

RECEIVED

SEP 10 2010

DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION  
STUDENT HEARING OFFICE

STUDENT,<sup>1</sup> )  
By and through PARENT, )  
 )  
Petitioner, )  
v. )  
 )  
DISTRICT OF COLUMBIA )  
PUBLIC SCHOOLS, )  
 )  
Respondent. )

Case No.  
Bruce Ryan, Hearing Officer  
Issued: September 9, 2010

**HEARING OFFICER DETERMINATION**

**I. PROCEDURAL BACKGROUND AND RECORD**

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The Complaint was filed June 23, 2010, against Respondent District of Columbia Public School ("DCPS"). It concerns a -year old student (the "Student") who resides in the District of Columbia and has been determined to be eligible for special education and related services as a child with a disability under the IDEA. During the 2009-10 School Year and at the time the Complaint was filed, the Student attended School A, her neighborhood public elementary school. As of the beginning of the 2010-11 School Year, the Student now attends School B, a DCPS public middle school.

Petitioner claims that DCPS denied the Student a free appropriate public education ("FAPE") by failing (a) adequately to review independent evaluations, (b) to evaluate in all areas of suspected disability, and (c) to develop an appropriate individualized educational program ("IEP"), as described in greater detail below. Petitioner also claims that DCPS failed to ensure meaningful parent participation in the placement decision for the Student.

<sup>1</sup> Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

DCPS filed a Response on July 2, 2010, which responds, *inter alia*, that: (a) DCPS convened a meeting and adequately reviewed the independent evaluations on or about June 9, 2010; (b) DCPS offered to conduct an audiological evaluation of the Student, but the parent refused consent; and (c) the IEP is appropriate to meet the student's unique needs.

The resolution process was not successful, and the 30-day resolution period ended on July 23, 2010. A Prehearing Conference ("PHC") was held on July 27, 2010, at which the parties discussed and clarified the issues and requested relief. A Prehearing Order was issued August 3, 2010. *See Prehearing Order* (issued Aug. 3, 2010), ¶ 5 (statement of issues and requested relief for hearing). The Due Process Hearing was scheduled for two full days, on September 1 and 2, 2010. Petitioner elected for the hearing to be closed. Five-day disclosures were filed by both parties as directed on August 25, 2010.

At the beginning of the due process hearing on September 1, the parties informed the Hearing Officer that they had reached an agreement to resolve three of the four issues specified in the Prehearing Order – i.e., Issues (a), (b) and (d) as stated in Paragraph 5 of the 08/03/10 Prehearing Order. These issues concerned (a) "Review of Independent Evaluations," (b) "Failure to Evaluate in All Areas of Suspected Disabilities," and (d) "Procedural – Parent Participation." The agreement consists of DCPS' authorization and funding of independent evaluations in several areas (auditory processing, language processing, WIAT reading comprehension, and Gray oral reading subtest), followed by reconvening a meeting of the Student's Multi-disciplinary Team ("MDT") by October 30, 2010. In addition, under Issue (c) ("Inappropriate IEP"), the parties agreed not to proceed with respect to Petitioner's claim regarding specialized instruction hours, which would be discussed by the Team at the meeting.

The parties have requested the Hearing Officer to incorporate the terms of their agreement into an Order with consent of both parties, pursuant to Section 1002.1 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures* ("SOP"). Accordingly, the Order included in this HOD shall incorporate those terms.

The Due Process Hearing was held on September 1 and 2, 2010, on the remaining issue presented for determination, which is set forth below. During the hearing, the following Documentary Exhibits were admitted into evidence:<sup>2</sup>

**Petitioner's Exhibits:** P-1, P-2, P-3, P-5, P-6, P-8 through -10, P-13, and P-14.

**DCPS' Exhibits:** R-1, R-3, R-8 through -12, R-15, R-17, R-19 through -21, and R-26.

In addition, the following Witnesses testified on behalf of each party:

**Petitioner's Witnesses:** (1) Parent-Petitioner; (2) Dr. Ginny Paleg (Physical Therapist); and (3) Juliet Copeland (Occupational Therapist).

