DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

RECEIVED
MAY 23 2011

[STUDENT],[1]
through the Parent/Guardian,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 5/23/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date:5/16/11 Room: 2009

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

The student is a year-old male who is currently attending class at The student has been found eligible for special education and related services with the disability classification of Developmental Delay. (R-2, P-20) On April 5, 2011 counsel for petitioner filed a due process complaint. On April 11, 2011 a prehearing notice was sent by this hearing officer for a prehearing conference on April 21, 2011. The Notice in bold letters in the first paragraph stated: "Counsel shall provide to this hearing officer the date of resolution meeting as soon as known and a copy of the disposition form the day after the resolution meeting." Counsel for petitioners did not inform this hearing officer of the date of the resolution meeting until the prehearing conference on April 21, 2011. On April 13, 2011 a resolution meeting was held and no agreement was reached. On April 18, 2011 counsel for

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

respondent DCPS filed a response. On April 21, 2011 the first prehearing conference was held by telephone with counsel for petitioners Kiran Hassan of James E. Brown and Associates and counsel for respondent Linda Smalls. A prehearing Order was issued on April 22, 2011 stating that counsel for respondent DCPS would provide the April 2011 student IEP progress reports to counsel for petitioner and counsel for petitioner would share those reports with the parents. A May 24, 2011 MDT/IEP meeting had been scheduled and the counsel for the petitioner was to explore with the parents withdrawing this complaint and awaiting the result of the MDT meeting. A second prehearing conference was scheduled for May 2, 2011. At the second prehearing conference, counsel for petitioner stated the parents still wished to pursue a due process hearing despite the scheduled May 24, 2011 MDT meeting. A second prehearing Order was issued on May 3, 2011 that stated the issues to be decided are 1. Did DCPS deny a FAPE by failing to provide an appropriate IEP because the March 1, 2011 IEP did not allegedly contain appropriate mathematics, reading, and written expression goals and did not include goals on social emotional needs? 2. Did DCPS deny a FAPE by failing to conduct a Functional Behavior Assessment before March 1, 2011? The relief requested is convening an MDT/IEP Meeting to review and revise the student's IEP and compensatory education.

The due process hearing convened at 9 a.m. on May 16, 2011 in Room 2009 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Kiran Hassen of James E. Brown and Associates represented the petitioners and Linda Smalls represented the respondent DCPS. The hearing was closed. At the outset of the hearing, both the petitioners' documents P-1-P-40 and respondent DCPS's documents R-1-R-7 were admitted into evidence without objection. All witnesses were sworn under oath prior to testifying. Counsel for petitioners called as witnesses the mother, Dr. Ida Jean Holman and Chithalina Khanchalern-all

who testified in person. Counsel for respondent DCPS did not call any witnesses and rested on the documents.

JURISDICTION

The hearing was convened on , 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

BACKGROUND

The student is a -year-old male who is currently attending class at The student has been found eligible for special education and related services with the disability classification of Developmental Delay. (R-2, P-20) Counsel for petitioners has raised the issues that the March 1, 2011 IEP is inappropriate because the IEP goals for mathematics, reading and written expression are not resulting in progress, are similar to the previous year IEP goals and there are no social and emotional goals. Counsel for petitioner also maintains DCPS failed to do a Functional Behavior Assessment before the March 1, 2011 IEP. Counsel for respondent DCPS counters that the student's IEP progress reports show the student is progressing on all his IEP goals and a Functional Behavior Assessment has been completed.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Did DCPS deny a FAPE to the student failing to provide an appropriate IEP because the March 1, 2011 IEP did not allegedly contain appropriate mathematics, reading, and written expression goals and did not include goals on social emotional needs?
2. Did DCPS deny a FAPE by failing to conduct a Functional Behavior Assessment before March 1, 2011?

Counsel for petitioner is seeking as relief the convening of an MDT meeting to review and revise the student's IEP and compensatory education.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue one that the March 1, 2011 IEP goals in mathematics, reading and written expression are inappropriate and that there are no social and emotional goals are as follows:

I.

