

**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
August 06, 2013

Parent,¹ on behalf of,
Student,*

Petitioner,

Date Issued: August 5, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student attended School A for the 2012-2013 school year. The student's most recent individualized education program (IEP) lists Other Health Impairment (OHI) as his primary disability and provides for him to receive five (5) hours per week of specialized instruction outside of the general education environment in reading, five (5) hours per week of specialized instruction outside of the general education environment in mathematics, five (5) hours per week of specialized instruction outside of the general education environment in written expression, 240 minutes per month of speech-language pathology outside of the general education environment and 120 minutes per month of behavioral support services outside of the general education environment.

On June 4, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to timely reevaluate the student; failing to provide an appropriate IEP and placement; and failing to provide the parent with access to or a copy of all of the student's educational records. As relief for the alleged denials of FAPE, the Petitioner requested placement in a public or nonpublic school that can provide the student with educational benefit; full access to and/or copies of all of the student's school records; a comprehensive psychological, social history and Connors Attention Deficit Hyperactivity

¹ Personal identification information is provided in Appendix A.

*The student is a minor.

Disorder (ADHD) evaluations; for DCPS to convene a multidisciplinary team (MDT) meeting with 10 business days to review and revise the student's IEP to include increased hours of services, determine an appropriate placement; placement to be made within five days for a public school or 10 days for a nonpublic school; reservation of the right to file Complaints on issues that could not be determined upon receipt of records; timelines for compensatory education to be extended; and compensatory education.

On June 6, 2013, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that the student's January 20, 2012 and November 26, 2012 IEP Teams determined that the specialized instruction and related services were appropriate for the student; the parent did not present any disagreement regarding the adequacy of the student's educational services during the January 20, 2012 and November 26, 2012 IEP Team meetings or thereafter; the parent did not present any data at the student's IEP Team meetings which suggested that the student required a "full time" IEP; the student's current location of services is able to implement the student's IEP; the student's January 20, 2012 IEP and November 26, 2012 IEPs were appropriate for the student; the parent has not requested a meeting to review the student's IEP; the parent did not make a good faith effort to access the student's records; and DCPS requested that the Petitioner contact the school's special education coordinator to obtain a copy of the student's records.

On June 20, 2013, the Respondent filed a Motion for Summary Adjudication alleging that the reevaluation issue was dismissed with prejudice in an April 22, 2013 Order and that the relief of a comprehensive psychological evaluation and Attention Deficit Hyperactivity Disorder (ADHD) assessment had been provided to the Petitioner.

On June 25, 2013, the Petitioner filed a Response to Respondent's Motion for Summary Adjudication. The Petitioner argued that while the April 22, 2013 Order dismissed the reevaluation issue with prejudice, the issue of compensatory education related to the alleged delay in the reevaluation was specifically reserved within the Order; that the Complaint requested relief beyond a comprehensive psychological evaluation and ADHD assessment; and that the Complaint alleged issues regarding the appropriateness of the student's IEPs which were not addressed by the Petitioner in the Motion for Summary Adjudication.

On July 16, 2013, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement. The parties agreed that there was no adjustment to the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on July 5, 2013, following the conclusion of the 30-day resolution period, and ends on August 18, 2013. The Hearing Officer Determination (HOD) is due on August 18, 2013.

On June 28, 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 also discussed the Respondent's June 20, 2013 Motion for Summary Adjudication and the Petitioner's June 25, 2013 Response to Respondent's Motion for Summary Adjudication. Based on the conversation during the prehearing conference, the Respondent attorney verbally withdrew the Motion for Summary Adjudication and sent an electronic

communication to the Hearing Officer and Petitioner withdrawing the Motion for Summary Adjudication.

Additionally, during the discussion of the issues, the parties agreed that the allegation regarding access to the student's records would be withdrawn should the Respondent ensure that the student's records were forwarded to the Petitioner's attorney.

