District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office

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STUDENT HEARING OFFICE
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STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools Respondent.	HEARING OFFICER'S DETERMINATION August 27, 2009 Representatives: Counsel for Petitioners: Domiento Hill, Esq. Counsel for DCPS: Kendra Berner, Esq. Hearing Officer: Kimm H. Massey, Esq.

[1] Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

II. PROCEDURAL BACKGROUND

On June 30, 2009, Petitioner filed an Administrative Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS"), alleging that DCPS (1) denied Student a free appropriate public education ("FAPE") by failing to conduct a neurological evaluation, (2) or in the alternative, if the recommended neurological evaluation had been completed, then DCPS failed to reconvene Student's multidisciplinary team ("MDT") meeting to review the findings and recommendations of the assessment and make appropriate educational decisions, and (3) denied Student a FAPE by failing to provide Student with recommended Assistive Technology ("AT") equipment as part of her educational program.

On July 6, 2009, DCPS issued a letter waiving a resolution session meeting for this case. Therefore, the case was placed on a 45-timeline and the due process hearing was scheduled for July 31, 2009 at 11:00 a.m.

On July 20, 2009, DCPS filed District of Columbia Public Schools' Amended [sic] Response to Petitioner's Due Process Complaint. In its Response, DCPS asserted that a neurological assessment is not needed to determine Student's educational needs, that Parent stated she had obtained CT scans for Student and the doctors did not recommend a neurological evaluation, and that Parent agreed to provide copies of certain medical reports to the school but failed to do so. DCPS further asserted that Student has the AT equipment she needs at home and at school to provide her with a FAPE.

The hearing officer attempted to convene the prehearing conference scheduled for July 17, 2009 but was unable to do so due to DCPS's counsel's failure to appear by phone. On July 27, 2009 the hearing officer issued a Pre-Hearing Order that confirmed the date and time of the due process hearing.

By their respective disclosure statements dated July 24, 2009, DCPS disclosed eleven potential witnesses and three documents labeled DCPS-01 through DCPS-03, and Petitioner disclosed seven potential witnesses and 12 documents (hereinafter Petitioner's Exhibits 1 – 12). Thereafter, Petitioner filed Petitioner's Motion to Continue the Due Process Complaint Notice Hearing Due to Witness Unavailability, which the hearing officer granted by a July 28, 2009 Interim Order on Continuance Motion that rescheduled the hearing to August 17, 2009.

On August 10, 2009, DCPS filed a Supplemental Disclosure Statement, which added two documents labeled DCPS-04 and DCPS–05 to DCPS's previously disclosed documents. By cover letter dated August 10, 2009, Petitioner re-filed its original disclosure package.

The hearing officer convened the scheduled hearing on August 17, 2009, and the parties' disclosed documents were admitted into the record without objection. As a preliminary matter, Petitioner withdrew its second claim, which was the alternative claim asserted just in case DCPS had conducted a neurological evaluation for Student. Thereafter, the hearing officer received opening statements, the parties' testimonial evidence, and closing statements prior to concluding the hearing.

III. ISSUE(S)

1. Did DCPS deny Student a FAPE by failing to conduct a neurological assessment?

2. Did DCPS deny Student a FAPE by failing to supply necessary AT equipment?

IV. FINDINGS OF FACT

1. Student is now years old, and her current IEP, which is dated May 27, 2009, requires her to receive 27.25 hours of specialized instruction, 1 hour of physical therapy, .75 hour of occupational therapy, and 1 hour of speech/language therapy per hour, for a total of 30 hours of special education and related services per week. The IEP also states that student is multiply disabled ("MD") and requires the services of a dedicated aide 30 hours per week.[2]

2. Student's multiple disabilities include cerebral palsy, mental retardation, and mild hearing loss in the right ear. Student also has a history of a seizure disorder, 1p36 (chromosome) Deletion Syndrome, significant neurological abnormalities, and significant global developmental delays.[3]

3. On September 12, 2008, an independent AT practitioner issued an Assistive Technology Assessment Report based upon his assessment of Student on August 18, 2008, September 4, 2008, and September 9, 2008. In the assessment report, the evaluator summarized Student's performance on the assessment as follows:

> Throughout the evaluation, demonstrated her ability to understand cause/effect. She also showed her skills to operate switches in a computer program. However she has multiple challenges such as cognitive and language delay, poor sensory and fine motor skills. Those challenges inhibit her overall performance significantly. In order to maximize her overall learning, consistent repetition of highly motivating activities, tactile and visual stimulation and improvement of fine motor skills would be required. Progress for improved functional skills and improved

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[2] Petitioner's Exhibit 4.

[3] Petitioner's Exhibits 6 - 10.

communication through the use of Assistive Teschnology looks good based on her current skills, family and school support, and previous experience of Assistive Technology.

