

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

PETITIONER, on behalf of STUDENT, ¹)	
)	Date Issued: December 1, 2017
Petitioner,)	
)	Hearing Officer: Peter B. Vaden
v.)	
)	Case No: 2017-0260
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	
)	Hearing Date: November 15, 2017
Respondent.)	
)	Office of Dispute Resolution, Room 2006 Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (MOTHER) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.).

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on September 26, 2017, named District of Columbia Public Schools (DCPS) as Respondent. The undersigned hearing officer was appointed on September 27, 2017. Petitioner and DCPS met for a resolution session on October 11, 2017, which did not result in an agreement. On October 3, 2017, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. The final decision in this case is due by December 10, 2017.

¹ Personal identification information is provided in Appendix A.

The due process hearing was convened before this Impartial Hearing Officer on November 15, 2017 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Mother testified and called EDUCATIONAL ADVOCATE as an additional witness. DCPS called LEA REPRESENTATIVE as its only witness. Petitioner's Exhibits P-1 through P-15 and DCPS' Exhibits R-1 through R-16 were all admitted into evidence without objection. Counsel for both parties made closing arguments. At the request of Petitioner's Counsel I granted the parties leave to file post-hearing written closings. Only Petitioner's Counsel filed a post-hearing submission.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

At the beginning of the due process hearing, Petitioner's Counsel enumerated the following issues from the October 3, 2017 Prehearing Order as remaining to be determined:

Whether Student's September 13, 2017 IEP is inappropriate because the IEP does not provide for school transportation and does not provide for an adequate level of instruction.

For relief, the parent requests that DCPS be ordered to ensure that Student is comprehensively evaluated, that Student be placed in a full-time special education classroom and provided a full-time dedicated aide, that DCPS be ordered to fund an

Independent Educational Evaluation (IEE) functional behavioral assessment and an IEE autism spectrum assessment at the market rate, and fund any additional evaluations recommended in these assessments; that DCPS be ordered to convene Student's IEP team to review the new assessments and to revise Student's IEP as appropriate and that DCPS be ordered to provide Student school transportation. The parent also asserted reservation of her claim for compensatory education relief for Student until after the requested assessments are completed and Student's IEP is reviewed and revised.

FINDINGS OF FACT

After considering all of the evidence admitted at the due process hearing in this case, as well as the arguments of counsel, this hearing officer's findings of fact are as follows:

1. Student resides with Mother in the District of Columbia. Testimony of Mother. Student is eligible for special education and related services as a student with an Other Health Impairment based upon Attention Deficit or Attention Deficit-Hyperactivity Disorder (OHI-ADHD). Exhibit R-8. In the 2016-2017 school year, Student began attending CITY SCHOOL 2, where Student is now in the GRADE. Exhibit R-11.

2. Previously, Student attended PUBLIC CHARTER SCHOOL in the District of Columbia and subsequently, for a time, resided in the state of Georgia. Student's City School 2 December 9, 2016 IEP identified Cognitive; Emotional, Social and Behavioral Development; and Motor Skills/Physical Development as areas of concern for Student. For Special Education and Related Services, the December 9, 2016 IEP provided for 90 minutes per week of Specialized Instruction in the general education setting, 180

minutes per month of Occupational Therapy (OT) and 120 minutes per month of Behavioral Support Services (BSS), in addition to OT and BSS Consultation Services.

Exhibit P-2.

3. Petitioner filed a prior due process complaint concerning this student on or about April 26, 2017 (Case No. 2017-0119). In that case, Petitioner alleged that DCPS had failed to adequately evaluate Student, failed to develop an appropriate IEP, failed to provide an appropriate educational placement and failed to implement the IEP. In full settlement of that complaint, on June 13, 2017, DCPS agreed to fund a comprehensive psychological evaluation of Student, to convene Student's IEP team after the evaluation was completed to review and revise the IEP and to discuss compensatory education and further evaluations, if warranted. Exhibit R-3.

