

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

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

OSSE
Student Hearing Office
June 25, 2013

[Parent], on behalf of
[Student],¹

Date Issued: June 24, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

[Local Education Agency] (LEA),

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on April 25, 2013. A response to the complaint was filed on May 2, 2013. A prehearing conference was held on May 7, 2013, and a prehearing order was issued on that date. A resolution meeting was convened on May 29, 2013, and resulted in no agreements. The Petitioner filed a motion for summary judgment on June 8, 2013. The Respondent filed a response to the motion on June 13, 2013, opposing a summary determination. The Petitioner filed a reply to the response on June 14, 2013. Based on the rationale provided herein, the Petitioner's motion is granted and this Hearing Officer Determination (HOD) ensues.

¹ All names have been removed in accordance with Student Hearing Officer policy and are referenced in Appendix C which is to be removed prior to public dissemination.

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-E30.

There are no rules dealing with summary judgment for special education hearings under the IDEA or the District of Columbia Municipal Regulations. Hearing Officers do have the authority and responsibility to “take actions necessary to complete the hearing in an efficient and expeditious manner[.]” Student Hearing Office Standard Operating Procedure (SOP) § 600.1. In a notice and order in this case, dated April 29, 2013, the Undersigned advised the parties:

Any facts alleged in the complaint not disputed in a response consistent with the requirements of 34 C.F.R. § 300.508 are uncontested and may be deemed true. Uncontested material facts may provide a basis for summary disposition in appropriate circumstances as determined by the IHO.

To ensure the efficient and expeditious use of time and resources, this Independent Hearing Officer (IHO) adopts, by analogy, Federal Rule of Civil Procedure 56(c)(2) with regard to considering the Petitioner’s motion for summary judgment. Generally, summary judgment should be rendered for a movant if the pleadings and any affidavits or disclosed material show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See*, FRCP 56(c)(2).

While the Respondent has argued that there is no authority for the use of a summary judgment procedure, it is the Undersigned’s conclusion that such authority exists through the inherent power of the administrative tribunal to take actions necessary to complete the hearing in an efficient and expeditious manner, which the parties were on notice of via the SOP as well as the notice that such action would take place in certain circumstances in this case. The Respondent also argues that there is a need for an evidentiary hearing in this case because it has a right to object to documentary evidence and cross-examine the Petitioner on her sworn statement

and her witness. The Respondent has not specified any facts in dispute in either its response specifically addressing the issues raised in the complaint or its response to the motion. It has not indicated which documents filed by the Petitioner are inaccurate or would be inadmissible, has relied the Petitioner's documents in making its arguments, and has submitted its own documents into the record without objection from the Petitioner. It has not specified which, if any, statements in the sworn statements presented by the Petitioner are inaccurate and has submitted no contradictory statements from its own witnesses. Thus, there are no material facts in dispute upon which further evidentiary hearing is required, only questions of law to determine.²

III. ISSUES, RELIEF SOUGHT, and ARGUMENTS

The issues in dispute are:

1. Whether the Respondent failed to reevaluate the Student following the Petitioner's request for a comprehensive psychological assessment in October 2012?
2. Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to provide the Student with behavioral support services in conformity with her individualized education program (IEP) during the 2012-2013 school year?

The Petitioner is seeking an independently provided comprehensive psychological assessment and a functional behavioral assessment (FBA), and a meeting to discuss the assessments and revise the IEP and discuss placement. The Petitioner is also seeking compensatory education, consisting of approximately 15 hours of non-traditional counseling (sand-tray therapy) to address her lack of behavioral and academic progress this year.

² In conducting an independent review of the facts and exhibits submitted, the Undersigned has relied only on material facts in this decision and has made some different findings with regard to computations of services provided and missed, and the reasons therefore, based on the more complete service records provided by the Respondent (R 1).

There is no dispute that a comprehensive psychological assessment was requested and ultimately denied.³ There is a dispute whether some behavioral support services not received by the Student must be made-up, but this is a legal question as the Respondent has not challenged the specific facts relating to the amount or reasons the services were missed.

Because there are no material facts in dispute in this case, because the law requires a reevaluation upon parental request, because the Respondent has not provided a justifiable reason for not conducting the requested reevaluation, and because the Student did not receive behavioral support services in conformity with her IEP resulting in a denial of FAPE, the Petitioner's motion is granted. The Student will be reevaluated in accordance with the request of the Petitioner and the missed services will be made up in accordance with this order.

IV. EVIDENCE

In addition to the pleadings and other filings in this matter, the evidence in this case includes the 30 exhibits filed with the Petitioner's motion, listed in Appendix A, and the three exhibits filed with the Respondent's reply to the motion, listed in Appendix B. The Respondent did not dispute any of the Petitioner's proposed findings of fact.

