

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
May 31, 2013

Parent,¹ on behalf of,
Student,

Petitioner,

Date Issued: May 30, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a _____ year old female, who is a _____ grade student attending School A. The student's current individualized education program (IEP) lists Specific Learning Disability (SLD) as her primary disability and provides for her to receive five (5) hours per week of specialized instruction outside of the general education environment and thirty (30) minutes per week of consultative services.

On March 21, 2013, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to develop an appropriate IEP for the student by failing to provide a higher level of services and the disability classification of Other Health Impaired (OHI); failing to provide the student with transportation services; failing to provide the student with the specialized instruction and related services as required by her IEP; and failing to comprehensively evaluate the student in all areas of suspected disability. As relief for this alleged denial of FAPE, Petitioner requested revision of the student's IEP to include not less than ten (15) hours of specialized instruction outside of the general education environment and transportation as a related service; for the student's disability classification to be changed to OHI; an independent comprehensive psychological (including a social-emotional component) and functional behavioral assessments/evaluations; for DCPS to convene an IEP Team meeting within 10 days of the completed independent evaluation to develop an appropriate behavioral

¹ Personal identification information is provided in Appendix A.

intervention plan (BIP) and determine an appropriate location of services; and compensatory education in the form of tutoring in English and math.

On April 1, 2013, Respondent filed an untimely Response to the Complaint. In its Response, Respondent asserted that the student is progressing appropriately and has mastered some of her IEP goals.

On March 25, 2013, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on April 21, 2013, following the conclusion of the 30-day resolution period, and ends on June 4, 2013. The Hearing Officer Determination (HOD) is due on June 4, 2013.

On April 30, 2013, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on May 2, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order.

On May 17, 2013, Petitioner filed Disclosures including twenty-two (22) exhibits and six (6) witnesses.² On May 16, 2013, Respondent filed Disclosures including twenty (20) exhibits and seven (7) witnesses.

The due process hearing commenced at approximately 9:01 a.m. on May 24, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed. A Spanish language interpreter was present.

Petitioner's Exhibits 5-8, 12, and 14-22 were admitted without objection. Petitioner's Exhibits 1-4 were not admitted because they were duplicative of the record. Petitioner's Exhibit's 9-11 were admitted, over Respondent's objection, because they were found to be relevant. The Hearing Officer notes that Petitioner's Exhibits 9-11 were included as Respondent's Exhibits 1, 2 and 4 respectively. Petitioner's Exhibit 13 was admitted, over Respondent's objection, following the Parent's testimony. The Hearing Officer notes that Petitioner's Exhibit 13 was included as Respondent's Exhibit 15. Respondent's Exhibits 1-4 and 6-20 were admitted without objection. Petitioner's Exhibit 5 was admitted over Respondent's objection as potentially relevant. Respondent withdrew Respondent's Exhibit 15. Following the admission of Petitioner's Exhibit 18, Respondent requested that a rebuttal exhibit be admitted into evidence. Given that Petitioner's Exhibit 18 contained an electronic message trail without subsequent message, the Hearing Officer admitted Respondent's Exhibit 21 into evidence, over Petitioner's objection.

² A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

The hearing concluded at approximately 4:38 p.m. on May 24, 2013, following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to develop an appropriate IEP for the student on January 30, 2013, specifically by failing to include 15 hours per week of specialized instruction outside of the general education environment, and if so, whether this failure constitutes a denial of a FAPE?
2. Whether, on January 30, 2013, DCPS failed to appropriately classify the student as OHI, and if so, whether this failure constitutes a denial of a FAPE?
3. Whether, on January 30, 2013, DCPS failed to develop an appropriate IEP for the student, specifically by failing to include transportation as a related service, and if so, whether this failure constitutes a denial of a FAPE?
4. If DCPS did include transportation as a related service on the student's January 30, 2013 IEP, whether DCPS failed to implement the student's January 30, 2013 IEP by failing to provide transportation as a related service, and if so, whether this failure constitutes a denial of a FAPE?
5. Whether DCPS failed to implement the student's February 24, 2012 and January 30, 2013 IEPs, specifically by failing to provide the specialized instruction outside of the general education environment as prescribed on the IEPs during the 2012-2013 school year, and if so, whether this failure constitutes a denial of a FAPE?
6. Whether on or about February 24, 2012, DCPS failed to comprehensively evaluate the student by failing to assess the student's behaviors related to attention deficit hyperactivity disorder (ADHD), and if so, whether this failure constitutes a denial of a FAPE?