4. On July 29, 2017, INDEPENDENT PSYCHOLOGIST conducted a comprehensive psychological evaluation of Student. Student was administered the Woodcock-Johnson IV Tests of Cognitive Abilities (WJ-IV Cognitive) and the Woodcock-Johnson IV Tests of Achievement (WJ-IV Achievement). On the WJ-IV Cognitive Brief Intellectual Ability (BIA) measure, Student's cognitive score was 110, in the Average range when compared to others Student's age. On the WJ-IV Achievement, Student's scores were 79 in Reading (Low), 68 in Mathematics (Very Low) and 75 in Written Language (Low). Mother's responses to the Behavior Assessment Scale for Children, Second Edition (BASC-2) questionnaire supported Student's prior diagnosis of ADHD. Independent Psychologist's classroom observation suggested that Student's problems with inattention, hyperactivity and distractibility were severe. Independent Psychologist diagnosed Student with ADHD-Combined Type and recommended that Student continued to meet special education criteria as a student with OHI-ADHD.

Independent Psychologist recommended, *inter alia*, that Student should receive special education services in a self-contained classroom for children with ADHD. Independent Psychologist also recommended that Student requires school transportation because Student's ADHD is dangerous, Student is impulsive and may get in harm's way during transport to and from school. Exhibit P-4. Independent Psychologist did not testify at the due process hearing.

5. In an August 25, 2017 review of Independent Psychologist's evaluation report, SCHOOL PSYCHOLOGIST reported that Student's current areas of concern were Student's aggressive relationship with peers, impulsivity, and transitions inside and outside of the classroom. School Psychologist recommended, *inter alia*, that Student should receive specialized instruction services inside the general education classroom and that Student should receive transportation services to and from school. Exhibit P-5.

6. Student's IEP team at City School met on September 13, 2017 to review the IEE psychological evaluation and other information on Student and to revise Student's IEP. In the resulting September 18, 2017 IEP, the IEP team maintained Specialized Instruction Services at 90 minutes per week inside general education. OT services were reduced to 120 minutes per month. BSS services were maintained at 120 minutes per month outside general education, in addition to OT and BSS Consultation Services. Exhibit P-9. The IEP was amended on October 20, 2017 to provide for a dedicated aide for Student for 6 hours per day and to add 120 minutes per month of BSS in the general education setting (for a total of 240 minutes per months of BSS). These provisions had been agreed to by the September 13, 2017 IEP team. Exhibits R-5, R-7. The October 20, 2017 amended IEP provides that Student does not require school transportation

services. Exhibit R-5.

7. Although the family lives close to City School 2, it would not be safe for Student to walk to school because of Student's ADHD disorder. There have been multiple incidents when Student's grandmother would drive Student to school. Student would roll down the window or try to open the door and jump out of the car. Unless Mother holds Student's hand, Student would try to get out of the car and run away. City School 2 requires that Mother walk Student into the school and "hand off" Student to the dedicated aide in the cafeteria every morning. Testimony of Mother.

8. On September 19, 2017, DCPS issued an Independent Services Authorization for Student to receive, as compensatory education, 20 hours of tutoring and 13 hours of counseling by independent providers. Exhibit R-9.

9. On September 13, 2017, Mother provided written consent for DCPS to conduct an Occupational Therapy (OT) evaluation of Student. Exhibit P-8.

CONCLUSIONS OF LAW

Based upon the above findings of fact and argument and legal memoranda of counsel, as well as this hearing officer's own legal research, my conclusions of law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by DCPS, the District shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the

Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the District. The burden of persuasion shall be met by a preponderance of the evidence. See D.C. Code § 38-2571.03(6).

Analysis

Is Student's September 13, 2017 IEP, as amended on October 20, 2017, inappropriate because the IEP does not provide for school transportation and does not provide for an adequate level of instruction?

Student's IEP was reviewed and revised by the City School 2 IEP team at a meeting on September 13, 2017. The resulting September 18, 2017 IEP was corrected on October 20, 2017 to include provision for a dedicated aide and for increased Behavioral Support Services, to which the IEP team had agreed at the September 13, 2017 meeting. For special education services, the October 20, 2017 IEP maintains the provision from the December 9, 2016 IEP for 90 minutes per week of Specialized Instruction in the general education classroom. Petitioner contends that these special education services are insufficient and that the October 20, 2017 IEP also denies Student a FAPE, because there is no provision for school transportation. DCPS hold the burden of persuasion as to the appropriateness of the IEP.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements

are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Moradnejad at 274-75. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley, supra*, for what constitutes an appropriate IEP:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F.*, 137 S.Ct. at 999. . . . The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*pecially designed*" to meet a child's "*unique needs*" through an "*individualized* education program." An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. *Id.*, 137 S.Ct. at 1000. . . . [For a child who is not fully integrated in the regular classroom and not able to make grade-level advancement] his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Id.* . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