V. FINDINGS OF FACT

This Independent Hearing Officer's findings of fact, based on the undisputed facts of this case, are as follows:

³ Actually, the Respondent argues that it both did and did not refuse to conduct a reevaluation of the Student. Based on the evidence the Respondent provided in its reply to the motion, as well as the Petitioner's evidence, it is clear there was a request and no reevaluation was conducted. The Respondent's simultaneous and contrary arguments with itself will not force the Petitioner further into a costly administrative process when one of the Respondent's competing positions on the facts comport with the Petitioner's. (*See*: Response to Complaint; Opposition to Petitioner's Motion for Summary Judgment, R 2, and P 29.)

1. The Student is years of age.
2. The Student is a District of Columbia resident and resides with her mother, the Petitioner.
3. The Respondent is the local education agency (LEA) for the student and the entity responsible for ensuring that the Student's special education and related service needs are met.
4. The Student currently attends a Senior High School where she is in the grade.⁴ The Student is currently eligible to receive special education and related services as a result of being emotionally disturbed.
5. The Student's most recent comprehensive psychological reevaluation was performed by the Respondent on or about November 27, 2010. The evaluation report states, although the Student had academic and cognitive functioning ranging from average to significantly above average, and despite being on the honor roll at various points throughout the school-year, that she continued to be a student with a disability under the classification of emotional disturbance as a result of her well chronicled and ongoing problems of aggression and bullying, depression, and hyperactivity. The evaluator recommended several accommodations for the Student such as: medication for her anxiety and depression and assistance with her behavior in school; preferential seating; self-esteem counseling to help her develop a healthy self-concept; and working collaboration between the Parent and School to ensure the Student's success.
6. A FBA was completed on or about December 2, 2011. According to the FBA, the Student required, among other things, a behavior plan, a behavior/truancy contract, and group therapy to address her disruptive and mischievous behaviors and her boredom and frustration.

⁴ It is noted that the 2012-2013 school year for the LEA began on August 27, 2012.

7. On March 22, 2012, while in middle school, the Student's IEP team revised the Student's IEP to reflect her receipt of specialized instruction in the amount of four hours per week of specialized instruction and one hour per week of behavioral support services.
8. A meeting was convened for the student on September 25, 2012, at which the Parent and her Educational Advocate heard from school staff regarding the Student's problematic behavior in the classroom setting. Specifically, according to the Student's English and Chinese teachers, the Student's behaviors were noted as talking during inappropriate times, making sarcastic remarks to staff, and generally being noncompliant. During the meeting, the Parent and Advocate were advised of an incident in which the Student became unruly during class instruction and jumped upon a classroom desk and began dancing on it when she became irritated with her teacher. The IEP team further agreed to reconvene when the school nurse would be available in order to review medical documentation regarding the Student's sickle cell anemia and to review several therapeutic interventions the staff at the School were going to use.
9. On or about October 4, 2012, the Parent received an email correspondence from one of the Student's teachers complaining about the Student's behavior in his physical education classroom. Specifically, the Teacher noted that the Student was being extremely disrespectful and noncompliant in the school setting. The Teacher also noted that several of the Student's other teachers he had spoken too expressed the same concerns about the Student.
10. In mid-October, another IEP team meeting was convened. Present at the meeting were the Parent, her counsel, the special education coordinator of the School, and the school psychologist. At this meeting, the participants discussed the Student's continued and ongoing problematic behavior; how and why the Student's IEP was reduced from a fulltime IEP to a

part-time IEP the previous year, without any updated evaluations, and that a new reevaluation should be performed to determine, among other things, whether or not the School was the appropriate placement for the Student and whether or not the Student's IEP and its supports were appropriate for the Student. The LEA committed to reevaluating the student with an updated comprehensive psychological assessment.

11. On October 24th, 2012, the Parent received an email communication from the Student's Biology & Environmental Sciences Teacher, advising the Parent of problems the Student was encountering in his class with respects to her behaviors.
12. On March 6th, 2013, after responding to a Letter of Invitation from the special education coordinator (SEC) at the School regarding the reconvening of the Student's annual IEP team meeting, an inquiry was made to the SEC seeking the status of the Student's requested comprehensive psychological reevaluation. On March 7, 2013, the SEC advised that she was unaware of the request to reevaluate the Student made at the October IEP Team meeting. The Request for a reevaluation of the Student was again made, specifically, a comprehensive psychological assessment.
13. On March 15, 2013, the IEP team met and the IEP was revised and continued to provide the Student with four hours per week of specialized instruction and one hour per week of behavioral support services. At that meeting, a discussion took place regarding the student's current IEP needs and social emotional functioning. The Parent, through her Advocate, again requested that the Student be reevaluated with a comprehensive psychological assessment as Respondent was now representing that the Student had made tremendous behavioral and academic strides in school. The Respondent did not respond to this request.