The Hearing Officer issued the Prehearing Order on June 28, 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 July 24, 2013, Petitioner filed Disclosures including thirty-two (32) exhibits and eight (8) witnesses.² On July 24, 2013, Respondent filed Disclosures including six (6) exhibits and five (5) witnesses. On July 26, 2013, Respondent communicated objections to Petitioner's Exhibits 1-3, 15, 18, 22, 24-29 to the Petitioner and Hearing Officer.

The due process hearing commenced at approximately 9:17 a.m.³ on July 31, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2006. The Petitioner elected for the hearing to be closed however the parties agreed that the student's step-father would be permitted to attend the hearing.

Based on the Petitioner's difficulty with speaking, the Petitioner requested the accommodation of typing. A computer was provided for the Petitioner by the Student Hearing Office and the computer was attached to a projector which projected an image of the computer's screen onto the wall of the hearing room. During the Mother's testimony, a staff member of the Student Hearing Office read the Mother's responses into the record. The Student Hearing Office staff member was directed by the Hearing Office to read exactly as the Mother typed, without interjecting or deleting any words.

The Petitioner confirmed that the Respondent had provided the student's records to Petitioner's attorney and verbally withdrew Issue #3 as outlined in the Prehearing Order.

Petitioner's Exhibits 3-14, 16-17, 19-22 and 30-32 were admitted without objection. Petitioner's Exhibit 1 was not admitted because it was duplicative of the record. Petitioner's Exhibits 2, 18 and 23 were not admitted because they were not relevant to the remaining issues to be decided. Petitioner's Exhibit 15 was admitted, over Respondent's objection, because it was found to be relevant and complete. Petitioner's Exhibit 22 was withdrawn by the Petitioner. Petitioner's Exhibit 24 was admitted, over Respondent's objection, because the author of the document was a listed witness. Petitioner's Exhibit 25 was admitted, over Respondent's objection, because the author of the document was a listed witness. Petitioner's Exhibit 26 was not admitted because it was an incomplete document. Petitioner's Exhibit 27 was not admitted because it did not contain a date, the name of the author or the name of the student. Petitioner's

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

³ The hearing was scheduled to begin at 9:00 a.m. At 9:00 a.m. the Hearing Officer and the parent were present. At 9:05 a.m., Petitioner's attorney arrived. At 9:16 a.m., Respondent's attorney arrived.

Exhibit 28 pages 1-4 were not admitted because the author of the document was not going to testify and the Respondent would not have an opportunity to cross examine the author regarding the methods used to complete the checklist or the expertise of the author. Petitioner's Exhibit 28 pages 5-6 were admitted, over Respondent's objection, because the document was completed by the student's mother who was present and available to testify. Petitioner's Exhibit 29 pages 6, 8-15, 19-21 were not admitted because the documents were clear, not complete or duplicative. Petitioner's Exhibits 29 pages 1-5, 7, 16-18 were admitted, over Respondent's objection, because the documents were signed and dated by the student and clear. Respondent's Exhibits 1-6 were admitted without objection.

After the Hearing Officer admitted Disclosures into the record, as detailed above, the Petitioner requested that a supplemental exhibit, namely the student's January 20, 2012 IEP, be admitted into the record. The Respondent objected to the exhibit arguing that the exhibit did not fall into the exception allowed by 34 CFR §300.512(b)(2) and that admitting the exhibit would be highly prejudicial into the Respondent because the Petitioner did not submit this piece of evidence, required for the Petitioner's prima facie case, by the Disclosure deadline. The Petitioner argued that the document was a DCPS document and obviously at issue in the case therefore presented no prejudice to the Respondent if admitted into the record. In order to ensure a complete record, the Hearing Officer admitted the student's January 20, 2012 IEP into the record as Petitioner's Exhibit 33.

The hearing concluded at approximately 5:13 p.m. on July 31, 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 the student is entitled to compensatory education as a result of the DCPS' delay in conducting a reevaluation until May 2013?⁴
2. Whether DCPS failed to develop an appropriate IEP for the student on January 20, 2012 and/or November 26, 2012, specifically by failing to include 27.5 hours per week of specialized instruction outside of the general environment and 90 minutes per week of behavior support services outside of the general education environment, and if so, whether this failure constitutes a denial of a FAPE?