1. The student is a year-old male who is currently attending class at The student has been found eligible for special education and related services with the disability classification of Developmental Delay. (R-2, P-20)
2. The student's current March 1, 2011 IEP contains the following annual goals in mathematics: "Annual Goal 1: [student]will count by rote to 100, count by tens to 100, and recognize numbers that are multiples of 10 up to 100 with 80 % mastery. Annual Goal 2: [student] will represent, name and order sets of objects or pictures of

objects up to 50 with 80 % accuracy. Annual Goal 3: [student] will identify US coins by name and match the coins with the appropriate name and amount (i.e., penny=1 cent). Annual Goal 4: Student will identify US coins by name with 80 % mastery." (R-2 at p.2, P-20 at p.2)

3. The April 7, 2011 IEP Progress Report on Annual Goals prepared by the special education teacher at School covering the period of January 22, 2011 to March 25, 2011 states the student is progressing in meeting all of the four annual goals in mathematics stated in the above Findings of Fact #2. The special education teacher's comments on the above annual goal 1 are that the student "is not counting accurately to 100 yet. He does a better job at it when he looks at a number chart. He can count by tens to 100 without a chart." On annual goal 2 the student "has shown that he can represent and order sets of objects to 50 with assistance. We are working toward mastery and independent ability." On annual goal 3 student " has shown that he can identify a penny, nickel, dime, and quarter. He sometimes says he does not know when you ask him how much the coins are worth." On annual goal 4 student "is close to mastering this goal. He has identified a penny, nickel, dime, and quarter correctly, but not consistently. It is unclear if this is due to the effects of his medication." (R-4 at p.1-2)

4. The student's current IEP annual reading goal 1 is that the student will follow directions of 2 or more steps with 100 % accuracy. Annual reading goal 2 is that the student in response to an oral reading will share information, opinions and ask questions when it is his turn with 80% accuracy. Annual reading goal 3 is that the student in response to an oral reading, when questioned by the teacher, or when

telling about a personal experience, will describe people, places, things, location, size, color, shape and action with 80% accuracy. Annual reading goal 4 is that the student will be able to point to and touch the primary colors and match them to the appropriate name. (R-2 at p.3-4)

5. The April 7, 2011 IEP Progress Report on Annual Goals prepared by the special education teacher at School states the student is progressing in meeting all of the four annual goals in reading as stated in the above Findings of Fact #4. The special education teacher's comments on annual reading goal 1 are that the student can follow directions of 2 or more steps. On annual reading goal 2 the comments are that he shares information and opinions in response to oral readings. On annual reading goal 3 the comments are that he can describe items listed in annual goal 3 when prompted. On annual reading goal 4 the teacher's comments are that the student can identify colors and name them. He is working on matching them to their sight words. (R-4 a p.2-3)

6. The student's current IEP written expression annual goals are goal 1 to be able to say/read and write simple Dolch Words with 80% mastery. Annual goal 2 is to write his first and last name letters in order with 80% accuracy. Annual goal 3 is to write letters of the alphabet with 80% accuracy. Annual goal 4 is to make straight lines and circles with 80% accuracy. (R-2 at p.5)

7. The April 7, 2011 IEP Progress Report on Annual Goals prepared by the special education teacher at School states the student is progressing in meeting all of the four annual goals in written expression. The special education teacher's comment on annual goal 1 is that the student can read and say some sight

words that are used in class. On annual written expression goal 2 the student can write his first name with 100% accurately and just beginning to write his last name with one letter missing. He was writing letters backwards before and now he is not doing so for his name. On annual goal 3 he is looking carefully at the alphabet when writing the letters. On annual goal 4, the teacher's comment is he "loves writing straight lines and circles. He will achieve mastery of this skill very soon." (R-4 at p.3-4)

8. The student's annual goals in mathematics, reading and written expression are measurable. (R-2, P-20)
9. The March 1, 2011 IEP does not contain social and emotional goals. (R-2)
10. The student had several behavior issues at school prior to taking medication for his ADHD for the last three months. He was completing his assignments on the first prescribed medication, but it made him "zombie-like". (Testimony of mother) He switched to a new medication two months ago and has been more playful and focused. The student takes the medication before going to school. The medication is effective through the school day. There have been no behavior problems since taking the medication and the mother is not receiving calls from the school about her son's behavior. The student is completing his work with the medication. (Testimony of mother)
11. The school staff, including the special education teacher, is aware the student is on medication for his ADHD. (R-4 at p.2) At the time the March 1, 2011 IEP was developed, the student was on medication for his ADHD.