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. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student was reevaluated on April 15, 2010. (Petitioner's Exhibits 9 and 10; Respondent's Exhibits 1 and 2)

3. Prior to April 15, 2010, School A implemented strategies in reading and written expression for the student prior to her reevaluation and found that, with strategies, the student had consistent outcomes. (Petitioner's Exhibits 9 and 10; Respondent's Exhibits 1 and 2)
4. On April 15, 2010, the student's IEP Team reviewed the student's existing data and summarized the data reviewed to determine if the student continued to be a student with a disabilities and the content of the student's IEP. (Petitioner's Exhibits 9 and 10; Respondent's Exhibits 1 and 2)
5. The student's April 15, 2010 IEP Team determined that the student's greatest area of weakness was math and that she was not in need of special education services in the area of reading. (Petitioner's Exhibits 9 and 10; Respondent's Exhibits 1 and 2; Psychologist's Testimony)
6. The student's April 15, 2010 IEP Team acknowledged that the student's diagnosis of ADHD could impact her receptive language skills and recommended that School A continue to use the intervention of repetition of oral language. (Petitioner's Exhibits 9 and 10; Respondent's Exhibits 1 and 2)
7. In July 2010, a "comprehensive evaluation" of the student was conducted. (Petitioner's Exhibit 11; Respondent's Exhibit 4; Psychologist's Testimony; School Psychologist's Testimony)
8. The evaluator of the student's July 2010 Comprehensive Evaluation was aware that the student was diagnosed with ADHD and noted that the student was highly distractible during testing. (Petitioner's Exhibit 11; Respondent's Exhibit 4)
9. The July 2010 evaluator conducted the BASC-2 to assess the student's behavior and feelings across variant settings and with different individuals. (Petitioner's Exhibit 11; Respondent's Exhibit 4)
10. On the BASC-2, in July 2010, the student's mother indicated that the student exhibited clinically significant problems with attention. (Petitioner's Exhibit 11; Respondent's Exhibit 4)
11. On the BASC-2, in July 2010, the student self-reported an "at-risk" level for attention. (Petitioner's Exhibit 11; Respondent's Exhibit 4)
12. In the July 2010 Comprehensive Evaluation's Summary, the evaluator concluded that the student "has a significant history of problems with attention, impulse control and overall classroom behavior. She has previously been diagnosed with ADHD and the results of this evaluation support this diagnosis." (Petitioner's Exhibit 11; Respondent's Exhibit 4; Psychologist's Testimony)
13. The July 2010 evaluator recommended that the student receive classroom modifications such as extended time for tests, preferential seating near the teacher's desk and shortened assignments. (Petitioner's Exhibit 11; Respondent's Exhibit 4)
14. The July 2010 evaluator also recommended a small class size for the student. (Petitioner's Exhibit 11; Respondent's Exhibit 4; Psychologist's Testimony)
15. The student qualifies as a student with a SLD in math based on the student's discrepancy between her achievement and measured ability in math. (Petitioner's Exhibits 9, 10, 11, 12, 14 and 15; Respondent's Exhibits 1, 2, 4, 9, 11 and 12; School Psychologist's Testimony; Special Education Teacher's Testimony)
16. The student's primary area of weakness is math. (Petitioner's Exhibits 9, 10, 11, 12, 14 and 15; Respondent's Exhibits 1, 2, 4, 9, 11 and 12; Psychologist's Testimony;