"The adequacy of an IEP can be measured only at the time it is formulated, not in hindsight." *District of Columbia v. Walker*, 109 F. Supp. 3d 58, 66 (D.D.C. 2015) (citing *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C.2008)).

The parent did not raise a procedural violation issue in this case. Therefore, I turn to the second prong of the *Rowley/Andrew F.* inquiry. Was the September 18, 2017 IEP, as amended on October 20, 2017, reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances? Petitioner's expert, Educational Advocate, opined that the October 20, 2017 IEP special education services are not adequate and that Student should receive a combination of pull-out and push-in Specialized Instruction services or placement in a self-contained classroom for all academic classes. She noted that Student is significantly below age expectations in math and below expectations in reading and written expression. She opined that Student would continue to fall further behind grade level if only provided 90 minutes per week of Specialized Instruction.

DCPS' expert, LEA Representative, testified that Student's behavior at school has peaks and valleys and that with interventions, including community agency support, Student has been able to show improvement. According to LEA Representative, Student has connected well with the general education classroom teacher and has responded well to the general education classroom structure. He testified that since being provided a dedicated aide at school, Student has responded very well.

Although in the July 2017 comprehensive psychological evaluation, Student's cognitive skills tested in the Average range, on the WJ-IV Achievement administered in July 2017, Student scored Low in the Reading and Written Expression domains and Very Low in the Mathematics domains. Notwithstanding, the September 13, 2017 IEP team decided not to increase Student's Specialized Instruction Services from the 90 minutes per week, in the general education setting, provided in the December 9, 2016 IEP. LEA Representative could not speak to why the IEP team provided for only 90

minutes per week of Specialized Instruction in the fall 2017 IEP, except that SPECIAL EDUCATION TEACHER was confident of Student's progress at that level. Special Education Teacher did not testify. I find that DCPS has not offered a "cogent and responsive" explanation for how keeping Student's Specialized Instruction at 90 minutes per week in the general education setting was reasonably calculated to enable Student to make progress appropriate in light of Student's low WJ-IV educational achievement scores reported by Independent Psychologist in August 2017. *See Andrew F.*, 137 S.Ct. at 1002. DCPS has not met its burden of persuasion that this level of special education services was appropriate for Student.

The parent also objects to the failure of Student's IEP team to provide in the IEP for special education school transportation. LEA Representative testified that the IEP team did not discuss school transportation for Student, but that he had told Mother that Student did not meet criteria for school transportation.

School transportation is a related service which the IDEA mandates that the District provide at no cost to the parent, if required to assist a child with a disability to benefit from special education. *See* 34 CFR § 300.34(a), (b)(16). "The [IDEA] makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class." *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891, 104 S. Ct. 3371, 3376, 82 L. Ed. 2d 664 (1984) (citing 20 U.S.C. § 1401(17).) In the U.S. Department of Education's guidance to the 2006 IDEA regulations, it is explained,

If a child's IEP Team determines that supports or modifications are needed in order for the child to be transported so that the child can receive FAPE, the child must receive the necessary transportation and supports at no cost to the parents.

U.S. Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46579, 46576 (August 14, 2006). “If a child’s disabilities create unique needs that make it especially problematic to get the child to school in the same manner that a nondisabled child would get to school in the same circumstances, then transportation may be an appropriate related service. However, if the disabled student is capable of using the same transportation services as nondisabled students, then it would be consistent with Part B [of the IDEA] for the student’s IEP team to find that transportation is not required as a related service.” *Letter to Hamilton*, 25 IDELR 520 (OSEP 1996).