⁴ The Complaint alleged that DCPS denied the student a FAPE by failing to conduct a timely reevaluation however this issue was dismissed, with prejudice, in an April 22, 2013 Order of Withdrawal. While the April 22, 2013 Order of Withdrawal dismissed the reevaluation issue with prejudice, the Order reserved the issue of compensatory education related to the alleged denial of a FAPE.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student is diagnosed with ADHD. (Petitioner's Exhibits 3, 5, 19 and 21; Psychologist's Testimony; Mother's Testimony)
3. On April 29, 2009, a Confidential Psychological Evaluation was completed for the student. (Petitioner's Exhibit 3)
4. On September 12, 2011, a Speech and Language Evaluation was completed for the student. (Petitioner's Exhibit 4)
5. On the student's October 28, 2011 report card, the student received a grade letter "A" in Health and Physical Education, a grade letter "B" in Library Media, a grade letter "B-" in Science, a grade letter "D" in Exploratory Keyboarding, a grade letter "C+" in Music, and a "Satisfactory" in Advisory. The student received a grade "C" in Language Arts, World Geography and Cultures, math, Extended Literacy and math support. (Petitioner's Exhibit 5)
6. On November 18, 2011, a Woodcock-Johnson II was completed for the student. (Petitioner's Exhibits 5 and 15)
7. On November 18, 2011, compared to other students his age, the student's standard scores were low average in broad reading, basic reading skills and brief reading. The student's broad math, math calculation and brief math scores were in the low range. The student's broad written language, written expression and brief writing scores were in the low range. The student's standard scores in reading comprehension and math reasoning were very low. (Petitioner's Exhibits 5 and 15)
8. On November 23, 2011, a Confidential Psychological Reevaluation was completed for the student. (Petitioner's Exhibit 5)
9. The student was referred for the November 2011 psychological evaluation "to obtain current information on cognitive functioning, behavioral functioning, and adaptive functioning in order to determine appropriateness of educational placement." (Petitioner's Exhibit 5)
10. The evaluator who conducted the November 2011 psychological evaluation, performed two observations of the student. (Petitioner's Exhibit 5)
11. The observation on September 15, 2011, was conducted while the student was in library media with 29 students. (Petitioner's Exhibit 5)
12. During the September 15, 2011 observation, the student participated with his group and read along with the group. (Petitioner's Exhibit 5)
13. The October 13, 2011 observation took place in the student's special education classroom. (Petitioner's Exhibit 5)
14. During the observation on October 13, 2011, the student displayed few problem behaviors. (Petitioner's Exhibit 5)