12. The student's March 1, 2011 IEP provides for five hours a week of specialized instruction outside of general education taught by the special education teacher. (R-2 at p.9, P-20 at p.9)
13. The annual goals in mathematics, reading and written expression on the March 1, 2011 IEP are almost the same annual goals as on the previous IEP of March 15, 2010. (P-6 and P-20)
14. The IEP Progress Reports prepared by the special education teacher for the first advisory from August 23, 2010 to October 28, 2010 show that the student is progressing in meeting his annual goals in mathematics, reading and written expression. (P-17)
15. The IEP Progress Reports prepared by the special education teacher for the second advisory from October 29, 2010 to January 21, 2011 show that the student is progressing in meeting his annual goals in mathematics, reading, and written expression. (P-17)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue two not having a Functional Behavior Assessment before developing the current March 1, 2011 IEP are as follows:

II.

1. DCPS did a Functional Behavior Assessment (FBA) of the student on April 28, 2011. The FBA states: "The student's medication regimen according to his primary teacher…continues to aid him medically be decreasing certain impulsive acts or behaviors in the classroom. It must be noted that it takes time at least 30 minutes to 1 hour for the medication to take effect." The FBA stated the MDT will convene an

IEP meeting to discuss the FBA along with other evaluations in order to gauge the student's progress this academic year. The FBA did state: "The student may benefit from related services that can assist the student academically and socially."(P-36 at p.4)

2. DCPS did a Behavioral Intervention Plan for the student on April 28, 2011. (P-37)
3. DCPS referred the student for a FBA as a result of behavior issues at school. (P-36)
4. The record does not show any request from the parents for a FBA.
5. The record does show the parents' counsel made a request for a psychological evaluation on November 17, 2010. (P-12)

CREDIBILITY FINDING

A hearing officer is responsible for assessing the credibility of witnesses. *See Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194 (3rd Cir. 2004) Counsel for the respondent objected on the basis of bias to Dr. Holman's testimony because she is in the employ of counsel for petitioners' law firm James Brown and Associates. This hearing officer agrees that her expert opinions are not independent and unbiased. Dr. Holman also has not worked with pre-kindergarten and kindergarten children which she admitted in her testimony. This hearing officer observed that she was unsure of the D.C. curriculum for pre-kindergarten and kindergarten children. She also did not participate in the student's MDT meetings, visit the student's school or talk to his teachers. She only reviewed documents. (Testimony of Dr. Holman.) This hearing officer finds the testimony of Dr. Ida Jean Holman not credible and gives no weight to her expert opinion on the student's IEP goals.

DISCUSSION/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 on issue one:

"The burden of proof shall be the responsibility of the party seeking relief. 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. 3030.3*

In determining if the IEP is appropriate this hearing officer must answer the question "is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, at 206-07 (1982). In *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *cert denied*, 488 U.S. 1030 (1989), The Third Circuit held that appropriateness under *Rowley* as applied to a student with severe disabilities means more than trivial educational benefit. The Court held in *Polk* that "...using *Rowley*'s own terminology, we hold that Congress intended to afford children with special needs an education that would confer meaningful benefit." *Polk* at p.184 Other Circuits have endorsed the *Polk* court's interpretation of educational benefit in *Doe v. Smith*, 441 IDELR 544 (6th Cir. 1989); *Fort Zumwalt School District v. Clynes,* 26 IDELR 172 (8th Cir. 1991); *Roland M. v. Concord School Comm'n,* 16 IDELR 1129 (1st Cir. 1991) and *Hall v. Vance County Board of Education*, 557 IDELR 155 (4th Cir. 1985) In *Ridgewood Bd. of Educ. v. N.E.*, 30 IDELR 41,44 (3d Cir. 1999) and *T.R. v. Kingwood Township Board of Education*, 32 IDELR 30 (3d Cir. 2000) the