Mother testified that although Student’s home is close to City School 2, Student may not be permitted to walk to school because of safety concerns arising from Student’s ADHD related behaviors. City School 2 requires that Mother escort Student into the school every morning and “hand off” Student to the dedicated aide in the cafeteria. Mother reported that there have been multiple incidents this school year when Student’s grandmother would be driving Student to school, Student would roll down the window or try to open the door and jump out of the car. Unless Mother holds Student’s hand, Student would try to get out of the car and run away. Mother is no longer able to escort Student to school every morning, because she has to stay at home with a sick newborn. Both Independent Psychologist and School Psychologist recommended that Student needed school transportation to and from school.

Of course, Student has to get to school safely in order to receive a FAPE. I find that the hearing evidence establishes that Student’s OHI-ADHD disability creates unique needs that make it impracticable to get Student to and from school in the same manner as a nondisabled child. School transportation is therefore required as a related

service for Student. The failure to include school transportation as a requirement in the September 18, 2017 IEP, as amended on October 20, 2017, was a denial of FAPE.

Remedy

For relief, the parent requests that DCPS be ordered to place Student in a full-time special education classroom and to provide Student a full-time dedicated aide; that DCPS be ordered to ensure that Student is comprehensively reevaluated and that DCPS fund an Independent Educational Evaluation (IEE) functional behavioral assessment and an IEE autism spectrum assessment of Student at the market rate, and fund any additional evaluations recommended in these assessments.

With regard to evaluations, Student has already been provided an IEE comprehensive psychological evaluation. In her August 21, 2017 IEE report, reviewed by Student's IEP team, Independent Psychologist recommended that Student have a functional behavioral assessment (FBA). However, a DCPS school social worker completed an FBA of Student in late March 2017 which Independent Psychologist apparently did not review. Petitioner did not register any disagreement with the FBA. A Behavior Intervention Plan (BIP) was developed for Student at City School 2 on September 13, 2017. Independent Psychologist did not recommend an Autism Spectrum Disorder (ASD) assessment of Student. I find that Petitioner has not shown that a new FBA or an ASD assessment of Student is needed to determine Student's educational needs. *See* 34 CFR § 300.305(a)(2)(i)(B).

As noted in this decision, DCPS has already provided Student with a dedicated aide for six hours per day. I do not find that the evidence establishes that Student should be placed in a full-time special education classroom. The IDEA requires that students with disabilities be placed in the least restrictive environment so that they can

be educated in an integrated setting with students who are not disabled to the maximum extent appropriate. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012). LEA Representative testified credibly that Student should continue to have interaction with nondisabled peers. He explained that Student wants to make friends and to be a part of what happens in the general education classroom and that this school year, Student is responding very well to the general education classroom structure. Petitioner's expert, Educational Advocate, also opined that Student should probably receive a mix of pull-out and push-in Specialized Instruction Services.

While the evidence in this case establishes that the current IEP's provision of 90 minutes per week of Specialized Instruction Services in the general education setting was not reasonably calculated to enable Student to make appropriate progress, I do not have sufficient information to decide how much additional services Student requires, or the appropriate mix of services inside, and outside of, general education. Therefore, I will direct DCPS to reconvene Student's IEP team to make that determination. The evidence does establish that Student requires school transportation services to receive a FAPE and I will order that Student's IEP be revised to provide for special education school transportation.

ORDER

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

ORDERED:

1. Within 15 school days of this decision, DCPS shall ensure that Student's IEP team is convened to revise Student's IEP in accordance with this decision. Specifically, the IEP team, including the parent, shall review all of the current data in this case including input from the parent, parent's expert and Student's teachers to determine how much special education and related services Student needs, and in what educational setting, in order for Student (i) to advance appropriately toward attaining the annual

goals; (ii) to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and (iii) to be educated and participate with other children with disabilities and nondisabled children in school activities. *See* 34 CFR § 300.320(a)(4). The revised IEP shall provide for school transportation for Student as a related service;

2. Petitioner elected not to seek compensatory education at the due process hearing in this case. Petitioner shall not be precluded from requesting compensatory education in a new proceeding for the denials of FAPE found in this decision and
3. All other relief requested by the Petitioner herein is denied.

Date: December 1, 2017

s/ Peter B. Vaden
Peter B. Vaden, 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 U.S.C. § 1415(I).

cc: Counsel of Record
Office of Dispute Resolution
OSSE - SPED
DCPS Resolution Team