STUDENT HEARING OFFICE
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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,[1] through the Parent,	)	
Petitioner,	)	Date Issued: May 8, 2011
v.	)	Hearing Officer: Virginia A. Dietrich
District of Columbia Public Schools	)	Case No:
Respondent.	)	Hearing Date: 04/19/11 Room 2006 04/28/11 Room 2006

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of Student, filed a due process complaint notice on 02/22/11, alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

It was an independent psychological evaluation dated 09/14/10 that started the ball rolling with respect to all of the issues identified by Petitioner in the consolidated complaints filed on 02/22/11 and 03/25/11. Petitioner complained that based on the findings and recommendations contained in the independent psychological evaluation, the District of Columbia Public Schools ("DCPS") denied Student a FAPE by failing to provide Student with an Individualized Education Program ("IEP") in January 2011 that included speech and language services, occupational therapy services and alternate statewide testing assessments with accommodations; when DCPS failed to complete a full occupational therapy evaluation upon parental request in January 2011; when DCPS failed to provide Student with an appropriate placement that could implement Student's IEP or provide educational benefit for the 2010-2011 school year; and when DCPS failed to fund an independent speech and language evaluation in March 2011 after Petitioner disagreed with the recommendations of the speech and language evaluation conducted by DCPS.

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

Hearing Officer Determination

For relief, Petitioner requested that Student be placed in a nonpublic full-time special education school solely for students with an Intellectual Disability ("ID"); DCPS to fund independent occupational therapy and speech and language evaluations and then convene an appropriate IEP team to review the completed evaluations and revise Student's educational program and discuss and determine placement; and DCPS to fund and place Student at Joseph P. Kennedy Institute. Petitioner also requested an award of compensatory education to restore Student to the position Student would have been but for the denials of a FAPE.

DCPS asserted that all objective assessments, both historical and current, indicated that Student had reached the maximum potential of her intellectual functioning and that Student did not warrant direct occupational therapy or direct speech and language services. Nonetheless, in January 2011, DCPS agreed to complete an occupational therapy screening and in March 2011, DCPS agreed to complete a full occupational therapy evaluation. The occupational therapy screening did not recommend occupational therapy services and the full occupational therapy evaluation is near to completion. With respect to speech and language services, DCPS asserted that it conducted the speech and language evaluation that Petitioner requested and the evaluation indicated that Student did not warrant direct speech and language services. DCPS was prepared to show that the speech and language evaluation that it conducted was appropriate; therefore, Petitioner was not entitled to an independent speech and language evaluation at public expense. Moreover, DCPS asserted that special education services were being implemented in conformity with Student's IEP and Student was receiving educational benefit from the receipt of those services; therefore, placement in a nonpublic school for all disabled peers was unwarranted.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 38 D.C. Code 2561.02.

Procedural History

This Hearing Officer was assigned to the case on 02/25/11. A resolution meeting took place on 03/11/11 at which time both parties indicated in writing that no agreement was reached by the end of the 30-day resolution period and parties agreed that the case should proceed to a due process hearing. Thus, the 30-day resolution period ended on 03/24/11, the 45-day timeline to issue a final decision began on 03/25/11, and the final decision is due by 05/08/11. See 34 C.F.R. 300.510, 300.515.

The due process hearing was a closed hearing that took place on 04/19/11 and 04/28/11. Petitioner was represented by Darnell Henderson, Esq. and DCPS was represented by Linda Smalls, Esq.. Neither party objected to the testimony of witnesses via telephone.

Petitioner presented the following five witnesses: Student, who testified in person; Petitioner, who testified in person; Student's grandmother, who testified in person; Educational

Advocate, who testified in person; and Psychologist, who qualified as an expert in comprehensive psychological evaluations, testified by telephone. DCPS presented four witness: Student's special education teacher, who testified by telephone; DCPS Special Education Coordinator ("SEC"), who testified by telephone; DCPS speech and language pathologist ("SLP"), who testified by telephone; and DCPS school psychologist, who qualified as an expert in clinical and psychological testing for purposes of educational programming, testified by telephone.