Ultimately, the evaluator recommended that Student be provided with the following AT devices/software for use at home: SuperTalker™ progressive communicator; small oval textured switch; Switch Interface Pro 5.0; Overlay Maker 3; Classroom Suite; Sony CD w/ Latch, Timer Switch; First Words; Powerlink 3; and Musical Shapes.[4]

4. At Student's April 24, 2009 MDT/IEP meeting, the team reviewed Student's AT assessment report.[5]

5. At Student's follow-up May 27, 2009 MDT meeting, the team discussed the issue of whether Student needs additional AT devices for use at home. Student's educational advocate asserted that the devices Student uses at school should be provided at home also. However, the team explained that Student uses both low tech and high tech devices at school, but she can continue to use lower tech devices in the home setting and still receive a FAPE. The team further explained that Student is in a functional life skills program. Hence, she is learning skills applicable to practical life experiences, even though higher tech programming and devices are offered for all students to enhance learning. The DCPS representative said that he would check to see what could be done to provide additional devices for Student to use at home; however, the team noted that the team decides what devices Student needs to access education.[6]

6. At the May 27, 2009 meeting, DCPS provided Parent with a SuperTalker™ and one 2-cell overlay that Student uses at home. Parent has asked DCPS for the additional overlays that came with the Super Talker, but DCPS declined to provide them on the ground that Student is working with the 2-cell overlays in school at the present time.

   Parent also has the Classroom Suite software program at home, which DCPS provided in 2005 under the *Blackman-Jones* case; however, Parent cannot use the software without a computer and switches. Although DCPS also provided Parent with a computer in 2005 under *Blackman-Jones*, Parent says she no longer has the computer because it fell and broke. In any event, it is not necessary for Student to use a computer and Classroom Suite at home because they are only used on a supplemental basis at school to enhance learning; they are not the primary form of instruction. Moreover, Student is not required to do any homework at home, and the SuperTalker™ is sufficient to help her communicate at home.[7]

7. On November 11, 2008, an independent clinical psychologist issued a Psychological Assessment report based on her evaluation of Student on September 3, September 9, September 29, and October 20, 2009. The report indicates that although the evaluator

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[4] Petitioner's Exhibit 10.

[5] DCPS-02.

[6] Petitioner's Exhibit 5; Testimony of advocate.

[7] Testimony of Parent; Testimony of DCPS AT specialist; Testimony of house manager.

was unable to assess Student's intellectual abilities by using conventional cognitive test batteries, Student's overall functioning was assessed via multiple observations at home and at school, a review of pertinent medical, school and assessment records, and interviews with Parent and Student's teachers.

The evaluator concluded that Student primarily communicates through eye gaze, facial expression, vocalizations, and gestures, and that Student exhibits basic cause and effect skills necessary for learning. However, the evaluator also noted that Student has severe and pervasive developmental impairments and commensurate weaknesses in adaptive behavior. The evaluator stated that while some of Student's developmental impairments appeared consistent with 1p36 Deletion Syndrome, neurological abnormalities observed in Student's past CT scans, namely, low density of white matter in the brain and white matter atrophy, is also relevant to her developmental profile. The evaluator expressed concern that atrophy of Student's white matter, which represents the connections between the brain's processing centers (gray matter), can have serious implications for Student's learning.

The assessment revealed that some of Student's skills have deteriorated over time, and the evaluator stated that it was unclear whether such deterioration was due to continued brain tissue deterioration, the fact that Student's educational programming now focuses on vocational rather than academic skill development, or Parent's lack of AT devices, such as a two-cell communication device (which DCPS has since provided to Parent). Ultimately, the evaluator recommended, *inter alia*, a neurological evaluation for Student to determine whether Student has suffered further brain tissue deterioration. The evaluator posited that additional atrophy would have implications for Student's educational programming.[8]

8. A neurological evaluation that includes an MRI and a CT scan would help with the development of IEP goals for Student because, by examining blood flow to the brain and Student's brain structure, the evaluation will indicate what skills Student reasonably will be able to acquire. The evaluation will help determine whether Student has reached her plateau and will not be able to grow further, or whether she will be able to increase her skills to previous levels that included identifying colors and shapes, learning sign language, and saying her name.[9]

9. The MDT team reviewed Student's November 11, 2008 Psychological Assessment report at Student's April 24, 2009 MDT meeting. The evaluator participated in the meeting by phone and explained her recommendation for a further neurological evaluation to determine whether there are brain loss issues in light of Student's apparent loss of skills.[10]

10. When the team revisited the issue of Student's November 11, 2008 Psychological Assessment report at Student's May 27, 2009 MDT meeting, the team asked Parent whether she had followed through with follow up doctor appointments for Student.

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[8] Petitioner's Exhibit 8.

[9] Testimony of psychological evaluator.

[10] DCPS-02.