14. Following the IEP meeting the Parent's Advocate wrote to the SEC, on March 17, 2013, requesting that the Student's team be reconvened in order to hear from some of the Student's teachers, specifically Teacher A, who were not present at the IEP team meeting but expressed some serious concerns regarding the Student. Notably, Teacher A shared with the Parent's Advocate concerns that he had about the Student in terms of her behavior in the school setting and the community.
15. On April 9, 2013, the Student's Science Teacher prepared a memorandum to the Student's file. According to the Science Teacher, the Student has an aptitude towards higher level thinking and questioning, however, he continued to have concerns about the Student regarding her disregard for faculty direction, confrontational behavior with other students, refusing to comply with staff instructions, she will often say that she will do what she wants to do, lack of intrinsic motivation which results in attention seeking behaviors, and not completing class assignments in favor of other activities she would rather do.
16. On April 11, 2013, an IEP team meeting was held and a comprehensive psychological assessment was again requested by the Petitioner, discussed, and denied.⁵ The Parent and Advocate also heard from several of the Student's teachers who shared with the team, either in verbal or written format, concerns they had about the Student. According to Teacher A, the student was exhibiting "anger problems" in his class and that once she "loses it" it is difficult to get anything out of her academically. According to the Student's Chinese teacher, the Student is "out of control" and that the Student routinely evidences "severe" behavioral problems in her classroom and that some of the problems the Student evidenced in her class were fighting, verbal disrespect of peers, chasing students around the classroom and refusing to engage in meaningful instruction.

⁵ Undisputed fact discussed and agreed upon at prehearing. (*See*: Prehearing Order dated May 7, 2013.)

17. At the conclusion of the meeting the Parent was provided a copy of the Student's encounter service tracking logs for her behavioral support services. A review of the Student's encounter service tracking logs for her behavioral support services demonstrate that since the beginning of the school year through the week of May 27, 2013, the Student received 10.5 hours of 37 hours of behavioral support services she was entitled to (about 28%).⁶ The Student refused or was ill for 15 hours of her entitled services during that time (about 40%). The Respondent failed to provide, for reasons not related to the Student, 11.5 hours of behavioral support services (about 31%).
18. On May 3, 2013, following the filing of the Parent's administrative due process complaint notice on April 25, 2013, in which the Respondent refused to comply with the Parent's request for reevaluation, the Respondent issued a prior written notice regarding the Parent's request for reevaluations. The prior written notice erroneously states that the IEP Team agreed that no additional evaluation is warranted, even though the team was not in agreement and the Respondent was denying the Petitioner's request. It also erroneously states that the purpose of the reevaluation request was to make a change or determination about the Student's disability classification, when the request was to determine the content of the Student's IEP. The notice lacks an explanation for the refusal, only stating that "[t]here is no supporting data to support a change in disability classification at this time." (Obviously, the purpose of the request for reevaluation was to obtain data, and not for changing disability classification but rather to ensure accurate data existed upon which to formulate the IEP. *See*, R 2.)

⁶ This, and the following statements in this finding of fact, is based on the IHO's independent review of the service logs and the school calendar. (One hour per week for 37 weeks of school until that time.) The Respondent has not specifically refuted any of the claims made about the alleged failure to provide services and only disputes its obligation to make up some services.

19. The requested reevaluation has not been conducted.

V. 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 hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is a 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).
2. Students with disabilities must be reevaluated in accordance with 34 C.F.R. §§ 300.304 through 300.311 if the LEA determines a student's educational or related service needs, including improved academic achievement and functional performance, of the student warrant a reevaluation. 34 C.F.R. § 300.303(a)(1). A reevaluation must also occur if the student's teacher or parent requests it. 34 C.F.R. § 300.303(a)(2). A reevaluation may not occur more than once per year, unless the LEA and parent agree otherwise. 34 C.F.R. § 300.303(b)(1). A reevaluation must occur at least once every three years, unless the LEA and parent agree that a reevaluation is unnecessary. 34 C.F.R. § 300.303(b)(2). *See also*, D.C. Mun. Regs. 5-E3005.7. 34 C.F.R. § 300.304 requires, in relevant part:

(b) In conducting the evaluation, the public agency must—

- (1) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining—
 - (i) Whether the child is a child with a disability under § 300.8; and
 - (ii) The content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities);
- (2) Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
- (3) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
- (c) *Other evaluation procedures.* Each public agency must ensure that—
 - (1) Assessments and other evaluation materials used to assess a child under this part—
 - (i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;
 - (ii) Are provided and administered in the child’s native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;
 - (iii) Are used for the purposes for which the assessments or measures are valid and reliable;
 - (iv) Are administered by trained and knowledgeable personnel; and
 - (v) Are administered in accordance with any instructions provided by the producer of the assessments.
 - (2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
 - (3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child’s aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child’s impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).
 - (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; . . .
 - (6) In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
 - (7) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

See also D.C. Mun. Regs. 5-E3005.9.