- Advocate's Testimony; Student's Testimony; Parent's Testimony; School Psychologist's Testimony; Special Education Teacher's Testimony; Principal's Testimony)
17. The student functions in the low average range in math. (Petitioner's Exhibits 10 and 11; Respondent's Exhibits 2 and 4; School Psychologist's Testimony)
 18. The student is functioning commensurate with same-aged peers in reading and written language. (Petitioner's Exhibits 10 and 11; Respondent's Exhibits 2 and 4; School Psychologist's Testimony; Special Education Teacher's Testimony)
 19. The student is an avid reader and note-taker. (Student's Testimony; Special Education Teacher's Testimony; Principal's Testimony)
 20. The student is diagnosed with ADHD. (Petitioner's Exhibits 5, 6, 9, 10, 11 and 13; Respondent's Exhibits 1, 2, 4 and 6; Psychologist's Testimony; Advocate's Testimony; Parent's Testimony)
 21. The student's ADHD impacts her processing and retention of material. (Petitioner's Exhibits 5, 6, 10 and 11; Respondent's Exhibits 2, 4 and 6; Psychologist's Testimony; Parent's Testimony)
 22. The student takes medication to manage her ADHD symptoms. (Petitioner's Exhibits 11 and 13; Respondent's Exhibit 4; Parent's Testimony)
 23. When the student loses focus, she is able to independently utilize strategies to refocus. (Student's Testimony)
 24. The student responds positively and appropriately to redirection. (School Psychologist's Testimony; Special Education Teacher's Testimony; Principal's Testimony)
 25. The student is friendly, interacts appropriately with same-aged peers, is well liked by her classmates and participates with her regular education peers in school groups and church. (Principal's Testimony)
 26. The student's February 24, 2012 IEP prescribes six hours per week of specialized instruction outside of the general education environment. (Petitioner's Exhibit 5)
 27. The student's February 24, 2012 IEP includes the classroom accommodations of repetition of directions, simplification of oral directions, calculators, preferential seating, location with minimal distractions, small group testing, flexible scheduling, breaks between subtests, extended time on subtests and breaks during subtests. (Petitioner's Exhibit 5)
 28. For the first quarter of the 2012-2013 school year, the student received the grade letter B- in World History, the grade letter D in Pre-Algebra, the grade letter C in Science, the grade letter B+ in English, the grade letter B in Spanish and the grade letter B in Health and Physical Education. (Petitioner's Exhibit 17)
 29. Within the classroom, the student exhibits ADHD type behaviors such as distractibility and lack of focus however the student does not exhibit other inappropriate behaviors that would impact her learning or the learning of others. (Petitioner's Exhibits 10, 11 and 17; Respondent's Exhibits 2 and 4; Advocate's Testimony; School Psychologist's Testimony; Principal's Testimony)
 30. During the first quarter of the 2012-2013 school year, the student participated in the general education environment for all subject areas. (Petitioner's Exhibit 5; Respondent's Exhibit 8; Student's Testimony; Special Education Teacher's Testimony; Principal's Testimony)

31. During the second quarter of the 2012-2013 school year, the student received the grade letter D in World History, the grade letter F in Pre-Algebra, the grade letter D in Science, the grade letter F in English, the grade letter A in Spanish and the grade letter C in Health and Physical Education. (Petitioner's Exhibit 17)
32. The student's second quarter grades were impacted by the student's tardiness and the student's failure to submit assignments. (Petitioner's Exhibits 7, 12 and 17; Respondent's Exhibits 9 and 13; Parent's Testimony; Special Education Teacher's Testimony; Principal's Testimony)
33. During the second quarter of the 2012-2013 school year, the student participated in the general education environment for all subject areas. (Petitioner's Exhibit 6; Respondent's Exhibits 6, 8 and 17; Student's Testimony; Special Education Teacher's Testimony; Principal's Testimony)
34. During the second quarter, the student had extensive tardiness in World History, needed more study and did not complete class assignments in Pre-Algebra, had good participation and poor test scores in Science, needed more study in English, and was a pleasure to have in class in Spanish. (Petitioner's Exhibit 17)
35. Prior to the January 30, 2013 IEP Team meeting, the student had been tardy to school on 20 school days during the 2012-2013 school year. (Petitioner's Exhibit 12; Respondent's Exhibit 9; Special Education Teacher's Testimony; Principal's Testimony)
36. The student's January 30, 2013 IEP Team was aware of the student's diagnosis of ADHD. (Petitioner's Exhibit 6; Respondent's Exhibit 6)
37. The student's January 30, 2013 IEP Team specifically discussed whether the student should be classified as SLD or OHI. (School Psychologist's Testimony)
38. The student's January 30, 2013 IEP Team discussed that the student's ADHD behaviors would be suppressed because the student was taking medication to address the ADHD behaviors. (School Psychologist's Testimony)
39. The student's January 30, 2013 IEP Team acknowledged the student's improvement in math during the prior school year. (Petitioner's Exhibits 6 and 7; Respondent's Exhibits 6 and 13; Special Education Teacher's Testimony; Principal's Testimony)
40. The student's January 30, 2013 IEP Team discussed the student's tendency to fail to complete homework and the student's tardiness during the 2012-2013 school year. (Petitioner's Exhibit 7; Respondent's Exhibit 13; Parent's Testimony; Principal's Testimony)
41. During the student's January 30, 2013 IEP Team meeting, the mother agreed that the student needed to be in school and on time. (Principal's Testimony)
42. During the January 30, 2013 IEP Team meeting, School A personnel suggested strategies for the student to arrive to school on time and to prepare for class. (Principal's Testimony)
43. The student's January 30, 2013 IEP Team discussed the student's distractibility and lack of focus. (Special Education Teacher's Testimony)
44. The student January 30, 2013 IEP Team was aware that the student was taking medication to minimize her ADHD symptoms. (School Psychologist's Testimony)
45. The student's January 30, 2013 IEP Team discussed including strategies for attention and focusing on the student's IEP. (School Psychologist's Testimony; Principal's Testimony)

