

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

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

OSSE
Student Hearing Office
September 25, 2013

Parent,¹ on behalf of,
Student,

Petitioner,

Date Issued: September 25, 2013

Hearing Officer: Melanie Byrd Chisholm

v.

Case No:

Respondent.

Hearing Date: September 10, 2013

Room: 2003

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is an eight (8) year old _____ who is attending School A. The student's current individualized education program (IEP) lists Other Health Impairment (OHI) as primary disability and provides for _____ to receive ten (10) hours per week of specialized instruction outside of the general education setting and one (1) hour per week of occupational therapy (OT) outside of the general education environment.

On July 17, 2012, Petitioner filed a Due Process Complaint (Complaint) against Respondent _____ alleging that _____ denied the student a free appropriate public education (FAPE) by exiting the student from special education services on March 5, 2012; failing to provide or implement an IEP for the student from the beginning of the 2012-2013 school year through November 2012; and failing to include behavioral support services and/or appropriately address social/emotional and behavioral concerns for the student during the 2012-2013 school year and on _____ November 8, 2012 IEP. As relief for these alleged denials, the Petitioner requested an independent functional behavioral assessment (FBA); following the completion of the independent FBA, for _____ to develop a behavior intervention plan (BIP) for the student; thirty (30) minutes to one (1) hour per week of counseling services to be added to the student's IEP; and compensatory education in the form of 38 hours of independent one-on-one tutoring and executive functioning coaching.

¹ Personal identification information is provided in Appendix A.

On July 24, 2012, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that the student's IEP Team met on March 5, 2012 and determined that the student no longer qualified for special education and related services; an eligibility meeting was held on November 8, 2012 and the multidisciplinary team (MDT) determined that the student qualified for special education and related services; the student's parent and advocate did not request behavioral support services for the student; and the student does not exhibit behaviors in the school setting which would necessitate a functional behavioral assessment or counseling services.

The parties held a Resolution Meeting on August 6, 2013 and failed to reach an agreement during the meeting however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on August 17, 2013, following the conclusion of the 30-day resolution period, and ends on September 30, 2013. The Hearing Officer Determination (HOD) is due on September 30, 2013.

On August 12, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on August 12, 2013. 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 issues as outlined in the Order.

On September 3, 2013, Petitioner filed Disclosures including twenty-four (24) exhibits and four (4) witnesses.² On September 3, 2013, Respondent filed Disclosures including twelve (12) exhibits and four (4) witnesses.

The due process hearing commenced at approximately 9:22 a.m. on September 10, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2003. The Petitioner elected for the hearing to be closed however the Petitioner agreed to open the hearing for the new special education coordinator and the student's grandmother to observe.

Petitioner's Exhibits 1-24 were admitted without objection. Respondent's Exhibits 1-12 were admitted without objection.

At the close of Petitioner's case, the Respondent made a motion for a Directed Verdict. The Respondent argued that the evidence that was presented indicated that after March 15, 2012, the student continued to receive services therefore assuming *arguendo* that the student should not have been exited from special education, the student nonetheless received services. The Respondent also argued that the Petitioner failed to meet its burden in proving that counseling and a BIP were needed to address the student's behavioral concerns on November 8, 2012 IEP. The Petitioner argued that the record did not indicate that the student received services from March 2012 through November 2012 and that the exhibits in the record supported that claim that the decision to exit the student from special education was an inappropriate decision. The

² A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

Petitioner also argued that the parent requested counseling and a BIP for the student on November 8, 2012 and that the record supports the student's need for a BIP. Not having reviewed the entire record, the Hearing Officer denied Respondent's Motion for a Directed Verdict.

The hearing concluded at approximately 1:48 p.m. on September 10, 2013, 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.

ISSUES

The issues to be determined are as follows:

1. Whether denied the student a FAPE by determining that the student was no longer eligible for special education and related services on March 5, 2012?
2. Whether denied the student a FAPE by failing to include behavioral support services/counseling and a behavior intervention plan to address the student's behavioral concerns in the student's November 8, 2012 IEP?