3. When proposing or refusing an evaluation, the Respondent must provide a parent with prior

written notice that includes:

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (7) A description of other factors that are relevant to the agency’s proposal or refusal.

34 C.F.R. § 300.503, D.C. Mun. Regs. 5-E3024 & 5-E3025.

4. A comprehensive psychological assessment was conducted in November 2010. The IEP team agreed to conduct a reevaluation in October 2012, and the Respondent did not ensure this happened. When the Petitioner requested the reevaluation again in March 2013, the Respondent refused to conduct the reevaluation. No prior written notice was provided to the Petitioner, until May 2013, for the request. That notice did not accurately reflect the Respondent's refusal, but stated that the team agreed no reevaluation was necessary, when that was not the case. Given the Parent has the right to request a reevaluation, the last comprehensive psychological was conducted in November 2010, and the Respondent has provided no reasonable justification for refusing a reevaluation, the Petitioner's request is granted as ordered below.

5. 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. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1).

6. The IDEA “is violated when a school district deviates *materially* from a student's IEP.” Wilson v. D.C., 770 F.Supp. 2d 270, 275 (D.D.C. 2011), *citing*: Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) (“[A] *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.”); *accord* S.S. ex rel. Shank v. Howard Road Acad., 585 F.

Supp. 2d 56, 68 (D.D.C. 2008); Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007). “[T]he materiality standard *does not require that the child suffer demonstrable educational harm* in order to prevail” on a failure-to-implement claim. Wilson, at 275 (emphasis in original), *citing*: Van Duyn, 502 F.3d at 822 (emphasis added); *cf.* MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA). “Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *Id.*, *See, e.g.*, Van Duyn, 502 F.3d at 822; S.S., 585 F. Supp. 2d at 65–68; Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115–16 (D.D.C. 2008); Catalan, 478 F. Supp. 2d at 76.

7. The Respondent failed to provide approximately 11.5 hours, or about 31%, of the hours of behavioral support services the Student was entitled to from the beginning of the 2012-2013 school year until the end of May 2013. Nearly a third of the services the Student was entitled to is a material failure to implement the IEP and, thus, a denial of a FAPE. There is no legal basis to excuse the Respondent from providing services the Student is entitled to because of provider unavailability or due to school related events or interruptions. If the scheduled time for service in a given week cannot be utilized, the Respondent must find another time, or make up the missed services in a subsequent time period (e.g. weekly services missed made up the following week). The Student’s refusal of services need not be made up. However, this behavior must be addressed by the IEP team, including conducting a new FBA.

8. This hearing officer has broad discretion to 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 Petitioner has requested, and provided no evidence in support for, 15 hours of a specific therapy for the missed behavioral services. Because there was no requirement to show demonstrable harm as a result of the failure to implement the IEP, and because there is no evidence provided to demonstrate more than 11.5 hours of services are necessary to remedy the failure to provide 11.5 hours of service, and because the Student's behavioral issues are her primary educational need, the missed services (11.5 hours) will be made up over the course of the summer of 2013, prior to the start of the 2013-2014 school year.

VII. DECISION

The Respondent failed to reevaluate the Student in accordance with the Petitioner's request.

The Respondent denied the Student a FAPE when it failed to provide the Student with behavioral support services in conformity with her IEP during the 2012-2013 school year.

VIII. ORDER

1. The Respondent must conduct or provide for a comprehensive psychological assessment and a functional behavioral assessment of the Student, and convene the IEP team to review the assessments and revise the IEP as appropriate, no later than August 2, 2013.
2. The Respondent will provide the Student with 11.5 hours of psychological counseling prior to August 26, 2013, to address her behavioral needs as stated in her IEP. The counseling sessions will be performed at a reasonable location agreed upon by the Petitioner and

Respondent. The Petitioner shall be responsible for ensuring the Student attends scheduled sessions and any sessions missed by the Student will be forfeit.

IT IS SO ORDERED.

Date: June 24, 2013

A handwritten signature in black ink, consisting of a stylized initial 'S' followed by a long horizontal line.

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).