Subsequent to the filing of this complaint on 02/22/11, Petitioner filed a second complaint on 03/25/11, i.e., Case No. with issues that were related to the issues in this complaint. By Order on Consolidation dated 04/05/11, Case No. was consolidated with Case No. and the issues and relief requested in this Hearing Officer Determination reflect consolidated issues and relief requested as previously memorialized in the Amended Prehearing Order.[2]

Petitioner's disclosures dated 04/12/11, mislabeled as Case No. containing a witness list and Exhibits CD-1 through CD-27 (hereinafter referred to as P-1 through P-27), were timely filed and admitted into evidence without objection. DCPS' disclosures dated 04/12/11, containing a witness list and Exhibits R-01 through R-19, were timely filed and admitted into evidence without objection.

The six issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS denied Student a FAPE by failing to conduct an occupational therapy evaluation as requested by Petitioner on 01/07/11.[3]

Whether DCPS denied Student a FAPE by failing to develop an IEP on 01/04/11 that included speech and language services, occupational therapy services and the provision that Student would participate in alternate statewide assessments with accommodations.

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement that could implement Student's IEP during the 2010-2011 school year.

Whether Student is entitled to compensatory education for the denials of a FAPE.

Whether DCPS denied Student a FAPE by failing to provide funding for an independent speech and language evaluation following Petitioner's request on 03/23/11.

Whether DCPS denied Student a FAPE by failing to develop an IEP on 03/23/11 that included speech and language services.

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[2] P-9.

[3] At the due process hearing, Petitioner withdrew the allegation that DCPS failed to conduct a speech and language evaluation following the request of Petitioner on 01/04/11, and that claim is dismissed with prejudice.

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 year old special education student currently attending a public high school in the District of Columbia.[4] Student currently participates in a special education class of 10 Intellectual Disability ("ID") (also known as Mental Retardation) students taught by one certified special education teacher with the assistance of two educational aids. Student's current teacher has taught Student for the past three years. All services in Student's IEP are currently being implemented by the school. Student participated in the DC CAS test and received the appropriate accommodations from her special education teacher who proctored the test.[5]

#2. On 02/21/07, a Multidisciplinary Team ("MDT") convened that included DCPS and Petitioner, and at that time the MDT determined that the use of word processing software had significantly improved Student's handwriting speed, and based on minimal progress in standardized occupational therapy testing and classroom functional performance, school-based occupational therapy services were no longer warranted and occupational therapy was discontinued because Student had reached her maximum potential. The MDT also indicated that Student had failed to make any measurable progress, triennial to triennial, when comparing speech and language evaluations from 2002 and 2005. On 02/21/07, Petitioner gave voluntary written consent to the termination of occupational therapy services and speech and language services.[6]

#3. An independent psychological evaluation completed on 09/14/10 indicated that Student had a disability classification of Moderate Mental Retardation and had poorly developed reading and writing language skills that were commensurate with her Intelligence Quotient ("IQ"). The results of this evaluation indicated that Student required schooling in a classroom with students with her level of disability and current academic and cognitive functioning. The evaluation also indicated that Student's poorly developed visual motor integration skills might impact her penmanship in the classroom and should be explored through a consultation with an occupational therapist. Additionally, the evaluation indicated that Student continued to demonstrate severe speech difficulties that were reflected in her below average receptive and expressive speech and language skills, and that a second opinion should be obtained to determine if Student required speech and language therapy in school.[7]

#4. The independent psychological evaluation was reviewed on 01/04/11 by the MDT that included Petitioner and Petitioner's advocate and based on the results of the independent psychological evaluation, Petitioner requested that DCPS conduct an occupational therapy

[4] P-11.
[5] Testimony of DCPS special education teacher.
[6] R-16; R-17.
[7] P-16.