Parent questioned whether the team was asking her to follow up with the neurological evaluation and ultimately indicated that she was following up with genetics and a developmental clinic, that Student had received CT scans since the evaluation and the doctors did not indicate that further testing was warranted, and that she would provide the school with a copy of reports she received from specialists. At the due process hearing for this case, however, Parent indicated that she has not been able to obtain the neurological evaluation for Student, but she would like to have the evaluation done if it would be helpful.[11]

11. Although Student is presently receiving functional life skills training at school, it is possible that an evaluation revealing an additional loss of brain matter would affect her educational programming.[12]

V. CONCLUSIONS OF LAW

The issues to be determined in this case are whether DCPS denied Student a FAPE by (1) failing to conduct a neurological assessment, and (2) failing to supply necessary AT equipment. As the party seeking relief in this action, Petitioner bears the burden of proof. *See* 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

1. Neurological Evaluation

With respect to evaluations, IDEIA requires each public agency to ensure that the child being evaluated is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, and communicative status, among other areas. 34 C.F.R. § 300.304(c)(4). Moreover, the evaluation must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.204(6).

In this case, the evidence demonstrates that Student's independent psychological evaluator recommended a neurological evaluation for Student to determine whether Student has experienced further brain tissue deterioration, which may be responsible for her regression in certain areas. The evidence further demonstrates that an evaluation report indicating that Student has experienced an additional loss of brain matter could possibly affect her educational programming. Student's MDT reviewed Student's Psychological Assessment report at her April 24, 2009 meeting. The independent psychological evaluator participated in the meeting by phone and explained her recommendation for a neurological evaluation. When the MDT revisited the issue at Student's May 27, 2009 MDT meeting, it questioned whether Parent had followed through with follow-up visits to the doctor, and the nature of the discussion was such that Parent inquired whether the team was asking her to follow up with the neurological evaluation. Parent has since been unable to obtain the evaluation, although she would like for Student to have one if it will be helpful. Under these circumstances, the hearing officer

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[11] DCPS-03; Petitioner's Exhibit 5.

[12] Testimony of house manager.

concludes that DCPS abdicated its duty under IDEIA to comprehensively evaluate Student by shifting to Parent the responsibility of fulfilling that duty with respect to the recommended neurological evaluation was concerned. As a result, the hearing officer further concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to provide her with a neurological evaluation, and the hearing officer will order DCPS to fund an independent neurological evaluation of Student.

2. AT Equipment

Under IDEIA, an AT device is a device "that is used to increase, maintain, or improve the functional capabilities of a child with a disability," and an AT service is "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device." 34 C.F.R. §§ 300.5 and 300.6. IDEIA charges a child's IEP team with the responsibility of determining whether that child needs AT devices and services. *See* 34 C.F.R. §§ 300.324(a)(2)(v) and (b)(2).

In this case, the evidence reveals that Student's independent AT evaluator issued a report recommending that Student receive numerous AT devices for use at home. Student's IEP team reviewed the AT assessment report at Student's April 24, 2009 MDT meeting. When Parent and Student's educational advocate requested at a follow-up May 27, 2009 MDT meeting that DCPS provide Student with the AT devices recommended in the AT assessment report, the team rejected the request and explained that although Student uses both low tech and high tech devices at school, Student's use of only lower tech devises at home is sufficient to provide her with a FAPE. At that meeting, DCPS provided Parent with a SuperTalker™, which was one of the devices recommended in the AT assessment report, as well as one 2-cell overlay for use at home.

As noted above, it is the IEP team, not an independent evaluator, that is charged with the responsibility of determining whether a child with a disability requires AT devices and services. *See* 34 C.F.R. § 300.324. In this case, the evidence demonstrates that Student's IEP team reviewed and took into consideration Student's AT assessment report, but ultimately decided that the recommended AT devices were not necessary to provide a FAPE to Student. However, Parent was provided with an AT device that would allow Student to communicate with Parent at home. Based on this evidence, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS denied Student a FAPE by failing to supply all items listed in the AT assessment report for use at home by Student. *See Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley,* 458 U.S. 176 (1982) (Act designed to provide basic floor of opportunity and does not require States to maximize potential of handicapped children); *Id.* at 206-207 (State complies with obligations under the Act by complying with procedures set forth in Act and developing IEP reasonably calculated to provide educational benefit). Nevertheless, as DCPS received additional overlays with the SuperTalker™ it provided to Parent for Student's use at home, and it is possible that Parent may be able to use one or more of those overlays to help Student acquire new skills, the hearing officer will order DCPS to provide Parent with the additional overlays.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proof on its claim concerning the neurological evaluation but failed to meet its burden of proof on the claim concerning AT devices.

VII. ORDER

1. Parent is hereby authorized to obtain at DCPS's expense an independent neurological evaluation of Student that includes an MRI and a CT scan. However, in so doing, Parent must comply with any applicable cost guidelines DCPS has established.

2. Within 30 days of the issuance of this HOD and Order, DCPS shall supply to Parent for Student's use at home the additional overlays it received with Student's SuperTalker™.

3. All remaining requests for relief in Petitioners' Complaint are hereby **DENIED.**

/s/ *Kimm H. Massey*
Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 27th day of August, 2009.

NOTICE OF APPEAL RIGHTS
This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).