15. During the 15 minute observation on October 13, 2011, the student responded to the teacher/lesson 10 times, worked on school subjects 16 times, engaged in transition movement two times and displayed inattention two times. (Petitioner's Exhibit 5)
16. In October 2011, the student participated in activities with the assistance of a classmate. (Petitioner's Exhibit 5)
17. In November 2011, the student's cognitive ability was in the Boderline range. (Petitioner's Exhibit 5)
18. In November 2011, the student scored in the significantly below average range on the Reynolds Intellectual Assessment Scales (RIAS) Verbal Intelligence Index and the moderately below average range on the Nonverbal Intelligence Index. (Petitioner's Exhibit 5)
19. In November 2011, the student understood and remembered best when information included a visual component since his nonverbal memory and nonverbal reasoning abilities were his strengths. (Petitioner's Exhibit 5)
20. In November 2011, inattention was a common concern among the student's parent and teachers. (Petitioner's Exhibit 5)
21. The student displayed some improvement in the severity of his ADHD symptoms from April 2009 to November 2011. (Petitioner's Exhibit 5)
22. In November 2011, the student needed counseling in the school setting to address managing his symptoms of ADHD. (Petitioner's Exhibit 5)
23. In November 2011, the student was concerned about his learning problems. (Petitioner's Exhibit 5)
24. The student's IEP Team met and developed an IEP for the student on January 20, 2012. (Petitioner's Exhibit 33)
25. The student's January 20, 2012 IEP established annual goals related to reading, math, written expression and behaviors related to ADHD. (Petitioner's Exhibit 33)
26. The annual goals on the student's January 20, 2012 IEP were appropriate for the student. (Stipulated Fact)
27. The student's January 20, 2012 IEP prescribed specialized instruction five hours per week outside of the general education environment for reading, for five hours per week outside of the general education environment for math, for five hours per week outside of the general education environment for written language and for 180 minutes per month of behavioral support services outside of the general education environment. (Petitioner's Exhibit 33)
28. On the April 2012 DC CAS, the student performed below basic in reading and mathematics. (Petitioner's Exhibit 13)
29. In May 2012, June 2012, September 2012 and October 2012 the student was progressing toward mastery of his social/emotional annual goals, with the exception of one session where the student was "maintaining." (Petitioner's Exhibits 6 and 7)
30. In September 2012, the parent completed an Ohio Mental Health Consumer Outcomes Systems Parent Rating Form. (Petitioner's Exhibit 25)
31. The Ohio Mental Health Consumer Outcomes Systems Parent Rating Form measured the student's behavior for the preceding 30 days. (Petitioner's Exhibit 25)
32. In September 2012, the student did not get into fights, cause trouble for no reason, use drugs or alcohol, skip school or classes, lie, hurt himself, talk or think about death,

- feel worthless or useless, feel lonely or not have friends, or have eating problems. (Petitioner's Exhibit 25)
33. For the 30 days preceding September 2012, the student "once or twice" argued with others, yelled or screamed at others, refused to do things teachers or parents asked, broke rules or the law, felt anxious or fearful, worried that something bad was going to happen, felt sad or depressed and had nightmares. (Petitioner's Exhibit 25)
 34. For the 30 days preceding September 2012, the student "often" had fits of anger and could not sit still. (Petitioner's Exhibit 25)
 35. The student's November 26, 2012 IEP established annual goals related to reading, math, written expression and behaviors related to ADHD. (Petitioner's Exhibits 9 and 10; Respondent's Exhibits 2 and 4)
 36. The annual goals on the student's November 26, 2012 IEP were appropriate for the student. (Stipulated Fact)
 37. An IEP was developed and implemented for the student on January 30, 2013. (Petitioner's Exhibit 16)
 38. The student's January 30, 2013 IEP prescribed five hours per week of specialized instruction outside of the general education environment in reading, five hours per week of specialized instruction outside of the general education in math, five hours per week of specialized instruction outside of the general education environment in written language and 120 minutes per month of behavioral support services outside of the general education environment. (Petitioner's Exhibits 16 and 17)
 39. On January 30, 2013, the student needed assistance reading but was beginning to have a better understanding of reading, was reading aloud "much more," was improving his competency skills and was participating in shared inquiry. (Petitioner's Exhibit 17)
 40. At the January 30, 2013 IEP Team meeting, the parent voiced concerns that the student was not making progress in general education classes. (Petitioner's Exhibit 17; Mother's Testimony)
 41. On January 30, 2013, the student had a delayed reaction to understanding basic directions. (Petitioner's Exhibit 17)
 42. On January 30, 2013, the student was eager to learn and answer questions and demonstrated more participation in class. (Petitioner's Exhibit 17)
 43. On January 30, 2013, the student's overall self-esteem was weak and the student had problems making eye contact. (Petitioner's Exhibit 17)
 44. On January 30, 2013, the student was starting to mature and feel more confident.
 45. On January 30, 2013, the student displayed problems getting started on tasks but was cooperative with behavioral support services. (Petitioner's Exhibit 17)
 46. The student's IEP Progress Reports from February 4, 2013 and April 15, 2013, report the student's progress toward the annual goals on his November 26, 2012 IEP. (Petitioner's Exhibits 9 and 10; Respondent's Exhibits 2 and 4)
 47. The student has a pleasant attitude. (Petitioner's Exhibit 5; Student's Testimony)
 48. The student is not a discipline problem. (Petitioner's Exhibits 6, 7, 11, 17 and 25)
 49. The Psychologist was qualified as an expert in comprehensive psychological evaluations.
 50. The Psychologist gave generally creditable testimony however the Psychologist testified regarding what was in the student's "best interest" and gave testimony

regarding the student's functioning far after the time periods relevant to the issues to be decided.