46. The student's January 30, 2013 IEP identifies SLD as the student's primary disability category. (Stipulated Fact)
47. The student's January 30, 2013 IEP Team included academic goals for math on the student's IEP. (Petitioner's Exhibit 6; Respondent's Exhibits 6 and 17; Special Education Teacher's Testimony)
48. The student's January 30, 2013 IEP Team prescribed five hours per week of specialized instruction in math and 30 minutes per week of consultation services for the special education teacher to work with the general education teacher related to the student's math skills. (Petitioner's Exhibit 6; Respondent's Exhibit 6)
49. The student's January 30, 2013 IEP included the classroom accommodations of repetition of directions, simplification of oral directions, calculators, preferential seating, location with minimal distractions, small group testing, flexible scheduling, breaks between subtests, extended time on subtests and breaks during subtests. (Petitioner's Exhibit 6; Respondent's Exhibit 6)
50. The January 30, 2013 IEP Team agreed on the student's annual goals. (Respondent's Exhibit 6; Parent's Testimony)
51. The student does not have physical or behavioral concerns which would necessitate transportation as a related service. (Respondent's Exhibit 18; Parent's Testimony; Principal's Testimony)
52. The student's January 30, 2013 IEP does not contain transportation as a related service. (Petitioner's Exhibit 6; Respondent's Exhibit 6)
53. After the January 30, 2013 IEP Team meeting, School A implemented strategies such as enrolling the student in a before-school program and putting a checklist into the student's locker. (Principal's Testimony)
54. During the 2012-2013 school year, the student's schedule included social studies for first period, math for second period, science for third period, lunch, specials for fourth period (Spanish and physical education for the first semester and Spanish and art for the second semester) and English as the last period of the day. (Petitioner's Exhibit 17; Student's Testimony; Principal's Testimony)
55. During the 2012-2013 school year, the student has been engaged in and has participated in her general education classes. (Petitioner's Exhibit 17; Advocate's Testimony; School Psychologist's Testimony; Special Education Teacher's Testimony; Principal's Testimony)
56. During the 2012-2013 school year, within her general education classes, the student receives individualized attention. (Advocate's Testimony; School Psychologist's Testimony; Principal's Testimony)
57. During the 2012-2013 school year, the student has been removed from her World History class to receive specialized instruction in math. (Student's Testimony; Special Education Teacher's Testimony; Principal's Testimony)
58. The student's third quarter grades and on-time attendance have improved however the student continues to fail to submit homework assignments. (Principal's Testimony)
59. The student's 2012-2013 general education class at School A totals 16 students. (Special Education Teacher's Testimony)
60. School A is not the student's neighborhood school. (Parent's Testimony)
61. The student is attending School A at the choice of the parent and not for special education purposes. (Parent's Testimony; Principal's Testimony)

62. The student is able to travel to and from School A via public transportation. (Parent's Testimony)
63. The student is able to arrive to school on time when she wakes up on time. (Student's Testimony)
64. The majority of the parent's communication with School A is through the special education teacher. (Parent's Testimony)

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:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). 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 prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See 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); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

Issues #1

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). The program must be implemented in the LRE. 20 U.S.C. § 1412(a)(5); 34 CFR §§300.114(a)(2), 300.116(a)(2). For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

Designing an appropriate IEP is necessary but not sufficient. The public agency must also implement the IEP, which includes offering placement that can fulfill the requirements set forth in the IEP. *See O.O. v. District of Columbia*, 573 F. Supp. 2d 41 (D.D.C. 2008). Placement decisions must be determined individually based on each child's abilities, unique needs and IEP, not solely on factors such as category of disability, severity of disability,

availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. *See Analysis and Comments to the Regulations*, 71 Federal Register 46540:46588 (14 August 2006); *see also Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (clarifying that the LEA does not have a “main goal” which it must achieve when making a placement decision and that what is pertinent in making the placement decision will vary based upon the child’s unique and individual needs.)

“Educational placement,” as used in IDEA, means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) (*citing AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314. For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. *Id.*

For the first quarter of the 2012-2013 school year, the student received the grade letter B- in World History, the grade letter D in Pre-Algebra, the grade letter C in Science, the grade letter B+ in English, the grade letter B in Spanish and the grade letter B in Health and Physical Education. During the second quarter of the 2012-2013 school year, the student received the grade letter D in World History, the grade letter F in Pre-Algebra, the grade letter D in Science, the grade letter F in English, the grade letter A in Spanish and the grade letter C in Health and Physical Education. For the subjects for which grades are reported, the student was assigned to and participated in the general education environment. The student’s report card indicates that during the second quarter, the student had extensive tardiness in World History, needed more study and did not complete class assignments in Pre-Algebra, had good participation and poor test scores in Science, needed more study in English, and was a pleasure to have in class in Spanish. The Principal testified that the student’s second quarter grades were impacted by the student’s attendance and the student’s failure to submit assignments.