**DCPS' Witnesses:** (1) DCPS' Physical Therapist; and (2) DCPS' Occupational Therapist, School A.

This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*.

## **II. ISSUES AND REQUESTED RELIEF**

As a result of the PHC and the parties' agreement, the following issue was presented for determination at hearing:

**Inappropriate IEP** — Did DCPS deny the Student a FAPE by failing to develop an IEP designed to provide meaningful educational benefit; specifically, by not including Physical Therapy ("PT") and Occupational Therapy ("OT") as related services, as of June 9, 2010?

As relief for this alleged denial of FAPE, Petitioner seeks an Order directing DCPS to revise the 06/09/10 IEP to include 60 minutes per week of PT and 45 minutes per week of OT as related services. All requests for relief in the Complaint, including compensatory education, were withdrawn by Petitioner at this time.

---

<sup>2</sup> The parties withdrew a number of Documentary Exhibits that had originally been included in their five-day disclosures because they were deemed no longer relevant to the single remaining issue for hearing. Petitioner withdrew Exhibits P-4, P-7, P-11, and P-12. DCPS withdrew Exhibits R-2, R-4 through -7, R-13, R-14, R-16, R-18, and R-22 through -25. Petitioner had filed written objections to Exhibits R-22 through -25, but the objections were mooted by DCPS' withdrawal of those exhibits.

### III. FINDINGS OF FACT

1. The Student is a -year old child who resides with Petitioner in the District of Columbia. Petitioner is the Student's grandmother, legal guardian, and adoptive mother. *P-1; Parent Testimony.*
2. The Student has been determined to be eligible for special education and related services under the IDEA as a child with a Specific Learning Disability ("SLD"). *See P-2.* The Student has also been diagnosed since infancy with cerebral palsy and other developmental disabilities. *P-1; Parent Testimony.*
3. The Student's current IEP, developed June 9, 2010, provides for two (2) hours per day of specialized instruction in an Outside General Education setting, one hour per week of behavioral support services also Outside General Education, and one hour per week of speech-language pathology services in a General Education setting. *P-2, p. 8.*
4. During the 2009-10 School Year, the Student attended the grade at School A, her neighborhood DCPS elementary school. Prior to that school year, she had attended charter schools and private parochial schools. *P-1; Parent Testimony.*
5. On or about March 18, 2010, Petitioner and DCPS entered into a Settlement Agreement ("SA") to resolve an earlier due process complaint. DCPS agreed to fund independent neuropsychological, speech/language, and occupational therapy ("OT") evaluations of the Student. *P-13.*
6. On or about May 6, 2010, an independent OT evaluation of the Student was completed by Ms. Juliet Copeland of Ellis Therapeutic Consultants. *P-5; Copeland Testimony.* The evaluation report found (*inter alia*) that the Student "demonstrates difficulties in the areas of visual motor integration, fine motor precision, fine motor integration, manual dexterity, upper limb coordination, and efficiency of handwriting." *P-5, p. 8.* The report also found that the Student's difficulty with visual motor tasks "impact her accuracy when copying from the board, copying from a text, forming letters, and forming and copying shapes involved in math;" that her fine motor precision, fine motor integration, and upper limb coordination subtest skills

were all within the “Below Average” range; and that her “decreased fine motor speed and dexterity will contribute to decreased speed of written communication including handwriting, as well as keyboarding.” *Id.*