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. School A has a leveled, colored school-wide behavior system. (Parent's Testimony)
2. On the School A school-wide behavior system, brown means that the student exceeded behavior expectations, green means that the student has met expectations, gray is neutral/average, yellow means that the student required one or two reminders and red means that the student required three or four reminders. (Principal's Testimony)
3. The student has an average Intelligence Quotient (IQ). (Petitioner's Exhibit 10; Respondent's Exhibit 2)
4. The student presents with multiple symptoms of Attention Deficit Hyperactivity Disorder (ADHD). (Petitioner's Exhibits 4, 6, 8, 10 and 21; Respondent's Exhibits 2, 3 and 4; Parent's Testimony; Godmother's Testimony)
5. The student responds well to redirection and positive praise. (Petitioner's Exhibit 10; Respondent's Exhibit 2; Principal's Testimony)
6. The student performs better after taking short breaks. (Petitioner's Exhibit 10; Respondent's Exhibit 2; Godmother's Testimony)

7. Overall, the student's behavior is typical of children in age group. (Principal's Testimony)
8. During the 2011-2012 school year, the student received 30 minutes per week of specialized instruction within the general education environment. (Parent's Testimony; Principal's Testimony)
9. During the 2011-2012 and 2012-2013 school years, the student ranged between the yellow and brown levels of the school-wide behavior system. (Principal's Testimony)
10. In school, the student is quick to join group activities, offers to help others, completes homework, shares and is polite and a good sport. (Petitioner's Exhibit 10; Respondent's Exhibit 2)
11. In January 2012, a comprehensive psychological evaluation of the student was conducted. (Petitioner's Exhibit 10; Respondent's Exhibit 2)
12. In January 2012, the student was functioning in the average range in Brief Reading, Brief Math, Brief Writing, Academic Skills, Letter-Word Identification, Calculation, Spelling, Applied Problems and Writing Samples. (Petitioner's Exhibit 10; Respondent's Exhibit 2; Principal's Testimony)
13. In January 2012, the student was functioning in the low average range in Passage Comprehension. (Petitioner's Exhibit 10; Respondent's Exhibit 2)
14. In January 2012, the student's reading teacher had no concerns regarding the student's reading skills. (Petitioner's Exhibit 10; Respondent's Exhibit 2)
15. In January 2012, the parent had concerns about the student's reading skills. (Petitioner's Exhibit 10; Respondent's Exhibit 2; Parent's Testimony)
16. In January 2012, the student had recently displayed some behavioral outbursts in school. (Petitioner's Exhibit 10; Respondent's Exhibit 2)
17. The January 2012 evaluator concluded that "left to own devices, as in the classroom" the student's "inattention and impulsivity will likely impede visual processing skills," and the student's ADHD symptoms appeared to be impeding academic performance. (Petitioner's Exhibit 10; Respondent's Exhibit 2)
18. In March 2012, the student had the grade letter "Bs" on report card. (Parent's Testimony)
19. The student's MDT met on March 15, 2012 to determine the student's continued eligibility. (Stipulated Fact)
20. On March 15, 2012, the student was performing at grade level. (Petitioner's Exhibits 4 and 8; Respondent's Exhibit 3; Principal's Testimony)
21. On March 15, 2012, the student's IEP Team determined that although the student was ADHD, the student's ADHD did not cause an education impact. (Petitioner's Exhibits 4, 5, 6 and 7; Respondent's Exhibit 3)
22. On March 15, 2012, in making its determination that the student no longer qualified for special education and related services, the student's IEP Team used the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-III), Woodcock-Johnson Tests of Achievement, third Edition (WJ-III), Behavior Assessment System for Children, Second Edition (BASC-2), Conners, Third Edition (Conners-3), House-Tree-Person Projective Drawings, Kinetic Family Drawing, Children's Apperception Test (CAT), parent interview, teacher interviews, observations, record review and a review of Developmental Pediatric Clinic Letter. (Petitioner's Exhibits 5 and 8)