evaluation.[8] On 01/07/11, Petitioner and Petitioner's advocate agreed that DCPS would conduct an occupational therapy consultation.[9] The occupational therapy screening completed by DCPS on 02/23/11 indicated that Student's fine motor difficulties in the classroom consisted of Student having difficulty copying from the board, decreased handwriting legibility that impacted Student's success in the classroom, difficulty completing assignments due to being a slow writer, and flat affect that required constant instructions to engage in activities. Based on a screening of Student's work samples and writing samples and the record review which provided data regarding Student's intellectual ability, Student's handwriting was determined to be appropriate for her age and cognitive ability and any needed strategies could be implemented in the classroom. The occupational therapy screening indicated that a full occupational therapy evaluation was not warranted.[10] On 03/23/11, the MDT reviewed the occupational therapy screening and although DCPS did not believe that Student required direct occupational therapy services, DCPS agreed to complete the occupational therapy evaluation that Petitioner requested.[11] The full occupational therapy evaluation was scheduled to be completed by DCPS during the week of 05/02/11.[12]

#5. On 01/07/11, the MDT developed an IEP that classified Student with a primary disability of ID and prescribed 27.5 hours/week of specialized instruction outside of general education, 30 minutes/week of behavioral support services outside of general education, assistive technology consisting of an electronic dictionary thesaurus to assist with learning and studying, and a classroom aid consisting of a calculator computer graphic organizer. The IEP prescribed that Student would participate in regular statewide assessments with accommodations. Classroom and statewide assessment accommodations consisted of repetition of directions, simplification of oral directions, oral responses to tests, writing in test books, calculators, small group setting, testing to be administered over several days, extended time on subtests, breaks between subtests and testing to be administered at the best time of day for Student.[13]

#6. On 03/23/11, the MDT also reviewed a speech and language evaluation that was completed by DCPS on 02/16/11 that was based on the administration of standard testing measures, a review of historical school records, information provided by Student's classroom teacher and observation of Student in class. The speech and language evaluation revealed that Student had severe deficits in her overall language skills, both receptive and expressive; however, the testing results were no different from the results of Student's November 2002 and October 2005 comprehensive speech and language evaluations. There was no significant regression or improvement in speech and language skills between past and present test results. And, despite repeated and varied strategies and accommodations used by the evaluator during the testing process to facilitate Student's responsiveness and performance, Student failed to utilize any of the strategies. Based on Student's age, previous participation in speech and language intervention, medical history and motivation levels, Student's prognosis for improvement of her speech intelligibility and overall language skills was poor, and direct speech and language

[8] R-07; R-08; P-12.
[9] R-08; P-12.
[10] R-10.
[11] R-06; P-14.
[12] Testimony of SEC.
[13] R-09.

services were not warranted.[14] Petitioner, who disagreed with the recommendation of the DCPS evaluation that no speech and language services were warranted, requested that DCPS authorize funding for an independent speech and language evaluation, and DCPS refused.[15]

#7. As of February 2011, Student had passing grades in all of her classes and was described in the third advisory as having excellent initiative, excellent behavior and good participation in various classes.[16] Although a follower, Student has bonded with her classmates and appears comfortable in the classroom and school setting. Student is receiving educational benefit from the educational program she is receiving at the public high school she attends.[17]

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:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast,* 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. 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. 34 C.F.R. 300.513(a).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to conduct an occupational therapy evaluation as requested by Petitioner at the MDT meeting on 01/07/11.

The evidence in this case showed that the independent psychological evaluation upon which Petitioner so heavily relied, stated that Student's poorly developed visual motor integration skills might impact her penmanship in the classroom and that this possibility should

[14] R-06; R-11; P-19; Testimony of DCPS SEC, DCPS SLP.
[15] P-14.
[16] R-13; R-14.
[17] Testimony of DCPS special education teacher.

be explored through a consultation with an occupational therapist.[18] There was also historical evidence available to the evaluator and to the MDT that met on 01/07/11, that on 02/21/07, occupational therapy services were discontinued with the consent of Petitioner because Student had reached her maximum potential and was not benefitting from occupational therapy services.[19] On 01/07/11, Petitioner requested an occupational therapy evaluation and DCPS and Petitioner agreed that DCPS would conduct an occupational therapy screening. The type of assessment that DCPS agreed to conduct, i.e., an occupational therapy screening, precisely fit the recommendation in the independent psychological evaluation. And on 03/23/11, when the occupational therapy screening conducted by DCPS indicated that Student did not warrant direct occupational therapy services and when Petitioner disagreed with the results of the screening, DCPS agreed to conduct a full occupational therapy evaluation even though DCPS still disagreed that Student required direct occupational therapy services.[20]

