DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],[1]

Petitioner,

v

Respondent.

Date Issued: August 18, 2011

Hearing Officer: Jim Mortenson

Case No:

2011 AUG 18 PM 1:29
OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on June 24, 2011. The Petitioner is represented by Roberta Gambale, Esq., and the Respondent is represented by Lauren Baum, Esq.

A response to the complaint was timely filed on July 5, 2011.The resolution meeting was waived by the parties as of July 8, 2011. A prehearing conference was held on July 11, 2011, and a prehearing order issued on that date.

The hearing was convened and held over two days beginning on August 11, 2011, in room 2004 at 810 First Street NE, Washington, D.C. and ending August 12, 2011. The due date for the hearing officer determination (HOD) is August 22, 2011. This HOD is issued on August 18, 2011.

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

II. JURISDICTION

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

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is:

> Whether the Respondent failed to offer or provide the Student with an individualized education program (IEP) reasonably calculated to provide educational benefit when it lacks increased instructional and behavioral supports and interventions, or placement in a full-time therapeutic setting?

The substantive requested relief at the time of hearing included:

1. Revised IEP to include a "full-time" therapeutic setting.
2. Compensatory education consisting of counseling to remedy the regression in behavior and tutoring to remedy the failure to meet academic goals.

The Respondent did not fail to offer or provide the Student with an IEP reasonably calculated to provide educational benefit.

IV. EVIDENCE

Nine witnesses testified at the hearing, four for the Petitioner and five of the Respondent.

The witnesses for the Petitioner were:

1) The Petitioner (P)

2) Carolyn Miskel, Educational Advocate (C.M.)

3) Tutor

4) Executive Director,

The witnesses for the Respondent were:

1) Special Education Coordinator

2) Special Education Teacher

3) Counselor

4) General Education Teacher

5) Yuliana Del Arroyo, Placement Oversight Manager, OSSE (Y.D.)

23 documents were disclosed by the Petitioner and 21 were admitted into evidence.[2] The Petitioner's exhibits are:

Ex. No.	Date	Document
P 1	July 18, 2011	Advocate's Notes
P 2	June 21, 2011	IEP Meeting Notes
P 3	June 21, 2011	Advocate's Notes
P 5	March 31, 2011	IEP
P 6	March 31, 2011	Advocate's Notes
P 7	March 4, 2011	[Behavior Intervention Plan (BIP)]
P 8	February 23, 2011	IEP Meeting Notes
P 9	February 23, 2011	Advocate's Notes
P 10	October 22, 2010	IEP
P 11	October 22, 2010	Advocate's Notes
P 12	October 22, 2010	IEP Meeting Notes
P 13	August 11, 2010	Clinical Evaluation
P 14	August 4, 2010	Functional Behavioral Assessment
P 15	August 26, 2010	Occupational Therapy Evaluation
P 16	June 5, 2008	Psychoeducational Evaluation
P 17	January 7, 2009	Social History Report
P 19	August 27, 2010	Disciplinary Action
	November 19, 2010	Disciplinary Action
	February 14, 2011	Letter from Richardson & Sutton to P
	February 17, 2011	Extreme Behavior Report
P 20	May 16, 2011	Email chain ending from Baum to Gambale
	May 11, 2011	Incident Report
	May 11, 2011	Disciplinary Action
P 21	May 24, 2011	Email from Gambale to Baum
P 22	May 26, 2011	Email chain ending from Baum to Gambale et al.
P 23	March 7, 2011	Letter from Baum to Gambale

26 documents were disclosed by the Respondent and all were admitted into evidence. The Respondent's exhibits are:

[2] P 4 and P 18 were objected to at the start of the hearing and were not later offered.

