

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

OSSE
Office of Dispute Resolution
May 17, 2016

STUDENT, ¹)	
through the PARENT,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2016-0051
v.)	
)	Date Issued: May 17, 2016
District of Columbia Public Schools,)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

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

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed on March 3, 2016 by Petitioner (Student’s parent), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On March 9, 2016, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on April 7, 2016. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on April 3, 2016 and will conclude on May 17, 2016.

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) convened a Pre-hearing Conference (“PHC”) on April 11, 2016, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day

¹ Personal identification information is provided in Appendix A.

disclosures would be filed by April 15, 2016 and that the DPH would be held on April 22, 2016.² The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on April 11, 2016.

The DPH was held on May 3, 2016 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioner elected for the hearing to be closed. Petitioner was represented by [PETITIONER’S COUNSEL], Esq. and DCPS was represented by [RESPONDENT’S COUNSEL], Esq.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibits P-3 through P-5; P-7; P-9 through P-19; P-21; P-23 through P-39 were admitted without objection. Petitioner’s exhibits P-1, P-2, P-6, P-8, P-20, P-22 were admitted over Respondent’s objection. On April 27, 2016, Petitioner filed supplemental disclosures P-40, P-41 and P-42, which were not admitted, as they were not timely filed. Respondent’s exhibits R-1 through R-22 were admitted without objection.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Educational Advocate A
- (c) Occupational Therapist (Parent)³
- (d) Educational Advocate B⁴

Respondent called the following witness at the DPH:

- (a) Occupational Therapist (DCPS)
- (b) Social Worker
- (c) School Psychologist

Petitioner and Respondent gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to timely and comprehensively re-evaluate Student, in failing to conduct a functional behavior assessment (“FBA”) and a comprehensive psychological evaluation with clinical components as requested, and in failing to complete and/or review both with Parent during the 2015-2016 school year.
- (b) Whether DCPS denied Student a FAPE by failing to provide an appropriate individualized education program (“IEP”) for Student on or about September 30,

² Due to an unanticipated event, the DPH was subsequently rescheduled by mutual agreement for May 3, 2016.

³ Qualified as an expert in Occupational Therapy as it relates to the review of assessments and provision of services, without objections

⁴ Qualified as an expert in special education administration, without objection.

2015, in that the IEP inappropriately reduced Student's specialized reading instruction and did not contain sensory processing and organizational goals.

- (c) Whether DCPS denied Student a FAPE by failing to timely provide Parent access to educational records and a finalized IEP following the September 30, 2015 IEP meeting for Student, and on written request on December 11, 2015 and January 27, 2016.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding in Petitioner's favor, that Student has been denied a FAPE as to each issue alleged;
- (b) an Order the DCPS fund an independent education evaluation for a comprehensive psychological evaluation and convene a meeting to review the evaluations, and update and revise the IEP accordingly, including developing an updated behavior intervention plan ("BIP") based on the FBA completed;⁵
- (c) an Order that Student be awarded reasonable compensatory education (in the form of tutoring, behavioral support, and/or occupational therapy services) for the violations alleged, or an indication that compensatory education is determined not to be ripe until the evaluations are completed.

FINDINGS OF FACT

1. Student is [AGE] years old and is in the [GRADE] grade. Student resides in Washington, D.C. with Parent.⁶
2. Student is eligible for special education services under the disability classification "Specific Learning Disability."⁷

Behavior/Attendance/IEPs/FBA/BIP/Grades

3. Student has had in-school behavior challenges for a number of years, including at his previous school. Some of his behavior challenges include fighting, paying attention in class, focusing, attending class regularly and for the full class period.⁸

4. Student sometimes smokes marijuana, and comes to class smelling of the substance.⁹ He has come to school under the influence and been sent home because of it, and there have also been times he has been under the influence inside the school building and not been sent home.¹⁰ Student has random drug tests through his probation officer, and Parent does what she can do outside of school to prevent Student from using marijuana.¹¹

⁵ During the DPH, Petitioner withdrew a request for an FBA, reflected in the PHO.

⁶ Testimony of Parent.

⁷ P-31-1; P-5-1; P-6; R-2-1; R-4-1.

⁸ Testimony of Social Worker.

⁹ Testimony of Educational Advocate A; R-8-2.

¹⁰ Testimony of Social Worker; R-15.

¹¹ Testimony of Parent.