51. The Step-father gave generally creditable testimony however did not provide testimony specific enough to inform the issues to be decided.
52. The Student gave creditable testimony however did not provide testimony specific enough to inform the issues to be decided.
53. The Advocate gave generally creditable testimony however did not provide testimony regarding the time period relevant to the issues to be decided.
54. The Mother gave generally creditable testimony however provided little testimony specific enough to inform the issues to be decided or regarding the time period relevant to the issues to be decided.
55. The Associate Head of School gave creditable testimony however did not provide testimony relevant to the issues to be decided.

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).

Issue #1

Districts must reevaluate a special education student at least once every three years, and not more frequently than one time per year, unless the parents and district agree otherwise. 20 U.S.C. § 1414(a)(2)(b). A reevaluation occurs "if the local educational agency determines that the educational or related service needs, including improved academic achievement and

functional performance, of the child warrant a reevaluation ... or if the child's parents or teacher requests a reevaluation." 20 U.S.C. § 1414(a)(2)(1).

The IDEA and its implementing regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student's parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005). In light of the lack of statutory guidance, *Herbin* concluded that "[r]evaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone, 21 Individuals with Disabilities Education Law Report 1127, 1129 (1995)).

In the present matter, the Petitioner alleged that student is entitled to compensatory education as a result of the DCPS' delay in conducting a reevaluation until May 2013.

Evaluation is defined as, "procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 CFR §300.15. In conducting an evaluation, a local educational agency (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). IDEA regulations at 34 CFR §300.304(c)(4) require a student to be "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities."

While the Petitioner alleged that the student is entitled to compensatory education for DCPS' delay in conducting the student's reevaluation, the record does not contain evidence of the date of the student's prior evaluation or reevaluation. The record contains an April 29, 2009 Confidential Psychological Evaluation, a September 12, 2011 Speech and Language Evaluation, a November 23, 2011 Confidential Psychological Reevaluation, a November 18, 2011 Woodcock-Johnson II Summary and Score Report. The November 23, 2011 Confidential Psychological Reevaluation states that the student was referred for the evaluation "to obtain current information on cognitive functioning, behavioral functioning, and adaptive functioning in order to determine appropriateness of educational placement."

Here, it is important to note the distinction between "evaluation" and the parent's request for a specific assessment tool. The IDEA does not require LEAs to administer every test requested by a parent or educational advocate. Rather, to ensure that a child with a disability receives a FAPE, an LEA must use "a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information." *Long v. District of Columbia*, 780 F. Supp. 2d 49, (D.D.C. March 23, 2011) (quoting 20 U.S.C. § 1414(b)(2)(A)). The list of "evaluations" contained within the record included above is a list of assessment tools that could or did assist the student's IEP Team in determining the content of the student's IEPs. There is no documentation of an evaluation, as defined by 34 CFR §300.15, in the record.

As noted above, 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. Here, the Petitioner is the party seeking relief therefore the Petitioner has the burden of proof.

The Petitioner did not present evidence of the date of the student's prior evaluation or reevaluation or of the date the parent requested a reevaluation. Assuming *arguendo* the student's last evaluation was conducted following the completion of the student's September 2011 speech-language assessment tool, November 2011 educational assessment tool and November 2011 psychological assessment tool, the student's last evaluation would have occurred in November or December of 2011. Therefore, pursuant to 20 U.S.C. § 1414(a)(2)(b), a reevaluation of the student would not need to be completed until November or December of 2014. If the Petitioner's claim is based on the parent's request for a reevaluation, the Petitioner likewise did not present evidence of the date the parent requested a reevaluation of the student. Therefore, the Hearing Officer cannot determine if the reevaluation was conducted within a reasonable period of time or without undue delay.

