initial evaluation or reevaluation); 34 C.F.R. § 300.305 (Parent is part of team reviewing data, including observation by teachers and related service providers, as part of initial evaluation or reevaluation); 34 C.F.R. § 300.306 (parent part of group that determines eligibility); 34 C.F.R. § 300.320(a)(3) (Parent to receive periodic report on child's progress, pursuant to IEP); 34 C.F.R §§ 300.321, 300.322 (Parent part of the IEP team); 34 C.F.R. § 300.327 (Parent part of team that makes placement determination); 34 C.F.R. § 300.501 (Parent has the opportunity to examine records and participate in meetings with respect to the identification, evaluation, educational placement of the child, and the provision of FAPE to the child); 34 C.F.R. § 300.613 (Parents must be allowed to inspect and review education records pertaining to their child). Observation of the child in his or her classroom by an educational advocate is not a right the parent has pursuant to IDEA or implementing D.C. law. No Court with jurisdiction in the District of Columbia has interpreted the IDEA to require a public education agency to permit a parent's advocate to observe a child, where that

advocate is not a related service provider. As noted, supra, there are a multitude of specific ways parents are able to gather information about their child's academic achievement and functional performance. The Petitioner is requesting a policy change which is beyond the authority of this IHO.

6. In this case, the parent was able to observe the child and her Advocate was not. The Petitioner, or Advocate, could have asked for an IEP team meeting in order to gather more information about the child at school, but chose not to. The Principal declined to permit the Advocate observe the Student in the classroom due to the potential for disruption to the classroom environment. Given there is no explicit right granted to the Parent, under IDEA, to have an advocate or investigator observe her Student in the classroom, there was no violation of IDEA. Nor were any of the Petitioner's other rights concerning due process related to special education violated because she did not make other attempts to gather information about the Student which, if denied, could have illegally limited her opportunity to be involved in the identification, evaluation, educational placement, or provision of FAPE to her child.
7. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17.

8. IEPs must include, inter alia: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects his or

her involvement and progress in the general education curriculum; a statement of measurable annual academic and functional goals designed to meet the child's needs resulting from his or her disability to enable the child to be involved and make progress in the general education curriculum, and meet each of the child's other educational needs that result from his or her disability; a statement of the special education and related services, supplementary aids and services, and program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum, and to be educated and participate with other children with disabilities and nondisabled children; and a statement of the projected date for the beginning of the special education and related services, supplementary aids and services, and program modifications or supports for school personnel and the anticipated frequency, location, and duration of those services, modifications, and supports.

See: 34 C.F.R. § 300.320(a), D.C. Mun. Regs. 5-E3009.1.

9. The Student's IEP includes a goal addressing his needs in the functional area of behavior. The Student's services include specialized instruction for 30 hours per week outside of the special education setting. Behavioral support services are not separately indicated, and the evidence does not show he needs additional specific behavioral support services. The functional goal was not fully achieved from March 2010 to February 2011. However, changes to the IEP were made and by the end of the 2010-2011 school year the Student was making good progress according to his special education teacher. His special education teacher this year reports that she is not having significant behavioral problems with the Student. Based on the evidence in the record, the Student's behavioral goal may have been met. Thus, the IEP cannot be determined to not be reasonably calculated to provide

educational benefit for lacking different behavioral support services than are already provided by his special education teacher.

VII. DECISION

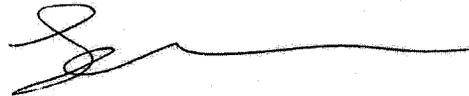
The Respondent did not deny the Student a FAPE when it did not conduct a FBA or a neuropsychological assessment of the Student because his special education and related service needs are already adequately identified. The Respondent did not deny the Student a FAPE when it did not permit the Educational Advocate to observe the Student in class because there is no requirement under IDEA that a local education agency must permit such observation. The Respondent did not deny the Student a FAPE when the IEP since February 2010 did not include behavioral support services because the Student's behavioral needs were successfully addressed by his special education teacher pursuant to his IEP. Because the Respondent did not deny the Student a FAPE based on the issues raised in the complaint no remedies are warranted.

VIII. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the Respondent prevails and the complaint is dismissed with prejudice.

IT IS SO ORDERED.

Date: December 13, 2011



Independent 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).