23. On March 15, 2012, the student's IEP Team determined that the student was no longer eligible for special education and related services. (Petitioner's Exhibits 4, 5, 6 and 7; Respondent's Exhibit 3; Parent's Testimony; Principal's Testimony)
24. At the March 15, 2012 MDT meeting, the parent did not agree with the MDT's determination that the student no longer qualified as a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
25. On March 15, 2012, the student's IEP Team determined that the student continued to require the accommodations of a highly structured academic setting with low student/teacher ratio, systematic presentation of materials, structure and routines, academic instruction supported with visual aids, frequent repetition of new and previously learned material, establishing eye contact before giving instructions, frequent repetition of instruction and frequent breaks. (Petitioner's Exhibits 4 and 8; Respondent's Exhibits 3 and 5)
26. On March 15, 2012, the student's IEP Team, including the student's mother, determined that the student did not exhibit behaviors which would require an FBA. (Petitioner's Exhibit 8)
27. On March 15, 2012, the student was well behaved in school. (Petitioner's Exhibit 8)
28. The student's March 15, 2012 IEP Team provided for all of the accommodations recommended in the student's January 20, 2012 Comprehensive Psychological Evaluation. (Petitioner's Exhibits 4 and 10; Respondent's Exhibits 2 and 5)
29. On March 15, 2012, the MDT agreed that the student continued to require OT services through a Section 504 Plan. (Stipulated Fact)
30. Following the March 15, 2012 meeting, School A continued to provide the student with the services prescribed in IEP through the remainder of the 2011-2012 school year. (Petitioner's Exhibit 16; Principal's Testimony)
31. At the end of the 2011-2012 school year, the student was suspended for a half day. (Parent's Testimony)
32. The student's reading performance regressed during the Summer of 2012. (Petitioner's Exhibits 2, 3, 8 and 10; Respondent's Exhibits 2, 8 and 12; Advocate's Testimony)
33. At the beginning of the 2012-2013 school year, the student was suspended for two days for being involved in an altercation with another student. (Parent's Testimony)
34. For the 2012-2013 school year, many students tested lower on the school's formative assessment because of changes in the programming. (Petitioner's Exhibit 2)
35. From August 2012 through October 2012, the student's distractibility caused to fall behind in the classroom. (Petitioner's Exhibit 11)
36. From August 2012 through October 2012, the student displayed inappropriate behavior when was corrected. (Petitioner's Exhibit 11)
37. From August 2012 through November 2012, the student was not on the red level on the school-wide behavior system. (Principal's Testimony)
38. During the 2012-2013 school year, prior to the student's November 8, 2012 IEP Team meeting, the student was receiving reading intervention on a daily basis. (Petitioner's Exhibits 1; Principal's Testimony)
39. On November 8, 2012, the student's IEP Team reconvened to discuss the student's eligibility. (Petitioner's Exhibits 1, 2, and 3; Respondent's Exhibits 7, 8 and 12)