The Psychologist, the Advocate, the Student, the Mother, the School Psychologist, the Special Education Teacher and the Principal all testified that the student’s primary area of weakness is math. The student’s educational testing indicated that the student is in the low average range in math. The student’s educational testing and the testimony of witnesses indicated that the student is functioning commensurate with same-aged peers in reading and written language. The Advocate’s and School Psychologist’s observation of the student revealed that the student was engaged in and enjoyed science. The Student testified that her favorite subject is English and that she is “doing good” in English. The student also testified that, at times, she does not know the required material in World History because she is removed from World History to receive math instruction from the special education teacher. The student is an avid reader and note-taker.

The student's January 30, 2013 IEP Team was aware of the student's diagnosis of ADHD. The student's January 30, 2013 IEP Team also acknowledged the student's improvement in math during the prior school year, the student's tendency to fail to complete homework and the student's tardiness during the 2012-2013 school year. Likewise, based on the student's first quarter grades, the January 30, 2013 IEP Team was aware that, with the exception of math, the student was capable of successfully completing grade level work in the general education environment.

The student's January 30, 2013 IEP Team prescribed five hours per week of specialized instruction in math and 30 minutes per week of consultation services for the special education teacher to work with the general education teacher related to the student's math skills. The January 30, 2013 IEP also included the classroom accommodations of repetition of directions, simplification of oral directions, calculators, preferential seating, location with minimal distractions, small group testing, flexible scheduling, breaks between subtests, extended time on subtests and breaks during subtests. The January 30, 2013 IEP Team agreed on the student's annual goals. No compelling evidence was presented which suggested that the student needed different or additional goals.

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). The IDEA creates a strong preference in favor of "mainstreaming" or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999). Furthermore, children with disabilities are only to be removed from regular education classes "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR §300.114(a)(2).

The student is friendly, interacts appropriately with same-aged peers, is well liked by her classmates and participates with her regular education peers in school groups and church. While the student exhibits ADHD type behaviors such as distractibility and lack of focus, the student does not exhibit other inappropriate behaviors that would impact her learning or the learning of others. During the first quarter of the 2012-2013 school year, the student received the grade letter "B" in her general education World History, English, Spanish and Health/Physical Education classes, a grade letter "C" in her general education Science class and the grade letter "D" in her Pre-Algebra class. While the student's grades decreased during the second quarter of the 2012-2013 school year, the decrease in grades was attributed to the student's failure to complete homework and tardiness.

The student's January 30, 2013 IEP Team discussed the student's decline in grades. The mother agreed that the student needed to be in school and on time and School A personnel suggested strategies for the student to arrive to school on time and to prepare for class. The IEP Team also discussed the student's distractibility and lack of focus and the fact that the student was taking medication to minimize her ADHD symptoms. The Principal testified that the student's third quarter grades and on-time attendance have improved following strategies being implemented yet the student continues to fail to turn in homework assignments.

While the Hearing Officer questions the principal's decision to remove the student from World History to receive specialized instruction in math rather than removing the student from general education math to receive specialized instruction in math, the Hearing Officer agrees with the testimony of the Special Education Teacher and the Principal that 15 hours of specialized instruction outside of the general education environment is far too restrictive for the student. The student's ADHD impacts her processing and retention of material, which explains her difficulty with completing homework assignments, however has not affected the student's ability to function within the general education setting at school.

While the Petitioner specifically alleged that DCPS failed to develop an appropriate IEP for the student on January 30, 2013 by failing to provide 15 hours of specialized instruction outside of the general education environment for the student rather than five hours of specialized instruction outside of the general education environment for the student, the Petitioner's fundamental argument was that the student's January 30, 2013 IEP failed to include the necessary supports to address the student's ADHD behaviors across all academic areas.

The student's IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (quoting *Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)).

On January 30, 2013, School A was aware of the facts that the student was not submitting assignments and had difficulty taking required materials to class. At this point, School A implemented strategies such as enrolling the student in a before-school program and putting a checklist into the student's locker however did not address the student's ADHD behaviors within the classroom. For example, the checklist in the student's locker may assist the student in remembering to take her homework to class but does little to assist the student in remembering to submit the homework once she gets into the classroom. Likewise, the student's January 30, 2013 IEP Team included accommodations to address the student's ADHD behaviors within the classroom but failed to include consultative services to ensure that the classroom accommodations are appropriately implemented in all of the student's classes.