The Hearing Officer concludes that the Petitioner failed to meet its burden in proving that there was a delay in conducting the student's reevaluation. Therefore, Petitioner failed to meet its burden with respect to Issue #1.

Issue #2

The Petitioner alleged that DCPS failed to develop an appropriate IEP for the student on January 20, 2012 and/or November 26, 2012, specifically by failing to include 27.5 hours per week of specialized instruction outside of the general environment and 90 minutes per week of behavior support services outside of the general education environment for the student.

January 20, 2012 IEP

The student's IEP Team met and developed an IEP for the student on January 20, 2012. At that time, the student had recently completed a speech-language assessment, educational assessment and psychological evaluation.

The evaluator who conducted the November 2011 psychological evaluation, performed two observations of the student. During the first observation on September 15, 2011, the student was in Library Media with 29 students. The student participated with his group and read along with the group. During the second observation on October 13, 2011, few problem behaviors were observed. During the 15 minute observation, the student responded to the teacher/lesson 10 times, worked on school subjects 16 times, engaged in transition movement two times and displayed inattention two times. The second observation took place in the student's special education classroom.

On the student's October 28, 2011 report card, the student received a grade letter "A" in Health and Physical Education, a grade letter "B" in Library Media, a grade letter "B-" in Science, a grade letter "D" in Exploratory Keyboarding, a grade letter "C+" in Music, and a

“Satisfactory” in Advisory. The student received a grade “C” in Language Arts, World Geography and Cultures, math, Extended Literacy and math support.

The educational assessment conducted in November 2011, indicated that compared to other students his age, the student’s standard scores were low average in broad reading, basic reading skills and brief reading. The student’s broad math, math calculation and brief math scores were in the low range. The student’s broad written language, written expression and brief writing scores were in the low range. The student’s standard scores in reading comprehension and math reasoning were very low.

Cognitively, the student scored in the Boderline range on the Wechsler, in the significantly below average range on the RIAS Verbal Intelligence Index and the moderately below average range on the Nonverbal Intelligence Index. The RIAS results indicated that the student understands and remembers best when information includes a visual component since his nonverbal memory and nonverbal reasoning abilities are his strengths.

Socially and emotionally, inattention was a common concern among the student’s parent and teachers. While the student displayed some improvement in the severity of his ADHD symptoms since his April 2009 evaluation, ADHD behaviors continued to be of concern. The evaluator recommended that the student continue to receive counseling in the school setting to address managing symptoms of ADHD. The student noted learning problems as a concern. The student was described as having a pleasant attitude and participated in activities with the assistance of a classmate.

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. No testimony of how the student was functioning in January 2012 was presented. Therefore, the only evidence related to the appropriateness of the student’s January 20, 2012 IEP is contained with the exhibits dated prior to January 20, 2012 which could have been relied upon by the student’s January 20, 2012 IEP Team in the development of the student’s IEP.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student’s needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For an IEP to be “reasonably calculated to enable the child to receive educational benefits,” it must be “likely to produce progress, not regression.” *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

The evaluations identified the student’s needs in reading, math, written language and with behaviors related to ADHD.⁵ The student’s January 20, 2012 IEP established annual goals related to reading, math, written expression and behaviors related to ADHD. The Petitioner stipulated that the annual goals on the student’s January 20, 2012 IEP were appropriate for the

⁵ The student’s evaluations also identified the student’s needs in speech-language however the student’s speech-language services are not at issue in this case.

student. While it can be presumed that the student's low level in reading affected his performance in other subject areas, the student's most recent report card on January 20, 2012 demonstrated average or above average achievement in all subject areas, with the exception of keyboarding. The January 20, 2012 IEP contains specialized instruction outside of the general education environment for five hours per week to address reading, for five hours per week to address math, for five hours per week to address written language and for 180 minutes per month for behavioral support services to address the student's behaviors related to ADHD symptoms. The student's Service Trackers for his behavioral support services from May 2012, June 2012, September 2012 and October 2012 indicated that the student was progressing toward mastery of his social/emotional annual goals for each applicable session, with the exception of one session where the student was "maintaining."

