

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street NE, STE 2  
Washington, DC 20002

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[Parents], on behalf of  
[Student],<sup>1</sup>

Petitioners,

v

District of Columbia Public Schools (DCPS),

Respondent.

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Date Issued: November 2, 2011

Hearing Officer: Jim Mortenson

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STUDENT HEARING OFFICE  
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**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed by the Petitioner on August 19, 2011.

No evidence of a resolution meeting was provided by either party. A prehearing conference was held on September 8, 2011, and a prehearing order issued on that date. No timely response to the complaint was filed and the facts alleged in the complaint are deemed undisputed. (See Prehearing Order, September 8, 2011, and Motion Order, October 4, 2011.) The Petitioners were still required to present evidence at hearing supporting their claims. The Respondent was not permitted to present evidence, including witnesses, or present a case, but was permitted to cross examine witnesses and make a closing argument on the record.

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<sup>1</sup> Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

The due process hearing was convened and held on October 17, 2011, at 810 First Street NE, Washington, D.C. The due date for this HOD is November 2, 2011. This HOD is issued on November 2, 2011.

## **II. JURISDICTION**

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

## **III. ISSUES, RELIEF SOUGHT, and DETERMINATION**

The issues to be determined by the independent hearing officer (IHO) are:

- (1) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to comply with the Petitioners' request for a reevaluation of the Student consisting of a speech and language assessment, physical therapy assessment, and an occupational therapy assessment on January 24, 2011?
- (2) Whether the Respondent denied the Student a FAPE when it did not review the independent comprehensive psychological assessment report provided to the Respondent on May 2, 2011?
- (3) Whether the Respondent denied the Student a FAPE when it did not evaluate the Student in all areas of suspected disability by failing to provide a visual deficit assessment and a sensory profile assessment?
- (4) Whether the Respondent denied the Student a FAPE when the individualized education program (IEP) proposed June 15, 2011 lacked a behavior intervention plan (BIP), applied behavioral analysis (ABA), and assistive technology (AT)?

The substantive requested relief at the time of hearing is:

- (1) An independent educational evaluation (IEE) consisting of: a speech and language assessment; physical therapy assessment; visual deficit assessment by a behavioral optometrist; and a sensory profile.
- (2) Placement at and transportation to an alternate school setting.

- (3) An IEP team meeting to review and revise the IEP by incorporating the findings of the comprehensive psychological assessment in the IEP, incorporating the recommendations of the assistive technology assessment in the IEP, and adding a BIP and ABA to the IEP.
- (4) Provide the assistive technology to the Student within 30 days and train teachers and Parents on using picture exchange communication system (PECS) and other recommended assistive technology.

The Respondent did not comply with or properly refuse the Petitioner's request for reevaluation. This failure was a procedural error that did not result in a denial of FAPE. The Respondent did not review the independent comprehensive psychological assessment report provided in May, 2011. This failure was a procedural error that did not result in a denial of FAPE. The Respondent did not provide a sufficiently comprehensive evaluation of the Student when it did not conduct a visual deficit assessment and a sensory profile assessment. This failure was the result of procedural errors and due to equitable considerations did not result in a denial of FAPE. The Student's IEP did address behavioral needs with goals and services. The IEP did not include ABA despite the team determining it was a specific methodology to be used with the Student, resulting in a denial of FAPE. The IEP did not include AT consisting of PECS because the Petitioners wanted more time to consider the AT assessment report that was reviewed and they never followed up with the Respondent to add PECS or the computer and software to the IEP.

#### **IV. EVIDENCE**

Three witnesses testified at the hearing, all for the Petitioners. The Petitioners' witnesses were:

- 1) The Petitioner (P)

2) Kevin Carter, Educational Advocate (K.C.)

3) Angie Kiger, Assistive Technology Evaluator (A.K.)

15 exhibits were admitted into evidence of 18 disclosures.<sup>2</sup> The Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 1	January 24, 2011	Letter from Hill to Seaward (Request for Reevaluation of Student)
P 2	March 4, 2011	Meeting Notes
P 3	March 4, 2011	Letter from Carter to Maisoner
P 4	March 9, 2011	Letter from Sado to [P] (IEE authorization)
P 6	April 11, 2011	Letter from Douds to [P] (IEE authorization)
P 7	April 11, 2011	Letter from Douds to [P] (Proposed Settlement)
P 8	April 20, 2011	Confidential Comprehensive Psychological Evaluation
P 9	May 2, 2011	Email from Douds to Hill
P 10	Undated	Assistive Technology Evaluation (Completed April 22, 2011)
P 11	May 13, 2011	Email from Douds to Hill
P 12	Undated	(Functional behavioral assessment report)
P 14	June 15, 2011	Letter from Carter to Mendez-Maisonet
P 15	June 15, 2011	IEP, Prior Written Notice, Meeting Notes
P 16	May 23, 2011	Email from Douds to Hill
P 18	Undated	Curricula Vitae of Pius Ojevwe