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5. Though Student receives behavior support as a related service, generally, Student is not making progress with respect to his behavioral support services. At times he has maintained the same behavioral level, and at times he has regressed in his behaviors. Student's absences and suspensions sometimes prevent him from being able to receive the services.¹² For example, during the months of November and December 2015, Student either regressed or did not receive his behavior support services because he was absent.¹³ Additionally, Student mostly regressed during the month of March 2016.¹⁴

6. Student does not attend classes consistently, even when he is in the school building.¹⁵ As of the DPH, Student had at least 50 unexcused absences throughout the 2015-2016 school year.¹⁶ There were a significant number of days on which Student was not out of school the entire school day, but attended some classes and skipped others.¹⁷

7. Student's October 9, 2014 IEP provided Student 8 hours of specialized reading instruction outside the general education setting, and 5 hours of specialized instruction inside the general education setting.¹⁸

8. Student's March 30, 2015 IEP provided him 8 hours of specialized reading instruction outside the general education setting, and 5 hours of specialized instruction inside the general education setting.¹⁹

9. According to his September 11, 2015 SRI reading assessment, Student reads on grade level.²⁰

10. The September 30, 2015 IEP reduced Student's reading support from 8 to 5 hours per week outside the general education setting, based on Student's 2012 psychological, DCCAS, SRI and BASIC scores, and observations from Student's English teacher. The September 30, 2015 IEP also provided Student 240 minutes per month of behavioral support services outside the general education setting, 120 minutes per month of occupational therapy services outside the general education setting.²¹

11. Shortly after receiving a request from Parent, DCPS completed an FBA for Student on October 5, 2015.²²

¹² P-15; R-17.

¹³ R-17-4.

¹⁴ R-17-8.

¹⁵ Testimony of Parent.

¹⁶ R-19.

¹⁷ R-20.

¹⁸ P-29-13.

¹⁹ P-30-12.

²⁰ R-18-1.

²¹ P-31.

²² Testimony of Educational Advocate B; P-28; R-6.

12. The IEP team met on December 10, 2015, and Parent and Educational Advocate A expressed concerns about Student's failing grades, behavior issues and lack of initiative, and requested a more restrictive school environment for Student.²³ As of this meeting, Student had a 32% in English, was missing at least five assignments, rarely went to class, and refused to do the classwork (rather was a distraction to himself and the rest of the class) when he was in class. Student indicated as of this meeting that he needed to and wanted to correct his actions on his own.²⁴

13. A BIP is not necessary after each and every FBA. Once a BIP is conducted, the team determines whether a BIP is necessary. A BIP is generally appropriate when behaviors are present that impact a student in the school setting.²⁵

14. DCPS completed a BIP for Student on or about March 30, 2015. Approximately six months after completing Student's October 5, 2015 FBA, DCPS prepared an updated BIP for Student on April 11, 2016.²⁶

15. Student is receiving many failing grades this school year.²⁷

Occupational Therapy

16. DCPS conducted an occupational therapy assessment of Student, reflected in a report dated July 28, 2014.²⁸ The assessment revealed that Student was below average in visual motor integration, low in visual perception, and very low in motor coordination. The report indicated that Student "will at times be disengaged from learning due to sensory seeking behaviors or distracted by environmental stimuli . . . [and that his] low muscle tone will impact his development of hand skills that lead to precise, coordinated classwork."²⁹

17. Occupational Therapist (DCPS) provides Student with direct OT. 30-60 minutes when she can catch him. She tries to do as much as she can when she sees him, because he is often absent/not in the classroom. She has had a conversation with him several times about the need to come. He says he doesn't need the services and is not sure why he is getting them.

18. From the periods of approximately January 26, 2015 through and April 3, 2015, August 16, 2015 and October 31, 2015, December 1, 2015 and December 30, 2015, and November 2, 2015 through March 1, 2016 Student mastered or made progress on most of his occupational therapy goals that had been introduced.³⁰

²³ Testimony of Educational Advocate A; P-39.

²⁴ P-39; R-8-1. While there was conflicting testimony as to whether the FBA was reviewed at this meeting, the Hearing Officer does not find that the FBA was reviewed in any formal sense at this meeting, including because the available notes do not reference an FBA review at that time.

²⁵ Testimony of Educational Advocate B.

²⁶ Testimony of Educational Advocate B; P-27.

²⁷ Testimony of Educational Advocate A.

²⁸ P-26.

²⁹ P-26.

³⁰ P-13; P-14; P-16; R-4; R-9.