The Hearing Officer concludes that five hours of specialized instruction outside of the general education environment comported with the student's IEP, was reasonably calculated to provide the student with some educational benefit in the least restrictive environment however failed to meet the student's unique needs related to her ADHD behaviors across all subject areas. The nature and severity of the student's disability is not such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily however the student's January 30, 2013 IEP does not include the necessary support services for the student to benefit from instruction in the regular education environment. Specifically, the student's January 30, 2013 IEP lacks the appropriate level of consultative services for the special education teacher to develop and implement strategies to address the student's ADHD behaviors and to ensure the implementation of classroom accommodations with regular education teachers across all academic areas.

The Petitioner met its burden with respect to Issue #1.

Issue #2

The IDEA and its implementing regulations define “child with a disability” to mean “a child evaluated in accordance with §§300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.” 34 CFR §300.8(a). The fact that a child may have a qualifying disability does not necessarily make him “a child with a disability” eligible for special education services under the IDEA. *See Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 383 (5th Cir. 2007). The child must also need special education and related services. *Id.*

Specific learning disability means “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” 34 CFR §300.8(c)(10); *see also* 20 U.S.C. §1401; *Nguyen v. District of Columbia*, 681 F. Supp. 2d 49, 52 (D.D.C. 2010). IDEA regulations further provide that an MDT Team “may determine” that a child has a SLD as defined in §300.8(c)(10) if three requirements are met. First, the child “does not achieve adequately for the child’s age or to meet State-approved grade-level standards” in one or more basic academic skill areas (e.g. written expression, reading comprehension or mathematics calculation). 34 CFR §300.309(a)(1). Second, the child “does not make sufficient progress to meet age or State-approved” standards “when using a process based in the child’s response to scientific, research-based intervention” or the child “exhibits a pattern of strengths and weaknesses in performance, achievement, or both” relative to relevant areas. 34 CFR §300.309(a)(2). Third, the MDT Team determines its findings are not the result of factors such as a visual or hearing disability, cultural or environmental factors. 34 CFR §300.309(c)(3).

The District of Columbia Office of the State Superintendent (OSSE) has adopted criteria for determining whether a child has a SLD by implementing the rules in 5 DCMR §E-3006. These rules provide that the “IEP team shall determine that a child has a SLD if: a disorder is manifested in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to learn, think, speak, read, write, or do mathematical calculations.” 5 DCMR §E-3006.4(a).

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) Adversely affects a child’s educational performance. 34 CFR §300.8(c)(8).

The student has a discrepancy between her achievement and measured ability in math. It is uncontested that the student has a specific learning disability in the area of math. It is also uncontested that the student has been diagnosed with ADHD. The Petitioner alleged that DCPS denied the student a FAPE by failing to appropriately classify the student as OHI rather than SLD.

The IDEA does not give a substantive right to a particular disability classification. Nothing in the IDEA requires that children be classified by their disability so long as each child who has a disability that is listed in 34 CFR §300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability. 34 CFR §300.111(d). The student does have a right to an IEP which addresses her unique needs, regardless of her disability classification. *See* 20 U.S.C. §1414(d); 34 CFR §§300.320-300.324.

The Petitioner argued that since the student was not classified as a student with OHI on January 30, 2013, the student was harmed in that her IEP did not address her ADHD which would carry from class to class. The Hearing Officer is not persuaded by this argument. First, the student's January 30, 2013 IEP Team specifically discussed whether the student should be classified as SLD or OHI. The IEP Team determined that the student's behaviors were suppressed because the student was taking medication to address her ADHD behaviors and that the IEP Team could include strategies for attention and focusing on the student's IEP.

Next, the student's January 30, 2013 IEP Team included academic goals for math and classroom accommodations to address the student's ADHD behaviors on her IEP. The classroom accommodations listed on the student's IEP are to be implemented in all of the student's classes, not solely her math class. Additionally, the student testified that although she loses focus at times, she is able to independently utilize strategies to refocus. The School Psychologist, the Special Education Teacher and the Principal testified that the student responds positively and appropriately to redirection. Finally, it was uncontested that although the student frequently fails to submit homework assignments, the student is able to function well within her general education classes, with the exception of math. Although the Mother testified that the student struggles with homework and the record contains evidence that the student's grades dropped from the first quarter to the second quarter, the record also contains evidence that the student's grades increased from the second quarter to the third quarter and that strategies are effective in assisting the student in managing ADHD symptoms.