Petitioner failed to meet her burden of proof that DCPS failed to comply with a provision of the IDEA and that the violation resulted in the denial of a FAPE. The actions taken by DCPS with respect to completing the occupational therapy screening and a full occupational therapy evaluation were timely and reasonable, consistent with the findings in the independent psychological evaluation, and consistent with reliable data that indicated that the limitations on Student's intellectual functioning combined with historical data strongly suggested that Student was not likely to benefit from direct occupational therapy services. Student was not denied a FAPE.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to develop an IEP on 01/04/11 that included speech and language services, occupational therapy services and the provision that Student would participate in alternate statewide assessments with accommodations.

The independent psychological evaluation that Petitioner relied on to request the addition of speech and language services and occupational therapy services to Student's IEP, indicated that Student's abilities were commensurate with her cognitive ability and that further evaluation was required to determine whether or not these services should be added to Student's IEP. The evaluation duly noted that both of these types of services had been discontinued in the past due to Student's inability to make progress because of her limited intellectual functioning.[21] Based on the information available to the MDT on 01/04/11, DCPS did not err in refusing to add the requested related services to Student's IEP. There was no concrete data that the services were necessary to help Student access the curriculum. At that time, DCPS appropriately followed the recommendation of the independent psychological evaluation and agreed to conduct a speech and language evaluation, and on 01/07/11, DCPS and Petitioner agreed that DCPS would conduct an occupational therapy screening.

The evidence in the record was that Student was able to participate in statewide testing, i.e., DC CAS, with the appropriate IEP accommodations that were provided by a person who had

[18] Finding #3.
[19] Finding #2.
[20] Finding #4.
[21] Findings #2, #3, #4.

been Student's teacher for the past three years and knew Student well. This type of testing environment was the most optimal environment for Student's performance, regardless of the type of testing. Petitioner, with the burden of proof, did not present any evidence that failing to provide Student with alternate statewide assessments with accommodations caused any harm to Student or deprived her of an educational benefit. The evidence was clear that due to Student's limited cognitive functioning, Student would have had a difficult time completing any type of testing under any set of circumstances.

Petitioner did not meet her burden of proof that Student was denied a FAPE by DCPS providing Student with an IEP on 01/04/11 that did not include speech and language services, occupational therapy services or alternate statewide assessments with accommodations.

The third issue to be determined is whether DCPS denied Student a FAPE during the 2010-2011 school year by failing to provide Student with an appropriate placement that could implement the provision of Student's IEP that required classes with a low student to teacher ratio so that Student could receive individualized attention.

Petitioner, with the burden of proof, offered no evidence that Student was not receiving classes in a small student to teacher ratio, that Student's IEP was not being implemented at the public high school or that Student was not receiving educational benefit from the services provided at the public high school. The IEP merely stated that Student should remain in a self-contained setting and receive 27.5 hours/week of specialized instruction outside of general education.[22] Not only did Petitioner fail to meet her burden of proof that Student's IEP was not being implemented at the public high school, DCPS presented evidence that the IEP was being implemented and that Student was receiving instruction in a small student to teacher ratio of 10 students with one special education teacher and 2 educational aids, in a classroom solely comprised of ID students with the same range of intellectual deficits. Petitioner, with the burden of proof, offered no evidence that Student was not and could not receive any educational benefit from the delivery of services at the public high school and that placement at a nonpublic private special education school was warranted. The evidence presented by DCPS was to the contrary.[23]

Petitioner failed to meet her burden of proof with respect to the third issue.

The fourth issue to be determined is whether Student is entitled to compensatory education for the denials of a FAPE.

"When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place." *Reid v. District of Columbia,* 43 IDELR 32 (2005).

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[22] Finding #5.
[23] Finding #7.

Hearing Officer Determination

Petitioner failed to show that Student was denied a FAPE with respect to Issues #1, #2, #3, #5, and #6. Pursuant to *Reid,* Student is not entitled to compensatory education because Petitioner was unable to prove that DCPS denied Student a FAPE.