7. Based on the independent OT testing, the evaluator recommended OT services of 45 minutes per week to remediate delays. *P-5, p. 9.* More specifically, the evaluator recommended that the Student would benefit from “opportunities to improve visual perceptual and fine motor coordination, as well as attention to task, such as completing craft activities, playing cards, playing with video games, cutting and tracing tasks, etc.” *Id.*
8. On or about June 4, 2010, an independent physical therapy (‘PT’) evaluation was completed by Dr. Ginny Paleg of Ellis Therapeutic Consultants. *P-6; Paleg Testimony.*<sup>3</sup> The evaluation report found (*inter alia*) that the Student “is functional in her current setting but is being socially excluded during gross motor activities because of her poor motor function.” *P-6, p. 6.* The evaluator found that she “could benefit from stretching, strengthening, orthotics and medical follow-up by neurology and orthopedics.” *Id.*
9. Based on the independent PT testing, the evaluator recommended PT services of 60 minutes per month for approximately six months until the Student reaches a “plateau in her gross motor functioning,” with services likely reduced to 30-45 minutes thereafter. *P-6, p. 6.* She recommended a PT program consisting of “rigorous cardiopulmonary exercise, resistance exercises, stretching, as well as coordination and balance training.” *Id.*
10. On or about June 9, 2010, following receipt of the independent evaluations from Petitioner, DCPS convened a meeting of the Student’s MDT/IEP Team to review the evaluations, review the IEP, and discuss placement. *See P-3; R-21; Parent Testimony.*
11. At the June 9, 2010 MDT meeting, the Team reviewed the independent OT evaluation and decided that the Student does not require OT as a related service under her IEP. *P-3; R-21.* The DCPS OT evaluator indicated (*inter alia*) that the Student

---

<sup>3</sup> DCPS agreed to fund the independent PT evaluation subsequent to the 03/18/10 SA.

holds her pencil in proper grasp, can do cursive handwriting, is successful in opening packaging (e.g., milk cartons at lunch), and is functioning adequately in a school-based setting. *P-3, p. 2; see DCPS OT Testimony*. The special education teacher also stated that she has good handwriting and demonstrates hand-eye coordination in interactive games. *Id.* The DCPS evaluator did not recommend direct OT services at this time, but did recommend OT “consult” services. *P-3, p. 3; DCPS OT Testimony*.

12. At the June 9, 2010 MDT meeting, the Team reviewed the independent PT evaluation and decided that the Student does not require PT as a related service under her IEP. *P-3; R-21*. The DCPS PT evaluator consulted with the classroom and PE teachers and found (*inter alia*) that the Student is able to keep up with peers (e.g., during fire drills), participates in PE activities, and is functional in the school environment. *P-3, p.3*. She also found no school-related safety issues resulting from any gross motor difficulties. *DCPS PT Testimony*. However, the Team recommended PT “consult” services of 60 minutes per month to continue to monitor the situation. *Id., pp. 3-4*.
13. As a result of the 06/09/10 MDT meeting, the Team determined to continue special education services for the Student as a child with a learning disability in a placement/program of services at School A. *See P-3, pp. 5-7*.
14. Petitioner disagreed with the Team’s decision not to include PT and OT services in the IEP. Petitioner believes that due to her cerebral palsy and other disabilities, the Student has difficulty navigating the school environment and keeping up with other students her age in school. Petitioner believes that this difficulty affects the Student socially when other students “leave her behind.” She also indicates that the Student has difficulty tying her shoes and needs help with buttons and snaps on her clothing. *Parent Testimony; P-3, p. 2*.
15. At the beginning of the 2010-11 School Year, Petitioner enrolled the Student at School B, pursuant to a transfer in accordance with the No Child Left Behind Act (“NCLBA”). *See Parent Testimony*. The Student presently attends the grade at School B.
16. At the beginning of the due process hearing on September 1, 2010, the parties agreed on the record that DCPS would authorize and fund independent evaluations of the

Student in the following areas: Auditory Processing; Language Processing; Reading Comprehension subtest of the WIAT; and the Gray Oral Reading Test within the Gray Silent Reading Test. The parties further agreed that DCPS would reconvene an MDT/IEP Team meeting to review these additional evaluations by October 30, 2010.

#### IV. DISCUSSION AND CONCLUSIONS OF LAW

As noted above, Petitioner claims that DCPS denied the Student a FAPE because the 06/09/10 IEP fails to provide meaningful educational benefit by not including Occupational Therapy (“OT”) and Physical Therapy (“PT”) as related services.