Ex. No.	Date	Document
R 1	April 6, 2010	IEP
R 2	April 6, 2010	IEP Meeting Notes
R 3	July 14, 2010	Due Process Complaint Notice
R 4	August 6, 2010	Settlement Agreement
R 5	August 4, 2010	Functional Behavioral Assessment
R 6	August 11, 2010	Clinical Evaluation
R 7	August 26, 2010	Occupational Therapy Evaluation
R 8	October 22, 2010	IEP Meeting Notes
R 9	February 18, 2011	Administrative Due Process Complaint Notice
R 10	March 7, 2011	Letter from Baum to Gambale
R 11	March 4, 2011	Behavior Intervention Plan
R 12	March 9, 2011	Email chain ending March 9, 2011
R 13	March 31, 2011	IEP Meeting Notes
R 14	March 31, 2011	IEP
R 15	April 1, 2011	BIP
R 16	May 24, 2011	Email chain ending May 24, 2011
R 17	June 8, 2011	Email chain ending June 8, 2011
R 18	June 21, 2011	IEP Meeting Notes, Advocate's Notes
R 19	June 21, 2011	BIP
R 20	July 18, 2011	IEP Meeting Notes
R 21	July 18, 2011	OSSE State Recommendation on Change in Placement Request
R 22	2010-2011	[Report Card]
R 23	August 4, 2011	Extended School Year – IEP Progress Report
R 24	June 21, 2011	[NWEA progress report]
R 25	[Undated]	[DC-CAS] Student Report
R 26	[Undated]	Curricula Vitae for Sharron Williams

V. FINDINGS OF FACT

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

1. Student is a learner with a disability who completed the grade at at the end of the 2010-2011 school year.[3] The Student is eligible for special education and related services

[3] Testimony (T) of P, P 5/R 14.

under the definition of other health impairment as a result of his attention deficit hyperactivity disorder (ADHD).[4]

2. The Student is making progress in the general education curriculum.[5] His report cards show he is "proficient" and ready for fourth grade reading.[6] His writing skills are also largely "proficient" but for English language conventions, in which he "needs improvement."[7] His NWEA scores show growth in math and language usage as well.[8] His NWEA reading scores vary from test to test, and his highest score this year, during the winter, shows he was at the 76th percentile range, which is at least the best he could do, indicating learning of the curriculum taking place.[9] The Student's third grade scores on the DC-CAS, the state-wide academic achievement test, shows the Student is nearly at grade level in both reading and mathematics.[10]

3. The Student met or made progress on the majority of his annual IEP goals when the IEP was revised in March, 2011.[11] The Student met five of six math goals (only the goal on telling time was not met).[12] The Student did not meet his first reading goal, but met two of the other four goals and made enough progress on another to result in it being revised to a higher expected outcome.[13] The Student met two of three writing goals, which were revised, but did

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[4] T of P, P 5/R 14, P 16.
[5] T of P, T of E.H., T of T of S.H., T of M.T., R 22, R 24, R 25. (T.M., the tutor, testified that but for math, the Student is performing at the second and first grade levels in reading and writing respectively. This testimony is out weighed by the evidence provided by the school staff, report cards, NWEA scores, and DC-CAS, scores. Further, it was not shown that T.M. or the assessment she relied on for her testimony (Stepping Stones) has any relationship to the general education curriculum used by the Respondent.)
[6] R 22.
[7] R 22.
[8] R 24.
[9] R 24. (The wide variations in the reading scores on the NWEA tend to show how variable the Student's attitude is toward that particular testing as opposed to consistently showing the reading performance. While it is easy to score very poorly, it is not so likely a student can score higher than his or her true ability on such a test.)
[10] R 25.
[11] T of R.P., T of T of S.H, R 23, P 5/R 14, P 18/R 1.
[12] P 5/R 14, P 18/R 1.
[13] P 5/R 14, P 18/R 1.

not meet one of them.[14] The Student only met two of four communication/speech and language goals.[15] The Student met three of five emotional, social, and behavioral development goals.[16]