Although the Hearing Officer concluded in Issue #1 that DCPS did not appropriately address the supports needed by the student for her ADHD behaviors in her January 30, 2013 IEP, the record contains extensive evidence that the student's primary area of concern is mathematics. It is uncontested that the student is diagnosed with ADHD and that a classification of OHI could be considered however the Hearing Officer concludes that SLD is an appropriate primary disability classification for the student. DCPS did not deny the student a FAPE by failing to classify the student as OHI on January 30, 2013.

The Petitioner failed to meet its burden with respect to Issue #2.

Issue #3

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. *See* 34 CFR §300.34(a); *see also* 5 DCMR §E-3001.1. Transportation includes travel to and from school and between schools; travel in and around school buildings; and specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability. 34 CFR §300.34(c)(16).

Transportation to and from school is a related service that must be included in a student's IEP if the service is required to help the student benefit from special education. A school district must transport a student with a disability to and from school when the student's disability prevents the student from using conventional bus transportation. *See, e.g., Norton Pub. Sch. Dist.,* 21 IDELR 974 (SEA VT 1994).

The Petitioner requested transportation as a related service because, as of January 30, 2013, the student was tardy to school 20 times during the 2012-2013 school year. The student does not have physical or behavioral concerns which would necessitate transportation as a related service. While the student is not attending her neighborhood school, the student is attending School A by the choice of the parent and not for special education purposes. The student is able to travel to and from School A via public transportation.

At the January 30, 2013 IEP Team meeting, DCPS discussed the implications of the student's tardiness with the parent, offered the parent support with getting the student to school on time, enrolled the student in before-school care where she is able to arrive early to school and eat breakfast and implemented strategies for the student to get organized before school. The student testified that she was able to get to school on time when she began to wake up earlier in the morning.

If a child with a disability has no need for special arrangements or accommodations in connection with transportation, transportation is not a related service. *See Appendix A to 34 Part 300, Question 33*, page 113 (July 1, 1999). Here, the student does not have a need for special arrangement or accommodations in connection with transportation. The Hearing Officer concludes that DCPS did not fail to develop an appropriate IEP for the student on January 30, 2013 by failing to include transportation as a related service on the student's IEP.

The Petitioner failed to meet its burden with respect to Issue #3.

Issue #4

The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. A material failure to implement a student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

The Petitioner alleged that if DCPS did include transportation as a related service on the student's January 30, 2013 IEP, that DCPS failed to implement the student's January 30, 2013 IEP by failing to provide transportation as a related service to the student. The student's January 30, 2013 IEP does not include transportation as a related service for the student. As discussed in Issue #3, DCPS was not obligated to provide transportation as a related service for the student on January 30, 2013. Therefore, DCPS did not fail to provide the student a FAPE by failing to provide transportation as a related service to the student.

The Petitioner failed to meet its burden with respect to Issue #4.

Issue #5

The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. A material failure to implement a student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

In failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. *E.g., S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), the Fifth Circuit held that "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant provisions of the IEP." *Id.* at 349; *see also 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."). "[C]ourts applying [this] 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." *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.*, 200 F.3d at 349, n. 2. Failure to provide the services must deprive the student of educational benefit. *See Savoy v. District of Columbia*, 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012).

In the present matter, the Petitioner alleged that DCPS failed to implement the student's February 24, 2012 and January 30, 2013 IEPs during the 2012-2013 school year, specifically by failing to provide the specialized instruction outside of the general education environment as prescribed by the student's IEPs. The student's February 24, 2012 IEP prescribes six hours per week of specialized instruction outside of the general education environment. The student's January 30, 2013 IEP prescribes five hours per week of specialized instruction outside of the general education environment.

During the 2012-2013 school year, the student's schedule includes social studies for first period, math for second period, science for third period, lunch, specials for fourth period

(Spanish and physical education for the first semester and Spanish and art for the second semester) and English as the last period of the day. The record is unclear as to whether the student has both specials every day or if the specials alternate.

The Student testified that the special education teacher works with her, in math, outside of the general education environment during her first period class. The Mother testified that the majority of her communication with School A is with the special education teacher. The School Psychologist testified that the special education teacher works with the student. The Special Education Teacher testified that he works with the student, outside of the general education environment, on a daily basis. The Principal testified that the student is removed from her first period class to receive specialized instruction outside of the general education environment.