19. During the September 30, 2015 IEP meeting, Occupational Therapist (DCPS) recommended discharging Student from occupational therapy services. However, Parent did not agree that Student no longer needed occupational therapy services, as she did not feel Student's writing samples reflected grade level writing ability. As a result of Parent's concerns, the team maintained occupational therapy services on Student's IEP, and included a goal regarding writing.³¹

20. The September 30, 2015 IEP included one occupational therapy goal, which was as follows "[Student] will exhibit improved upper extremity control by performing academic tasks with increased speed, fluidity, and without complaints of fatigue or discomfort in 4 out of 5 opportunities." The goal did not include a baseline.³² Occupational Therapist (DCPS) drafted this goal at Parent's request and based on Parent's input, because while the July 28, 2014 occupational therapy evaluation highlighted hand fatigue as an issue, Occupational Therapist (DCPS) did not find it to be impeding Student's progress in the classroom at that time (based on her observations of Student, and/or based on teacher reports). Neither Parent nor any other members of Student's team brought up sensory processing or organizational skills as an area of concern for Student at this meeting.³³

21. From at least September 16, 2015 through March 31, 2016, Student's occupational therapy related services often addressed visual motor perceptual skills, though no visual motor goals are reflected on his September 30, 2015, March 17, 2016 or April 7, 2016 IEPs.³⁴

22. At the April 2016 RSM/MDT meeting, Occupational Therapist (DCPS) continued to believe that Student no longer needed OT services. However, at this meeting, Parent requested for the first time that organization be added as an OT goal, and the goal was added at Parent's request.³⁵

Comprehensive Psychological

23. A comprehensive psychological evaluation generally takes about a week to complete. Student participation is necessary, and the testing a student needs to do generally takes a total of 4-6 class periods (at least one full school day) to complete.³⁶

24. Student's most recent psychological evaluation is from November 2012.³⁷

25. School Psychologist received an evaluation referral in April 2015, and began trying to evaluate Student in May 2015. She has completed all portions of the evaluation, except the testing that Student needs to complete. Though she has tried, she has not been able to

³¹ Testimony Parent.

³² P-31-11.

³³ Testimony of Occupational Therapist (DCPS).

³⁴ P-16.

³⁵ Testimony of Occupational Therapist (DCPS).

³⁶ Testimony of School Psychologist.

³⁷ Testimony of Educational Advocate B.

convince him to report to her office and complete the testing. The one time he did report to her office for testing, he soon stated he was not feeling well, and left to go home.³⁸

26. School Psychologist does not make it a practice to force students to test. She wants them to cooperate voluntarily, so they will be in the right state of mind. For example, it is possible for an evaluator to meet students at the front door when they arrive for school and ask them to report for testing. However, School Psychologist does not prefer this approach, because she prefers to follow a student's regular routing and pull them from class. School Psychologist sometimes sees Student during lunch, when she has lunch duty. However, while she could test him during lunch, she hesitates to interrupt his free time, because he enjoys the lunch period.³⁹

27. Parent attempted to support School Psychologist in getting the evaluation completed. In addition to completing the assessment Parent was assigned to complete, she authorized/encouraged School Psychologist to pull Student out of class at any time for the necessary testing. Parent also offered to come to the school to help secure Student's participation in the necessary testing.⁴⁰

28. On October 19, 2015, a different hearing officer issued an HOD in a matter regarding the same Petitioner and Respondent. One of the certified issues for the October 19, 2015 HOD was whether DCPS failed to evaluate Student after multiple parental requests between January 2014 and March 2015, in violation of 34 C.F.R. § 300.303(a)(2). The hearing officer found that DCPS denied Student a FAPE when it failed to reevaluate Student after Petitioner's January 2014 evaluation request. However, the hearing officer did not order DCPS to complete the evaluation.⁴¹

30. On December 11, 2015, Parent made written requests via email to the building principal, a DCPS compliance case manager, and the Special Education Coordinator at District School inquiring of the status of the comprehensive psychological, requesting an independent psychological evaluation, and requesting records including the BIP, behavior trackers, behavior incident reports, disciplinary records, occupational therapy trackers, attendance records, and the finalized IEP from September 30, 2015.⁴²

CONCLUSIONS OF LAW

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade

³⁸ Testimony of School Psychologist.

³⁹ Testimony of School Psychologist.

⁴⁰ Testimony of Parent.

⁴¹ R-7.

⁴² P-5; P-6.

the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

(a) Whether DCPS denied Student a FAPE by failing to timely and comprehensively re-evaluate Student, in failing to conduct an FBA and a comprehensive psychological evaluation with clinical components as requested, and in failing to complete and/or review both with Parent during the 2015-2016 school year.

Pursuant to 34 CFR § 300.303, once a parent requests a reevaluation, the student's IEP team and other qualified professionals as appropriate must review existing evaluation data, and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child continues to have a disability, and the educational needs of the child. *See* 34 CFR § 300.305(a); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46641 (August 14, 2006). Petitioner's requests for a comprehensive psychological and FBA were requests for reevaluation. The IDEA does not set a time frame within which an LEA must conduct a reevaluation after receiving a request from a student's parent. Rather, "[r]evaluations should be conducted in a 'reasonable period of time,' and 'without undue delay,' as determined in each individual case." *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005).