4. The special education and related services and supplementary aids and services were changed when the IEP was revised in March 2011.[17] Specialized instruction was changed from five hours per week in the general education setting to ten hours per week.[18] Conversely, the ten hours per week of specialized instruction outside of the general education setting was changed to five hours per week.[19] Speech and language services and behavioral support services did not change.[20] 45 minutes per week of occupational therapy (OT) services were added (and motor skills goals) in October 2010.[21] Repetition of directions and permitting dictated response were removed as supplemental aids or services, while the simplification of oral directions, use of a pencil grip, a location with minimal distractions, preferential seating, testing over several days, breaks between subtests, extended time on subtests, breaks during subtests, and bus service were all added.[22] The reading of test questions, translation of words and phrases (in math, science and composition), small group testing, and extended school year services all remained the same.[23]
5. Functionally the Student progressed during the 2010-2011 school year, even though he continued to have some behavioral problems, such as fighting.[24] Adjustments were made to

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[14] P 5/R 14, P 18/R 1.
[15] P 5/R 14, P 18/R 1.
[16] P 5/R 14, P 18/R 1.
[17] P 5/R 14, P 18/R 1., T of
[18] P 5/R 14, P 18/R 1., T of
[19] P 5/R 14, P 18/R 1., T of
[20] P 5/R 14, P 18/R 1.
[21] P 5/R 14, P 18/R 1, P 11, R 8/ P 12
[22] P 5/R 14, P 18/R 1.
[23] P 5/R 14, P 18/R 1.
[24] T of P, T of T of E.H., T of R.P., T of S.H.

his behavior intervention plan (BIP) during the course of the year to address perceived changes in the Student's behavior.[25]

6. The Petitioner sought and obtained acceptance of the Student at the

a non-public special education school for children with emotional disabilities in the District of Columbia.[26]

VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* DCMR 5-E3030.14. 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 meet their burden. DCMR 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g.,* N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

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

34 C.F.R. § 300.17.

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[25] T of S.H., T of , T of E.H., P 3, P 6, P 11, R 8/ P 12, P 7/R 11, R 13, R 15, R 18, P 2/R 19.
[26] T of A.K.

3. Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose. *See:* 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. "[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." 71 Fed. Reg. 46662 (2006).

4. The Supreme Court has described the purpose of the IDEA as providing a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). When a child is mainstreamed:

> the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit.

Id. at 203. The Court held:

> When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Id. at 203-204. Thus, the "basic floor of opportunity" provided by the IDEA for this Student, and as described by the Supreme Court, consists of the opportunity for advancement in the grade level content for the grade in which the Student is enrolled.

5. The Student has made steady, although variable, improvement in the general education curriculum and toward most of his IEP goals over the past year. The Petitioner is not satisfied with this progress and believes it should be greater. While not all of the Student's IEP goals

were met, changes have been made to the IEP to address this. (Although it is unclear why, when the Student failed to meet two of four communication goals, his speech and language services were not changed.) The Student is progressing in the general education curriculum and is at or near grade level based on consideration of all of the evidence of his academic performance. The Petitioner has not shown that the changes made to the IEP will not continue to enable the Student to be involved in and progress in the general education curriculum. Thus, the IEP for the 2011-2012 school year is reasonably calculated to provide educational benefit without increases behavioral supports and interventions or placement in a full-time therapeutic setting. The Petitioner did not challenge the speech and language services, and the Respondent is advised to consider whether the Student's speech and language services are sufficient to enable him to meet annual communication goals.

VII. DECISON

The Respondent prevails because the IEP is reasonably calculated to provide educational benefit to the Student without increased behavioral supports or placement in a full-time therapeutic setting.

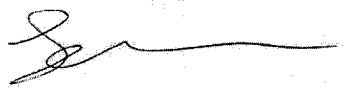
VIII. ORDER

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

The complaint is dismissed with prejudice.

IT IS SO ORDERED.

Date: August 18, 2011



Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

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