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. Here, the Hearing Officer concludes that the Petitioner did not present sufficient evidence to prove that the student's January 20, 2012 IEP should have contained 27.5 hours per week of specialized instruction outside of the general environment and 90 minutes per week of behavior support services outside of the general education environment for the student. The student's IEP reflected the results of his most recent evaluations, established annual goals related to those needs and provided specialized instruction and related services that were appropriate to address those needs. There was no evidence presented which suggested that the IEP was not reasonably calculated to enable the student to receive educational benefit.

November 26, 2012 IEP

The record does not include a copy of the student's November 26, 2012 IEP and, as in the case of the January 20, 2012 IEP, no testimony of how the student was functioning in November 2012 was presented. The record contains IEP Progress Reports from February 4, 2013 and April 15, 2013 which report progress toward the goals on the student's November 26, 2012 IEP however the record contains a January 30, 2013 IEP which would have been in effect during the time periods of the February 4, 2013 and April 15, 2013 IEP Progress Reports. Additionally, while the progress reports list the annual goals from the student's November 26, 2012 IEP, the progress reports do not list the amount of specialized instruction or the amount of behavior support services prescribed by the student's November 26, 2012 IEP. Likewise, the record contains Service Trackers of the behavioral support services received by the student following the implementation of the student's November 26, 2012 IEP but do not indicate the amount of behavioral support services prescribed by the student's November 26, 2012 IEP.

The documents in the record which would have been available to the student's November 26, 2012 IEP Team to inform the Team's decisions regarding the amount of specialized instruction and related services appropriate for the student on November 26, 2012, include the November 2011 Psychological Reevaluation described above, the student's April 2012 DC CAS scores, the student's behavioral support services Service Trackers from May 2012, June 2012, September 2012 and October 2012, and a September 2012 Ohio Mental Health Consumer Outcomes Systems rating form completed by the parent.

As outlined above, the student's November 2011 psychological evaluation indicated that compared to other students his age, the student's standard scores were low average in broad reading, basic reading skills and brief reading. The student's broad math, math calculation and brief math scores were in the low range. The student's broad written language, written expression and brief writing scores were in the low range. The student's standard scores in reading comprehension and math reasoning were very low. Cognitively, the student scored in the Borderline range on one measure, in the significantly below average range and the moderately below average range on another measure. The student's primary social/emotional/behavioral concern was inattention.

On the April 2012 DC CAS, the student performed below basic in reading and mathematics. The student's Service Trackers for his behavioral support services from May 2012, June 2012, September 2012 and October 2012 indicated that the student was progressing toward mastery of his social/emotional annual goals for each applicable session, with the exception of one session where the student was "maintaining."

In September 2012, the parent completed an Ohio Mental Health Consumer Outcomes Systems Parent Rating Form. In this form which measured the student's behavior for the preceding 30 days, the parent indicated that the student did not get into fights, cause trouble for no reason, use drugs or alcohol, skip school or classes, lie, hurt himself, talk or think about death, feel worthless or useless, feel lonely or not have friends, or have eating problems. The parent indicated that the student "once or twice" argued with others, yelled or screamed at others, refused to do things teachers or parents asked, broke rules or the law, felt anxious or fearful, worried that something bad was going to happen, felt sad or depressed and had nightmares. The parent indicated that the student "often" had fits of anger and could not sit still. The parent did not report that the student had any of the listed behaviors "most of the time" or "all of the time."

For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted). 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. Since the record does not contain a great deal of evidence of what was objectively reasonable to the student's November 26, 2012 IEP Team, it is prudent to also examine whether the student's November 26, 2012 IEP produced progress.