40. On November 8, 2012, the student was found eligible for special education and related services. (Stipulated Fact)
41. On November 8, 2012, the student's IEP Team discussed behaviors. (Petitioner's Exhibits 1 and 2; Respondent's Exhibits 7 and 8; Advocate's Testimony; Godmother's Testimony)
42. On November 8, 2012, the student was not crying or screaming in school. (Petitioner's Exhibit 2; Respondent's Exhibit 8)
43. On November 8, 2012, the student's "behaviors" included distractibility and hyperactivity. (Petitioner's Exhibits 1, 2 and 12; Respondent's Exhibits 7 and 8; Advocate's Testimony; Godmother's Testimony)
44. The student's November 8, 2012 IEP includes accommodations to address the student's distractibility and lack of focus. (Petitioner's Exhibit 3; Respondent's Exhibit 12)
45. On November 8, 2012, the student was able to focus when working with the special education teacher. (Petitioner's Exhibit 2; Respondent's Exhibit 8)
46. On November 8, 2012, the student was able to appropriately and accurately participate in lessons during carpet time. (Petitioner's Exhibits 1 and 2; Respondent's Exhibits 7 and 8)
47. On November 8, 2012, the student's IEP Team determined that the student would receive ten hours per week of specialized instruction, in both the pull-out and push-in methods. (Petitioner's Exhibit 1; Respondent's Exhibit 7; Principal's Testimony)
48. The student's November 8, 2012 IEP includes the classroom accommodations of reading test questions, repetition of directions, simplification of oral directions, pencil grip, location with minimal distractions, small group testing, breaks between subtests, extended time on subtests, breaks during subtests and flexible scheduling. (Petitioner's Exhibit 3; Respondent's Exhibit 12)
49. At the end of the 2012-2013 school year, the student was progressing toward five of six of academic IEP goals and had mastered one of six academic IEP goals. (Respondent's Exhibit 10)
50. The Parent provided generally creditable testimony however the Parent's descriptions of the student's classroom behaviors were exaggerated as compared to evidence in the record.
51. The Advocate provided creditable testimony for what believed to be true. The Advocate's knowledge of the student and the student's needs was largely based on the Parent's report.
52. The Godmother provided creditable testimony for what believed to be true.
53. The Principal provided generally creditable testimony. The Principal's testimony largely aligned with other evidence in the record however the Principal did not recall several key details of the IEP Team's 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:

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).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term “free appropriate public education” means “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped.” 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 seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

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.

Issue #1

In January 2012, a comprehensive psychological evaluation of the student was conducted. As a part of the comprehensive psychological evaluation, the evaluator assessed the student using the WPPSI-III, WJ-III, BASC-2, Conners, Conners-3, House-Tree-Person Projective Drawings, Kinetic Family Drawing, CAT, parent interview, teacher interviews, observations, record review and a review of Developmental Pediatric Clinic Letter. In January 2012, the student was functioning in the average range in Brief Reading, Brief Math, Brief Writing, Academic Skills, Letter-Word Identification, Calculation, Spelling, Applied Problems and Writing Samples. The student was functioning in the low average range in Passage Comprehension.

During the teacher interview, the student’s reading teacher had no concerns regarding the student’s reading skills however during the parent interview the parent expressed concerns about the student’s reading skills. Behaviorally, the student was quick to join group activities, offered to help others, completed homework, shared and was polite and a good sport. Prior to the evaluation, the student had recently displayed some behavioral outbursts in school. Using the assessment information in the January 20, 2012 Comprehensive Psychological Evaluation, the student’s IEP Team conducted a reevaluation of the student on March 15, 2012.

Pursuant to 34 CFR §300.303(a), a public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§300.304 through 300.111 if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or the child's parent or teacher requests a reevaluation. In conducting an evaluation, an LEA must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability" and the content of the child's IEP. 34 CFR §300.304(b). On the basis of the review of data, and input from the child's parents, the IEP Team is to determine whether the child continues to have such a disability and the educational needs of the child. *See* 34 CFR §300.305(a)(2)(i)(B).

The IDEA and its implementing regulations define "child with a disability" to mean "a child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services." 34 CFR §300.8(a). The fact that a child may have a qualifying disability does not necessarily make him "a child with a disability" eligible for special education services under the IDEA. *See Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007). The child must also need special education and related services. *Id.*

In March 2012, the student had the grade letter "Bs" on report card, was performing at grade level and was well behaved in school. The IEP Team, including the student's mother, agreed that the student did not exhibit behaviors which would require an FBA. On March 15, 2012, the student's IEP Team determined that although the student was ADHD, the student's ADHD did not cause an education impact therefore the student was no longer eligible for special education and related services. At the March 15, 2012 MDT meeting, the parent did not agree with the MDT's determination that the student no longer qualified as a student with disabilities as defined by 34 CFR §300.8.