#### **V. FINDINGS OF FACT**

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

1. Student is a     year old learner eligible for special education under the definition of Autism Spectrum Disorder (ASD), in the first grade at one of the Respondent's elementary schools.<sup>3</sup>
2. On January 24, 2011, the Petitioners requested, through counsel, a reevaluation of the Student consisting of: a speech and language assessment; an audiological assessment; and a physical therapy assessment.<sup>4</sup>

<sup>2</sup> P 5, P 13, and P 17 were not admitted.

<sup>3</sup> Testimony (T) of P, P 15

3. The Respondent never responded to the reevaluation request.<sup>5</sup>
4. The Respondent authorized an independently provided comprehensive psychological assessment on March 9, 2011.<sup>6</sup> This assessment was completed on April 20, 2011, and a report was provided to the Respondent on May 2, 2011.<sup>7</sup>
5. The IEP team never reviewed the comprehensive psychological assessment report.<sup>8</sup> An IEP team meeting was held on June 15, 2011, and none of the participants raised discussion about or utilized the comprehensive psychological assessment report in their review of the Student's IEP, including the Petitioner and her Educational Advocate who was a participant.<sup>9</sup>
6. The comprehensive psychological assessment report included a recommendation that a "sensory profile" be completed to identify interventions to be used with the Student in the classroom.<sup>10</sup> The Petitioners never requested this sensory profile be completed and it was not discussed at the June 15, 2011, IEP team meeting.<sup>11</sup>
7. An independent assistive technology assessment was authorized by the Respondent and completed on April 22, 2011.<sup>12</sup> This report was discussed at the June 15, 2011, IEP team meeting.<sup>13</sup> The report recommended that the Student utilize the Picture Exchange

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<sup>4</sup> P 1. (The letter uses the terms for assessment and evaluation interchangeably. In the District of Columbia, an assessment is a particular data collection tool or process, and an evaluation is the entire process of determining "whether a child has a disability and the nature and extent of the special education and related services that the child needs." D.C. Mun. Regs. 5-E3001.1, *See also* D.C. Mun. Regs. 5-E3005.)

<sup>5</sup> There is no evidence to the contrary. The Respondent did not contest in a timely response to the complaint that either the request was not received or that it replied in any way. P 2, notes from a March meeting, does not indicate any discussion about the requested assessments.

<sup>6</sup> P 4.

<sup>7</sup> P 8, P 9, T of K.C.

<sup>8</sup> T of K.C., P 15. (P 15 includes the notes of the only IEP team meeting held following completion of the comprehensive psychological assessment.)

<sup>9</sup> P 15, T of K.C., T of P.

<sup>10</sup> P 8.

<sup>11</sup> P 15, T of K.C., T of P. (Here, other than showing they provided the assessment report to the Respondent, the Petitioners neither argue nor provide evidence that they raised concern about the recommended sensory profile with the Respondent.)

<sup>12</sup> P 6, P 7, P 10.

<sup>13</sup> P 15, T of K.C., T of P.

Communication System (PECS) and that his family and teachers be trained to use PECS, so that effective communication with the Student can be established.<sup>14</sup> The report also recommended specialized software to assist the Student with academics and that the computer he uses include a touch screen monitor.<sup>15</sup> The report also recommended additional assessments including a formal evaluation by a Behavioral Optometrist to assess visual deficits and an occupational therapy assessment.<sup>16</sup>

8. The assessments recommended were not discussed or provided.<sup>17</sup>
9. The Petitioners wanted additional time to consider the team's review of the AT report following the meeting and never communicated to the Respondent again about it, until the complaint in this matter was filed.<sup>18</sup>
10. The Respondent proposed an IEP following the June 15, 2011, IEP team meeting.<sup>19</sup> The IEP includes goals in multiple academic and functional skill areas.<sup>20</sup> There are eight goals under the area for adaptive/daily living skills which deal with things like following directions and rules, correctly using toys or objects, and engaging peers and adults appropriately.<sup>21</sup> There are six goals under the area of communication/speech and language which deal with expressive and receptive communication in different situations.<sup>22</sup> The IEP includes specialized instruction for 24 hours per week outside of the general education setting, speech-language pathology for 4 hours per month, and occupational therapy for 90 minutes per

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<sup>14</sup> P 10, T of A.K.

<sup>15</sup> P 10, T of A.K.

<sup>16</sup> P 10, T of A.K. (The Petitioners had previously requested an occupational therapy assessment that went unanswered.)