At the student's January 30, 2013 IEP Team meeting, the student's reading teacher noted that the student needed assistance reading but was beginning to have a better understanding of reading, was reading aloud "much more," was improving his competency skills and was participating in shared inquiry. At the meeting, the parent voiced concerns that the student was not making progress in general education classes. The social worker agreed that the student had a delayed reaction to understanding basic directions.

The student's January 30, 2013 IEP Team also indicated that the student was eager to learn and answer questions, participated more. Although the student's overall self-esteem was weak and the student had problems making eye contact, the student was starting to mature and feel more confident. It was noted that the student was never a discipline problem. The student displayed problems getting started on tasks but was cooperative with behavioral support services.

Although the student's January 30, 2013 IEP would have been in effect during the time periods of the student's February 4, 2013 and April 15, 2013 IEP Progress Reports, the progress reports indicated that the student was progressing toward all November 26, 2012 IEP goals that had been introduced, had mastered one speech-language goal in February 2013 and had mastered one social/emotional goal in April 2013.

Although the Petitioner alleged that the student's November 26, 2012 IEP was inappropriate because it failed to include 27.5 hours per week of specialized instruction outside of the general environment and 90 minutes per week of behavior support services outside of the general education environment, the Petitioner did not present evidence of the amount of specialized instruction and behavior support services on the student's November 26, 2012 IEP. It can be inferred, in reviewing the student's January 20, 2012 and January 30, 2013 IEPs, that the student's November 26, 2012 IEP prescribed five hours per week of specialized instruction outside of the general education environment in reading, five hours per week of specialized instruction outside of the general education in math and five hours per week of specialized instruction outside of the general education environment in written language. From the notes of the student's January 30, 2013 IEP Team meeting, it can be inferred that the student's November 26, 2012 IEP prescribed 120 minutes per month of behavioral support services since the social worker recommended "keeping" the student's behavioral support services at 120 minutes per month.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

The evaluations identified the student's needs in reading, math, written language and with behaviors related to ADHD.⁶ The student's November 26, 2012 IEP established annual goals related to reading, math, written expression and behaviors related to ADHD. The Petitioner stipulated that the annual goals on the student's November 26, 2012 IEP were appropriate for the student. While the parent expressed her concern that the student was not making progress in general education classes during the student's January 30, 2013 IEP Team meeting, there is no evidence which suggests that the student was not adequately functioning in his general education classes at the point the student's November 26, 2012 IEP Team met. It can be inferred that the student's November 26, 2012 IEP contains specialized instruction outside of the general education environment for five hours per week to address reading, for five hours per week to

⁶ The student's evaluations also identified the student's needs in speech-language however the student's speech-language services are not at issue in this case.

address math, for five hours per week to address written language and for 120 minutes per month for behavioral support services. The record indicates that the student did not have discipline problems and was demonstrating more confidence. Although the student's January 30, 2013 IEP would have been in effect during the time periods of the student's February 4, 2013 and April 15, 2013 IEP Progress Reports, the progress reports indicated that the student was progressing toward all November 26, 2012 IEP goals that had been introduced, had mastered one speech-language goal in February 2013 and had mastered one social/emotional goal in April 2013.

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. Here, the Petitioner is the party seeking relief therefore the Petitioner has the burden of proof. The Hearing Officer concludes that the Petitioner did not present sufficient evidence to prove that the student's November 26, 2012 IEP should have contained 27.5 hours per week of specialized instruction outside of the general environment and 90 minutes per week of behavior support services outside of the general education environment for the student. The student's IEP reflected the results of his most recent evaluations, established annual goals related to those needs and provided specialized instruction and related services that were appropriate to address those needs. There was no evidence presented which suggested that the IEP was not reasonably calculated to enable the student to receive educational benefit.

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

ORDER

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

The due process complaint in this matter is **dismissed** with prejudice. All relief sought 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: August 5, 2013


Hearing Officer