Despite finding that the student no longer qualified for special education and related services, the student's IEP Team determined that the student continued to require the accommodations of a highly structured academic setting with low student/teacher ratio, systematic presentation of materials, structure and routines, academic instruction supported with visual aids, frequent repetition of new and previously learned material, establishing eye contact before giving instructions, frequent repetition of instruction and frequent breaks. Additionally, the IEP Team agreed that the student continued to require OT services through a 504 Plan. Although the student's IEP Team "exited" the student from special education on March 15, 2012, School A continued to provide the student with the services prescribed in IEP through the remainder of the 2011-2012 school year.

It is uncontested that the student had a diagnosis of ADHD on March 15, 2012. However the student's diagnosis of ADHD did not automatically qualify for special education and

related services. The fact that a child may have a qualifying disability does not necessarily make him “a child with a disability” eligible for special education services under the IDEA. *See Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007); *see also S. v. Wissahickon Sch. Dist.*, No. 05-1284, 2008 WL 2876567 (E.D. Pa. July 24, 2008) *aff’d sub nom. Richard S. v. Wissahickon Sch. Dist.*, 334 F. App’x 508 (3d Cir. 2009) (finding that even a medical diagnosis of ADHD would not automatically qualify a student for special education where there was an absence of evidence that the student was eligible for special education).

While the parent argued that the student was not reading on grade level on March 15, 2012, the student’s January 2012 evaluation and the student’s teachers indicated that the student was functioning on grade level. The Court in *D.S. v. Neptune Twp. Bd. of Educ.*, 264 F. App’x 186, 189 (3d Cir. 2008) found that, “the statute should not be read to protect children with an impairment but not requiring special education.” *See also K.M. v. Wappingers Central Sch. Dist.*, 688 F. Supp. 2d 282 (SDNY 2010) (although the child had social and emotional difficulties as a result of ADHD, Asperger syndrome, and generalized anxiety disorder, the district correctly found the student ineligible for IDEA services because while the student’s disabilities might impede social and emotional functioning, they did not impede ability to obtain an educational benefit.) However, the Court in *G.D. ex rel. G.D. v. Wissahickon Sch. Dist.*, 832 F. Supp. 2d 455, (E.D. Pa. 2011) found that a district has an obligation to look beyond a child’s cognitive potential or academic progress and to address attentional issues and behaviors that have been identified as impeding his progress. Ultimately, there is no precise standard for determining whether a student is in need of special education, and well-settled precedent counsels against invoking any bright-line rules for making such a determination. *W. Chester Area Sch. Dist. v. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002).

If the present matter is viewed in light of *D.S.* and *K.M.*, did not deny the student a FAPE by determining that the student was no longer eligible for special education and related services on March 5, 2012. The student has an average IQ, was functioning on grade level and had better than average grades. However, if the matter is viewed in light of *G.D.*, did deny the student a FAPE by determining that the student was no longer eligible for special education and related services on March 5, 2012. The student’s March 15, 2012 IEP Team acknowledged the student’s attentional issues and provided for all of the accommodations recommended in the student’s January 20, 2012 Comprehensive Psychological Evaluation.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers’ Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff’d*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the

Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. While the evidence in the record appears to be roughly equal, the January 2012 evaluator noted that “when left to own devices, as in the classroom” the student’s “inattention and impulsivity will likely impede visual processing skills. Thus, it may take longer to maintain organization with visually presented information and complete written tasks at times.” Additionally, the student’s IEP Team determined that the student needed all of the accommodations recommended in the January 20, 2012 Comprehensive Psychological Evaluation and School A continued to provide the student specialized instruction through the remainder of the 2011-2012 school year. Had the student truly not needed specialized instruction, School A would not have provided it. The Hearing Officer concludes that it is more probable that the student’s March 15, 2012 IEP Team should have found that the student continued to be eligible for special education and related services.

The Petitioner met its burden with respect to Issue #1.