<sup>17</sup> P 15.

<sup>18</sup> P 15, T of K.C., T of P. (The Petitioners offered no evidence to demonstrate they followed up after considering the review of the report longer.)

<sup>19</sup> P 15.

<sup>20</sup> P 15.

<sup>21</sup> P 15.

<sup>22</sup> P 15.

week.<sup>23</sup> A dedicated aide is provided as are extended school years services.<sup>24</sup> Supplementary aids and services include repetition of directions, small group testing, and a classroom location with minimal distractions.<sup>25</sup>

11. The IEP team determined that “behaviors will continue to be addressed through the Applied Behavior Analysis strategies,” as documented in the prior written notice but not recorded in the IEP.<sup>26</sup>
12. The Student’s overall academic progress toward his goals or in the general curriculum at this time is unknown.<sup>27</sup> The Student has made improvements in behavior.<sup>28</sup>

#### **VI. CONCLUSIONS OF LAW**

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

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to meet their burden. D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

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<sup>23</sup> P 15.

<sup>24</sup> P 15.

<sup>25</sup> P 15.

<sup>26</sup> P 15.

<sup>27</sup> No evidence of current progress was provided, outside of the statements of present levels of performance in the IEP created back in June, 2011.

<sup>28</sup> T of P. (The Student’s mother attributes this progress to her work with the Student, but the overall evidence does not lead to such a finding.)

2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

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

34 C.F.R. § 300.17.

3. A “determination of whether a child received FAPE must be based on substantive grounds.”

34 C.F.R. § 300.513(a)(1). A procedural violation may result in a determination that a child was denied FAPE “only if the procedural inadequacies- (i) Impeded the child’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)(2). “Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§ 300.500 through 300.536.” 34 C.F.R. § 300.513(a)(3).

4. A local education agency (LEA) must comply with a parental request for a reevaluation of a student with a disability or provide written notice explaining the refusal. *See*: 34 C.F.R. § 300.303(a)(2), D.C. Mun. Regs. 5-E3005.7, 34 C.F.R. § 300.503(a), and D.C. Mun. Regs. 5-E3024.1.
5. The Petitioners made a very specific request for assessments as part of a reevaluation of the Student. The Respondent did not respond to the request with either a proposal or a refusal. There is not a preponderance of evidence that the Student was harmed as a result of this failure, so there was no denial of a FAPE, pursuant to 34 C.F.R. § 300.513(a). However, the

Respondent will be required to provide the requested assessments as it did not contest the Petitioners' claim they requested the assessments and show a proper written notice of a refusal with explanation for such refusal, as required by 34 C.F.R. § 300.504 and D.C. Mun. Regs. 5-E3024.1.

6. Federal regulations at 34 C.F.R. § 300.502(c) provides that an independent evaluation obtained by a parent “[m]ust be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child[.]”
7. The Respondent did not contest that the Petitioners provided it an independently provided assessment report, completed April 20, 2011, on May 2, 2011. That report was not considered at the June 15, 2011, IEP team meeting, however the Respondent never refused to consider it - the message from Mr. Douds indicating Respondent would not pay for the assessment not-with-standing. The IEP team will be required to discuss the assessment report, even though the Student was not denied a FAPE as a result of this procedural violation.
8. “Each public agency must ensure that- . . . (4) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.” 34 C.F.R. § 300.304(c)(4), *see also*: D.C. Mun. Regs. 5-E3005.9(g). Furthermore, an 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. § 300.304(c)(6), *see also*: D.C. Mun. Regs. 5-E3005.9(h).

9. The comprehensive psychological assessment report from April 2011 included a recommendation that a “sensory profile should be completed to identify interventions within the classroom.” Despite the receipt of this report in May, 2011, and being on notice of this recommendation, the Respondent failed to discuss this recommendation at an IEP team meeting to determine whether a sensory profile should be completed as part of the reevaluation of the Student. The Petitioners, who were assisted by an advocate, did not raise this as a concern prior to or at the meeting in June, 2011, or at any point thereafter until this complaint was filed in August. Thus, an equitable consideration must be made as to the parties interactions. Based upon the Petitioners’ failure to raise their concerns with the Respondent, it cannot be concluded there was a denial of FAPE. Based on Respondent’s failure to consider the assessment report, as it was required to do, the report must be brought to the IEP team for consideration.

10. The assessment technology report, also from April 2011, included a recommendation for a “[f]ormal evaluation with a Behavioral Optometrist to assess his visual deficits.” While the assistive technology report was reviewed at the June IEP team meeting, the recommended assessment of his visual deficits was not discussed and neither party raised it as a concern. In fact, the Petitioners wanted more time to consider the AT assessment and never got back to the Respondent with any concerns. Thus, while it cannot be concluded that there was a denial of FAPE, the assessments will be required to be conducted at this time.