Third Circuit held that an IEP must provide "meaningful benefit." *See also A.I.ex rel. Iapalucci v. D.C.*, 402 F. Supp. 2d 152 (D.D.C. 2005) ("...the appropriate focus of the court's review should be on whether DCPS is providing A.I. with an IEP that is reasonably calculated to provide meaningful educational benefit." *Id.* at p.167)

In *A.I. ex rel. Iapalucci v. D.C*, the Court upheld a hearing officer's decision that the IEP goals were appropriate based on reference to IEP progress reports that "contain a myriad of specifics that substantiate the hearing officer's finding of progress." *Id.at p.169* In this case, the IEP progress reports contain many specifics that also support a finding of progress on the student meeting his annual IEP goals in mathematics, reading and written expression. (See Findings of Fact # I. 3, 5, 7, 13, & 14)

In *S.S. by Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 70 (D.D.C. 2008), the Court held: "The annual goals met the requirements of the *IDEIA*. The Court cannot say that the IEP was not reasonably calculated to enable S.S. to derive educational benefit because it failed to provide more specificity with respect to reading, written language and mathematics goals or to provide additional short-term objectives in these areas." In this case, the IEP goals in the March 1, 2011 IEP also meet the requirements of *IDEIA* pursuant to *20 U.S.C. Section 1414 (d)(1)(A)(i) and 34 C.F.R. Section 300.320 (a)(2)(i)(A).* The annual goals in the March 1, 2011 IEP are measurable and meet the child's needs that result from the child's disability. (See Findings of Fact #I. 2, 4, 6 & 8)

Counsel for petitioner argues that because the annual goals in the current March 1, 2011 IEP are similar to the previous March 15, 2010 IEP annual goals that the student is not making progress. The IEP progress reports show, as discussed above, that the student is making progress toward meeting his annual goals, but has not yet mastered them. Once he has mastered those

goals, new goals can be developed. Until that time, it is appropriate for DCPS to maintain similar goals in the IEP. *See A.I.ex rel. Iapalucci v. D.C., Id.*

Counsel for petitioner also argues that the March 1, 2011 IEP is inappropriate for not containing social and emotional goals. The testimony of the mother, however, is that there have been no behavior problems since taking medication for ADHD and the mother is not receiving calls from the school about her son's behavior. The student is completing his work with the medication. (See Findings of Fact #I. 10) The student started taking the medication three months ago- before the current IEP was developed. (See Findings of Fact #I. 10) The school is aware of the student being on medication and has noticed the improvement in his behavior. (See Findings of Fact #I.11) Counsel for petitioner's own witness- the mother- has with her testimony on the positive effects of her son's medication on his behavior undermined her counsel's claim that the IEP is inappropriate for not containing social and emotional goals. Counsel for petitioner has failed to meet her burden of proof that the March 1, 2011 IEP is inappropriate.

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 on issue two: DCPS has conducted a FBA on its own referral. (See Findings of Fact # II. 1 &3) There has been no request by the parents for an FBA. (See Findings of Fact #II. 4) Counsel for petitioners has failed to meet her burden of proof that if it was a procedural violation for DCPS not to do an FBA before the March 1, 2011 IEP that it affected the student's substantive rights and resulted in a loss of educational benefits and a denial of a FAPE. *Lesesne v. District of Columbia,* 447 F. 3d 828, 834 (D.C. Cir. 2006); *accord Kingsmore ex rel. Lutz v. District of Columbia*, 466 F. 3d 118, 119 (D.C. Cir. 2006) ; *Schoenbach v. District of Columbia*, 309 F.

Supp. 2d 71, 79 (D.D.C. 2004) Findings of Fact #I. 3,5,7,14 &15 show that the student is progressing and receiving educational benefits pursuant to his IEP.

ORDER

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

Counsel for petitioners' request for relief is DENIED and the case is DISMISSED with prejudice.

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: 5/23/11_____ Seymour DuBow /s/_____
Hearing Officer