The fifth issue to be determined is whether DCPS denied Student a FAPE by failing to provide funding for an independent speech and language evaluation following Petitioner's request on 03/23/11.

34 C.F.R.300.502 provides that DCPS must provide Petitioner with an independent evaluation at public expense without unnecessary delay if Petitioner disagrees with the results of an evaluation conducted by DCPS unless DCPS files a due process complaint and shows at a hearing that its evaluation is appropriate.

In this case, Petitioner filed a complaint on 03/25/11 alleging that DCPS had failed to provide Petitioner with funding for an independent speech and language evaluation as requested by Petitioner on 03/23/11.[24] DCPS was not required to file a due process complaint in this case to show that its speech and language evaluation was appropriate because Petitioner had filed a complaint asking for a decision on the very issue just two days after DCPS refused to fund an independent speech and language evaluation.[25] At the due process hearing, DCPS presented DCPS' speech and language evaluation dated 02/16/11 that indicated that speech and language services were not warranted and the evaluator's credible testimony was that based on a review of historical records, the administration of testing assessments, an interview of Student's teacher who had known her for three years and an observation of Student in class, speech and language services would be of no benefit to Student. Just as significantly, the evaluator indicated that due to Student's reduced intelligibility, Student did not take the opportunity to use recommended strategies effectively or at all during the evaluation process; her response was to giggle. The evaluator's conclusion that Student had reached maximum potential for improvement and that speech and language services were not warranted, was a sound conclusion that was based on a composite picture of the available data. Petitioner did not offer any expert testimony to refute the findings and/or conclusions of DCPS' speech and language pathologist.[26] The speech and language evaluation completed by DCPS on 02/16/11 was appropriate.

Petitioner failed to meet her burden of proof that Student was entitled to an independent speech and language evaluation at public expense.

The sixth issue to be determined is whether DCPS denied Student a FAPE by failing to develop an IEP on 03/23/11 that included speech and language services.

34 C.F.R. 300.320 requires DCPS to provide Student with an IEP that includes academic and functional goals designed to meet the child's needs that result from the child's disability to

[24] P-4; P-9.
[25] Finding #6.
[26] Petitioner was precluded from calling a proposed witness as a speech and language expert because Petitioner had failed to comply with the Amended Prehearing Order requirement that Petitioner include in her disclosures the curriculum vitae of any witness to be called as an expert.

enable the child to be involved in and make progress in the general education curriculum and meet each of the child's other educational needs that result from the child's disability.

Although the results of the independent psychological evaluation indicated that Student had severe speech difficulties that were evidenced by below average receptive and expressive speech and language skills, these difficulties were not getting worse or changing, as evidenced by a comparison of testing scores from 2002, 2005 and 2011.[27] Rather, it was the limitations on Student's intellectual functioning that was the culprit for the difficulties, not the lack of direct speech and language services. This was confirmed by DCPS' speech and language evaluation that was completed on 02/16/11 and reviewed by the MDT responsible for educational decision making for Student. The 09/14/10 independent psychological evaluation indicated that a speech and language evaluation should be conducted to determine if direct speech and language services were warranted. The speech and language evaluation conducted by DCPS concluded that direct speech and language services were not warranted. The speech and language evaluation conducted by DCPS was determined to be an appropriate evaluation (See Issue #5). On 03/23/11, there was no data or assessment that supported the conclusion that speech and language services should be added to Student's IEP.

Petitioner failed to meet her burden of proof that Student was denied a FAPE by DCPS' failure to include speech and language services on Student's 03/23/11 IEP.

ORDER

Petitioner failed to meet her burden of proof on any of the issues identified in the complaint.

The complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: May 8, 2011

/s/ Virginia A. Dietrich
Hearing Officer

[27] Finding #6.

Hearing Officer Determination

Copies to:

Petitioner (U.S. mail)
Petitioner's Attorney: Darnell Henderson, Esq. (electronically)
DCPS' Attorney: Linda Smalls, Esq. (electronically)
DCPS (electronically)
SHO (electronically)