11. Federal regulations at 34 C.F.R. § 300.320(a) lists some of the required contents of an IEP:

- (a)(1) A statement of the child’s present levels of academic achievement and functional performance, including—
  - (i) How the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
  - (ii) For preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities;
- (2)(i) A statement of measurable annual goals, including academic and functional goals designed to —
  - (A) Meet the child’s needs that result from the child’s disability to enable the child to be involved in and

- make progress in the general education curriculum; and
- (B) Meet each of the child's other educational needs that result from the child's disability;
  - (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
- (3) A description of— (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
  - (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
- (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child —
  - (i) To advance appropriately toward attaining the annual goals;
  - (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, 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 the activities described in this section;
- (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
- (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
  - (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—
    - (A) The child cannot participate in the regular assessment; and
    - (B) The particular alternate assessment selected is appropriate for the child; and
- (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

12. The IEP proposed on June 15, 2011, included a BIP. "BIP" is a term of art. It refers to a set of goals and services and other instructions to use with a child with a disability who has behavioral needs. The IEP includes over a dozen functional goals under the areas of Adaptive/Daily Living Skills and Communication/Speech and Language Skills that deal with teaching the Student skills affecting his behavior. The 24 hours per week of specialized instruction and 4 hours per month of speech and language pathology will necessarily be addressing these goals and the Student's behavioral progress, reported by his mother, supports that they have.

13. The team determined to use the specific methodology of ABA with the Student. This was not documented in the IEP, however, and it is reasonable to conclude that failing to include a service in the IEP determined necessary by the team impeded the Student's right to FAPE

since the instructions to providing the service, including the anticipated frequency, location, and duration of that service was not communicated to staff through the IEP. This must be corrected, consistent with the IEP team's determination.

14. The inclusion and use of AT was discussed at the June meeting and the Petitioner and her Advocate wanted more time to consider it. There was never any follow-up to this. Yet, the Respondent did not respond to the complaint indicating it was opposed to the use of the AT in question, the PECS communication system and the touch-screen computer and software for the Student. Thus, the IEP will be revised to include the use of the PECS communication system and the touch-screen computer and software, and staff and the Petitioners will receive training on the use and implementation of the AT as well.
15. This hearing officer must grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). The order below will address both the procedural violations herein and will ensure the Student is provided a FAPE.

#### **VII. DECISION**

The Petitioners prevail because the Respondent has made procedural errors that must be corrected and has made a procedural error that resulted in the denial of FAPE to the Student.

#### **VIII. ORDER**

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

1. Within 10 business day of the date of this order the Respondent must authorize the Petitioners to obtain an IEE consisting of: a speech and language assessment, a physical

therapy assessment, an occupational therapy assessment, a visual deficit assessment, and a sensory profile. The Respondent must include, with its written authorization, the applicable agency criteria for the IEE.

2. Within 10 business days of receipt of the final assessment report of the assessments ordered herein the Respondent must convene the IEP team to consider the assessments, and the comprehensive psychological assessment completed April 20, 2011, and revise the IEP in accordance with the data contained in the assessment reports as appropriate. Proposals or refusals contrary to the assessment report recommendations, and with which the Petitioners do not agree, must be properly documented in a written notice consistent with 34 C.F.R. § 300.503, and D.C. Mun. Regs. 5-E3024.1.
3. The IEP team meeting will be proposed no less than 5 school days in advance of a meeting and the Respondent must advise the Petitioners of at least three alternate times for the meetings which are not consecutive and occur on more than one day, and inform the Petitioners of which time the meeting will proceed if she fails to inform the Respondent of which meeting time she will attend. Nothing in this order prevents the parties from agreeing on other alternate times for meetings.
4. Nothing in this order prevents the IEP team from making other revisions to the IEP if it determines are necessary to provide FAPE, based on documented data and properly recorded in a written notice consistent with 34 C.F.R. § 300.503, and D.C. Mun. Regs. 5-E3024.1.
5. Within 10 business days of the date of this order the Respondent must revise the IEP to include the use of ABA, PECS, and the touch-screen computer and software pursuant to the AT assessment report. The Respondent must then send the Petitioner a copy of the revised IEP with all specific revisions clearly marked. The IEP must also include the anticipated

frequency, location, and duration of those services, which, if not already begun, are to begin no later than 3 school days following the revision to the IEP. The IEP must also document the anticipated frequency, location, and duration of training to the Petitioners and staff who will be working with the Student using the PECS. The computer will only be used by the Student at school unless the IEP team agrees it is necessary for use at home as well.

**IT IS SO ORDERED.**

Date: November 2, 2011



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Independent Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

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