The IDEA requires that all students be provided with a Free Appropriate Public Education (“FAPE”). FAPE means:

[S]pecial education *and related services* that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are *provided in conformity with the individualized education program (IEP)...*”

20 U.S.C. § 1401(9) (emphasis added); 34 C.F.R. § 300.17; DCMR 5-E3001.1. “Related services,” in turn, mean “transportation and such *developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education*, and includes *...physical and occupational therapy....*” 20 U.S.C. § 1401(26) (emphasis added); 34 C.F.R. § 300.34 (a); DCMR 5-E3001.1.<sup>4</sup>

Thus, where appropriate to address the Student’s unique needs, DCPS is required to provide related services such as OT and PT in order to assist the Student to access her educational setting or benefit from her special education program. Also, in specifying the particular services required, the IEP “must be ‘reasonably calculated’ to confer educational

---

<sup>4</sup> See also *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984) (services qualify as “related services” if they are supportive services required for a disabled child to benefit from special education); *John M. v. Board of Educ. of Evanston Community Consolidated School Dist.*, 37 IDELR 38 (N. D. Ill. 2002), *aff’d*, 356 F.3d 798 (7<sup>th</sup> Cir. 2004) (addressing both direct and consultative OT and PT related services under the IDEA); 34 C.F.R. 300.320(a)(4) (IEP to include statement of related services to enable the child to “advance appropriately toward attaining the annual goals,” to “be involved in and make progress in the general education curriculum,” and “to participate in extracurricular and other nonacademic activities”).

benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982); see also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988).

The burden of proof in a special education due process hearing is on the party seeking relief. See DCMR 5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). The Hearing Officer concludes that Petitioner has carried her burden of proof on this issue, in part, but only to the limited extent set forth below.

**A. Occupational Therapy**

While the parties differ somewhat on the details, the weight of the evidence shows that the Student does have continuing problems that appear to require some level of remedial OT services at this time. The Student has unique needs that include difficulties in the areas of visual motor integration, fine motor precision, fine motor integration, and upper limb coordination. The crux of the disagreement is whether or not OT services are required to assist the Student to access or benefit from special education, rather than simply support the child in her daily living generally.<sup>5</sup>

Based on the independent evaluation and parent/student reports, Petitioner argues that the Student's difficulties in this area are affecting her performance in school, including handwriting, copying required material from a text or the board in the classroom, and forming and copying shapes involved in math. See *Findings* ¶ 6; P-5; *Copeland Testimony*. On the other hand, the DCPS evaluator found that the Student holds her pencil in proper grasp, can do legible cursive handwriting, can use utensils and open packaging (e.g., milk cartons) at lunch, and is otherwise functioning adequately in a school-based setting. *Findings* ¶ 11; P-3, p. 2; *DCPS OT Testimony*. The DCPS evaluator and Team also found that the difficulties with tying shoes and buttoning clothing reported by the parent had not affected the Student in the school setting. *Id.* The DCPS evaluator and the Team therefore concluded that the Student did not require direct OT services to

---

<sup>5</sup> Cf. *Natchez-Adams School Dist. v. Searing*, 918 F. Supp. 1028 (D. Miss. 1996) (school district did not dispute that -year old student with cerebral palsy needed OT services by reason of his disabilities, but argued that OT services were not required for him to benefit educationally).

access her education at this time. The Hearing Officer finds the DCPS evaluator's opinions to be entitled to greater weight since she reviewed the independent evaluation, made observations of the Student in three different school settings (classroom, cafeteria, and auditorium), and also talked with the special education teacher and other staff involved with the Student's program at School A.<sup>6</sup>

Accordingly, the Hearing Officer concludes that Petitioner has not carried her burden of proving that the MDT/IEP team acted inappropriately by failing to include the requested 45 minutes per week of direct OT services in the June 2009 IEP. However, consistent with the recommendation of the DCPS OT evaluator, the Hearing Officer concludes that the IEP should at least include OT "consult" services of 60 minutes per month in order to continue to monitor the situation. This also would be consistent with the Team's decision regarding PT (discussed below), and would be appropriate given the Student's advancement to middle school where increased handwriting and keyboarding demands may impact the OT issues already identified.