Issue#2

The Petitioner alleged that denied the student a FAPE by failing to include behavioral support services/counseling and a behavior intervention plan to address the student’s behavioral concerns in the student’s November 8, 2012 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)). Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.

School A has a leveled, colored school-wide behavior system. On the School A school-wide behavior system, brown means that the student exceeded behavior expectations, green means that the student has met expectations, gray is neutral/average, yellow means that the student required one or two reminders and red means that the student required three or four reminders. During the 2011-2012 and 2012-2013 school years, the student ranged between the yellow and brown levels of the school-wide behavior system. At the end of the 2011-2012 school year, the student was suspended for a half day. At the beginning of the 2012-2013 school year, the student was suspended for two days for being involved in an altercation with another student. The Principal testified that these were isolated incidents. From August 2012 through November 2012, the student was not on the red level on the school-wide behavior system

however the student's distractibility caused _____ to fall behind in the classroom and at times displayed inappropriate behavior when _____ was corrected.

On November 8, 2012, the student's IEP Team reconvened to discuss the student's eligibility. The student's IEP Team determined that the student was eligible for special education and related services. During the November 8, 2012 IEP Team meeting, the student's IEP Team discussed _____ behaviors. The student's "behaviors" included distractibility and hyperactivity. Although the student's January 20, 2012 Comprehensive Psychological Evaluation noted that the student had recently been yelling and crying in school, on November 8, 2012, the student was not crying or screaming in school. On November 8, 2012, the student was able to appropriately and accurately participate in lessons during carpet time and was able to focus when working with the special education teacher.

On November 8, 2012, the student's IEP Team determined that the student would receive ten hours per week of specialized instruction, in both the pull-out and push-in methods. In addition to specialized instruction and related services, the student's November 8, 2012 IEP includes the classroom accommodations of reading test questions, repetition of directions, simplification of oral directions, pencil grip, location with minimal distractions, small group testing, breaks between subtests, extended time on subtests, breaks during subtests and flexible scheduling.

The Parent testified that during the 2012-2013 school year, the student had "good days and bad days." The record indicates that the student is quick to join group activities, offers to help others, shares and is polite and a good sport. The Principal testified that the student's behavior is typical of children in _____ age group.

The Petitioner argued that since the student's January 20, 2012 evaluation indicated that the student "yells and cries at school" then the student required counseling and a BIP. The Hearing Officer is not persuaded by this argument. First, the January 20, 2012 evaluation indicated that the student "recently displayed some behavioral outbursts" however there was no evidence that this behavior continued. Next, at the student's November 8, 2012 IEP Team meeting, the teacher clearly indicated that the student no longer exhibited this behavior.

The Petitioner also argued also argued that School A should have conducted an FBA and developed a BIP to specifically address the student's needs resulting from _____ ADHD. The Hearing Officer is also not persuaded by this argument. The IDEA mandates that the public agency consider the use of positive behavioral interventions and supports, and other behavioral strategies, to address that behavior and provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Here, the student responds well to redirection and positive praise and performs better after taking short breaks. Additionally, the student is able to focus when working with the special education teacher. The student's November 8, 2012 IEP included 10 hours per week where the special education teacher would be working directly with the student and the accommodations that were effective in addressing the student's distractibility and hyperactivity.

The Parent testified that [redacted] “felt” that the student needed counseling because [redacted] could “related to how [the student] feels” because [redacted] struggled in school and had feelings of inadequacy. The Parent opined that “if I had had services maybe I would have pursued higher education.” The Parent stated that [redacted] “wants better for [the student]” and [redacted] does not want the student “to get into the wrong crowd.” The Godmother’s concerns were likewise rooted in future speculation of the student’s needs, specifically that “behaviors may begin to surface” when the student’s work becomes more difficult. The Godmother also acknowledged the need for data to confirm that the student is having behavior problems prior to an FBA or BIP being warranted.

An IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. *See Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (stating that the IDEA does not provide for an “education ... designed according to the parent's desires”) (citation omitted). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. *Id.* What the statute guarantees is an “appropriate” education, “not one that provides everything that might be thought desirable by ‘loving parents.’” *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

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. Although the parent is concerned about what effect the student’s educational performance may have on [redacted] in the future, the Hearing Officer concludes that the Petitioner did not present sufficient evidence to prove that [redacted] denied the student a FAPE by failing to include behavioral support services/counseling and a behavior intervention plan to address the student’s behavioral concerns in the student’s November 8, 2012 IEP. [redacted] appropriately addressed the student’s behaviors related to distractibility and hyperactivity through specialized instruction and accommodations in the student’s November 8, 2012 IEP.

The Petitioner failed to meet its burden with respect to Issue #2.

Requested Relief

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).

The Petitioner requested 38 hours of tutoring and executive functioning training. When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. *See also Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that [redacted] child has been denied a FAPE, [redacted] has met

burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

The Hearing Officer concluded that _____ denied the student a FAPE by determining that the student was no longer eligible for special education and related services on March 15, 2012. On November 8, 2012, the student was found eligible for special education and related services. Therefore, the period of the denial of FAPE was from March 15, 2012 through November 8, 2012. However, from March 15, 2012 through the end of the 2011-2012 school year, School A continued to provide 30 minutes per week of specialized instruction to the student as prescribed by the student's prior IEP. With this level of service, the student functioned on grade level and earned "Bs." Therefore, since School A continued to provide the services that the student would have had had the student been found eligible for special education and related services until the conclusion of the 2011-2012 school year, the Hearing Officer concludes that it is equitable to calculate compensatory education from August 2012 through November 2012.

From August 2012 through November 2012 there were approximately 11 weeks of school. In March 2012, the student was receiving 30 minutes per week of specialized instruction. In November 2012, the student's IEP Team determined that the student required 10 hours per week of specialized instruction. At the end of the 2012-2013 school year, the student was progressing toward five of six of _____ academic IEP goals and had mastered one of _____ six academic IEP goals. The student's reading performance regressed during the Summer of 2012 however the Principal testified that at the beginning of the 2012-2013 school year, many students tested lower on the school's formative assessment because of changes in the programming.

If the denial is calculated using the student's amount of specialized instruction in March 2012, the student was not provided with five and one half hours of specialized instruction. If the denial is calculated using the student's amount of specialized instruction in November 2012, the student was not provided with 110 hours of specialized instruction. When the student was exited from special education in March 2012, _____ explained to the parent that School A would monitor the student and reestablish the student's specialized instruction if it appeared the student needed the services. Following the receipt of the student's first advisory grades, _____ reconvened the student's IEP Team to reassess the student's eligibility.

It is likely that had the student been provided specialized instruction at the beginning of the 2012-2013 school year, the student's IEP Team would have not increased the student's specialized instruction until after data from the student's first advisory was gathered. Therefore, the Hearing Officer concludes that it is equitable to give greater weight to the amount of specialized instruction the student was receiving in March 2012. It is also likely that had the student's IEP Team found the student eligible for special education on March 15, 2012, the student would have shown the same regression after the Summer of 2012 however the student's IEP Team would have had to consider whether the student qualified for extended school year services (ESY).

One-on-one tutoring is a more intensive form of instruction and allows a student to progress at a faster rate than receiving instruction in a group setting within the school

environment. Therefore, the Hearing Officer concludes that it is equitable for the student to receive 15 hours of independent tutoring to provide the educational benefits that likely would have accrued from special education services the student would have received from August 2012 through November 2012.

ORDER

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

1. Issue #2 is **dismissed** with prejudice.
2. I shall provide the student with a total of 15 hours of independent tutoring, at a rate not to exceed the Office of the State Superintendent's (OSSE's) established rate for this service, to be completed by February 7, 2014.
3. All other relief sought herein by Petitioner herein 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: September 25, 2013


Hearing Officer