Respondent does not dispute that Student needs an updated comprehensive psychological. Rather, Respondent argues that it has not timely failed to conduct the comprehensive psychological, and that any delay in completing it is attributed to Student's resistance to showing up for the testing portion of the evaluation. On one level, Respondent's does not find itself in an easy position. It is not always easy to secure the participation of a student who is not motivated to participate. However, the law places the obligation on the school nonetheless, and in this instance, Student's behavioral and attendance issues may be the same types of issues that would make him resistant to showing up for lengthy testing, and are the same types of issues Parent is concerned about as impediments to Student's ability to make academic progress. A tipping point could conceivably be reached whereby an LEA has done all it could to secure a student's participation; however, that point has not been reached in this case. For example, Student (who is frequently in the school building, even when not in class) could have been met at the front door and directed to testing, he could have been tested at lunch, or Parent could have been more actively leveraged as a resource to help secure Student's participation. The Hearing Officer credits her testimony that she desperately wants this evaluation, and was willing and available to do what she could to help move it to completion.

Even counting from December 2015 (the date Respondent argues is appropriate, given that a previous HOD also found a denial of FAPE on this issue), the amount of time that has

passed without the evaluation being completed has impeded Student's right to a FAPE, significantly impeded Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, and caused a deprivation of educational benefit. Likewise, the delay in reviewing the FBA (which both parties agree was timely conducted after Parent's request) impeded Parent's opportunity to participate in the decision-making process regarding Student's behavioral services, even if as Respondent argues, the most current BIP did not change much from the previous version of the BIP. Petitioner met the burden of proving that DCPS denied Student a FAPE on this issue.

(b) Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP for Student on or about September 30, 2015, in that the IEP inappropriately reduced Student's specialized reading instruction and did not contain sensory processing and organizational goals.

To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefit. *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). In this instance, Student's reading instruction was reduced in his September 30, 2015 IEP. There was some data to indicate that Student was reading on grade level at the time. However, given that a comprehensive psychological was underway but not yet completed, the Hearing Officer finds that it was more likely than not that making a significant reduction in Student's reading support interfered with the Parent's ability to make an informed decision about how the reduction would impact Student's overall programming. Parent's desire and request for the data from the comprehensive psychological before reducing Student's reading support was reasonable. While this is a close issue, the Hearing Officer finds that it is more likely than not that this reduction under the circumstances impeded Parent's ability to participate in the decision making progress and denied Student a FAPE.⁴³

(c) Whether DCPS denied Student a FAPE by failing to timely provide Parent access to educational records and a finalized IEP following the September 30, 2015 IEP meeting for Student, and on written request on December 11, 2015 and January 27, 2016.

Pursuant to DC Code § 38-2571.03, "No fewer than 5 business days before a scheduled meeting where an IEP . . . will be discussed, the public agency scheduling the meeting shall provide parents with an accessible copy of any evaluation, assessment, report, data chart, or other document that will be discussed at the meeting; provided, that if a meeting is scheduled fewer than 5 business days before it is to occur, then these documents shall be provided no fewer than 24 hours before the meeting." In addition to this legal requirement, PETitioenr also requested the documents more than five days ahead of the December 2015 IEP team meeting. In its Response,

⁴³ The Hearing Officer does not find sufficient evidence to conclude that Parent or her advocates requested sensory processing or organizational goals as of September 2015, or that the failure to include such goals at that time was inherently a denial of FAPE.

Respondent indicate that Petitioner did not make the records requests to the appropriate people, and that Respondent provided the requested documents with its response to the DPC. Nonetheless, Petitioner did not have the documents ahead of the December 2015 IEP meeting which the law requires, even if Petitioner had not also requested the documents. Given the nature of Student's problems and the potential changes Parent may want to request to Student's programming, the lack of an opportunity to review the documents ahead of the December 2015 IEP meeting impeded Parent's opportunity to participate in the provision of FAPE to Student. Petitioner met the burden of proof on this issue.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- (a) within 20 business days from the date of this decision, DCPS complete Student's comprehensive psychological evaluation or issue to Parent an authorization for an independent education evaluation for a comprehensive psychological evaluation, funded at the OSSE rate;
- (b) within 15 business days of completing or receiving the evaluation report, DCPS shall and convene a meeting to review the evaluations, and to update and revise the IEP (and if appropriate the BIP) accordingly.⁴⁴

All other relief Petitioner requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: May 17, 2016

/s/ NaKeisha Sylvester Blount
Impartial Hearing Officer

Copies to:
Petitioner (by U.S. mail)
Petitioner's Attorney (electronically)
DCPS' Attorney (electronically)
Chief Hearing Officer Virginia Dietrich, Esq. (electronically)
OSSE-SPED (electronically)
ODR (electronically)

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).

⁴⁴ A compensatory education determination is not ripe in this action, as it is not possible to determine the scope of the harm, as the evaluation completion date is not yet known.