#### **B. Physical Therapy**

The IDEA defines "physical therapy" simply as "services provided by a qualified physical therapist," 34 C.F.R. § 300.34 (c) (9); *see also* DCMR 5-E3001.1, which certainly would encompass the services Petitioner proposes in this case. As in the case of OT, the evidence suggests the Student has unique needs, including poor motor function and other gross motor difficulties, which may require some form of remedial PT services. *See Findings* ¶ 8; *P-6; Paleg Testimony*. Again, the main question is whether or not the proposed PT services are required to assist the Student to access her educational setting or benefit from special education, such that they qualify as "related services" and should be included in the IEP.

As noted in the Findings above, the independent PT evaluator found that the Student is "functional in her current setting," although she believed she was being "socially excluded during gross motor activities because of her poor motor function." *P-6, p. 6; see also Paleg Testimony*. The parent also testified that the Student had difficulty navigating the school environment and keeping up with fellow students. *Findings* ¶ 14; *Parent Testimony*. However,

---

<sup>6</sup> The Hearing Officer does not agree, however, with the DCPS evaluator's opinion questioning the validity of the independent OT evaluation on timing grounds. She testified that standard guidelines indicate that testing ordinarily should not be repeated in less than 12 months, but since roughly 10 months had elapsed in this case (July 2009-May 2010), this seems like a relatively minor difference.

after consulting with the classroom and PE teachers at School A, the DCPS PT evaluator found that the Student was able to keep up with peers (e.g., during fire drills and other transitions), participated in PE activities, and was generally functional in the school environment. As a result, the Team decided that no direct PT services were required at this time. Nevertheless, the Team decided that PT “consult” services of 60 minutes per month were needed to continue to monitor the situation, which the DCPS PT evaluator agreed should be included in the June 2009 IEP. *See Findings ¶ 12; P-3, pp.3-4; DCPS PT Testimony.*

Accordingly, the Hearing Officer concludes that Petitioner has not carried her burden of proving that the MDT/IEP team acted inappropriately by failing to include the requested 60 minutes per month of direct PT services in the June 2009 IEP. However, Petitioner has shown that the IEP should include PT “consult” services of 60 minutes per month in order to monitor any potential educational impact of the Student’s gross motor difficulties, consistent with the Team’s decision at the 6/9/10 meeting. Such monitoring is particularly appropriate given the Student’s relocation to School B, which may have different physical features (e.g., involving stairway railings or nature of hallway traffic) that could affect the Student’s ability to access her educational setting or benefit from special education due to gross motor difficulties. Of course, whether the June 2009 IEP is appropriate “can only be determined as of the time it is offered for the student, and not at some later date.” *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993).

## V. ORDER

Based upon the above Findings of Fact and Conclusions of Law, the agreement of the parties, and the entire record herein, it is hereby ORDERED:

1. Within **10 school days** of this Order, DCPS shall amend the Student’s IEP dated June 9, 2010, to include the additional Related Services of **Occupational Therapy consult services** and **Physical Therapy consult services**, each for **60 minutes per month**.
2. DCPS shall authorize and fund **independent evaluations** of the Student in the following areas: (a) auditory processing; (b) language processing; (c) the Gray Oral Reading Test in the Gray Silent Reading Test; and (d) the Reading Comprehension subtest of the Wechsler Individual Achievement Test (“WIAT”).

3. Provided that DCPS receives copies of the independent evaluations at least five (5) days in advance, DCPS shall convene a meeting of the Student's Multi-disciplinary Team ("MDT") at School B no later than **October 30, 2010**.
4. At the MDT meeting convened pursuant to paragraph 3 above, DCPS shall: (a) review all independent evaluations, along with the neuropsychological evaluation dated May 7, 2010; (b) review and revise, as appropriate, the Student's IEP (including but not limited to the hours of specialized instruction) based on these evaluations and any other new information; and (c) discuss and determine whether any compensatory education is deemed warranted.
5. Petitioner's other requests for relief in her Due Process Complaint are **DENIED**.
6. This case shall be, and hereby is, **CLOSED**.

***IT IS SO ORDERED.***



Dated: September 9, 2010

---

Impartial Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).