While the record does not contain adequate evidence of the amount of time per week the student has received specialized instruction outside of the general education environment during the 2012-2013 school year, the record is clear that the student has received specialized instruction outside of the general education environment during her first period class during the 2012-2013 school year. Given the student's schedule, it is possible that the student did not receive six hours per week from the beginning of the school year until January 30, 2013 if the student's schedule includes both special classes every day. It is also possible, given the Special Education Teacher's testimony that the student is not removed for the entirety of her first period class every day, that the student has not received five hours per week of specialized instruction outside of the general education environment since January 30, 2013. However, the Petitioner did not prove by a preponderance of the evidence that the student did not receive six hours per week of specialized instruction outside of the general education environment from the beginning of the school year through January 30, 2013 or five hours per week of specialized instruction outside of the general education environment from January 31, 2013 through the date of the due process hearing.

The Petitioner failed to meet its burden with respect to Issue #5.

Issue #6

The Petitioner alleged that, on or about February 24, 2012, DCPS failed to provide the student a FAPE by failing to comprehensively evaluate the student, specifically by failing to assess the student's behaviors related to ADHD.

Evaluation is defined as, "procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 CFR §300.15. In conducting an evaluation, an LEA must "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 whether the child is a child with a disability" and the content of the child's IEP. 34 CFR §300.304(b). IDEA regulations at 34 CFR §300.304(c)(4) require a student to be "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."

The student was reevaluated on April 15, 2010.³ On that date, the student's IEP Team reviewed the student's existing data and summarized the data reviewed to determine if the student continued to be a student with a disabilities and the content of the student's IEP. The team noted that the student's greatest area of weakness was math and that she was not in need of special education services in the area of reading. School A implemented strategies in reading and written expression for the student prior to the reevaluation and found that, with strategies, the student had consistent outcomes. The team also acknowledged that the student's diagnosis of ADHD could impact her receptive language skills and recommended that School A continue to use the intervention of repetition of oral language.

In July 2010, a "comprehensive evaluation" of the student was conducted. The evaluator of the student's July 2010 Comprehensive Evaluation was aware that the student was diagnosed with ADHD and noted that the student was highly distractible during testing. The evaluator conducted the BASC-2 to assess the student's behavior and feelings across variant settings and with different individuals. On the BASC-2, the student's mother indicated that the student exhibited clinically significant problems with attention. Also on the BASC-2, the student self-reported an "at-risk" level for attention. In the evaluation's Summary, the evaluator concluded that the student "has a significant history of problems with attention, impulse control and overall classroom behavior. She has previously been diagnosed with ADHD and the results of this evaluation support this diagnosis." The evaluator recommended that the student receive classroom modifications such as extended time for tests, preferential seating near the teacher's desk and shortened assignments. The evaluator also recommended a small class size for the student.

The student's February 24, 2012 IEP includes the classroom accommodations of repetition of directions, simplification of oral directions, calculators, preferential seating, location with minimal distractions, small group testing, flexible scheduling, breaks between subtests, extended time on subtests and breaks during subtests. The Petitioner presented no evidence of the student's class size during the 2011-2012 school year however the student's 2012-2013 general education class includes 16 students. Within her general education classes, the student receives individualized attention.

The record indicates that on February 24, 2012, the student had an evaluation conducted less than two years prior to the IEP Team meeting which included assessments and recommendations related to ADHD. The student's February 24, 2012 IEP Team considered the student's diagnosis of ADHD when developing the student's IEP and included accommodations on the student's IEP which aligned with the evaluator's recommendations and addressed the student's attention deficits and distractibility. There was no evidence presented which suggested that the student's February 24, 2012 IEP was inappropriate for the student.

The Hearing Officer concludes that the student's February 24, 2012 IEP Team considered the evaluation and assessments of the student, conducted less than two years prior to the IEP Team meeting, which addressed all areas of the student's suspected disability including ADHD.

³ The student was also reevaluated on January 30, 2013 however January 30, 2013 is subsequent to the date of the alleged FAPE denial in this issue.

Therefore, DCPS did not deny the student a FAPE by failing to comprehensively evaluate the student.

The Petitioner failed to meet its burden with respect to Issue #6.

Requested Relief

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* “. . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003). In this case, the denial of FAPE is DCPS’ failure to include appropriate supports on the student’s January 30, 2013 IEP to address her ADHD behaviors in all subject areas.

As relief, the Petitioner requested compensatory education for two hours per week for 30 weeks in reading, two hours per week for 30 weeks in math, two hours per week for 30 weeks in written expression and 30 hours in behavioral support services.

When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. See also *Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010). However, even if a denial of a FAPE is shown, “[i]t may be conceivable that no compensatory education is required for the denial of a [FAPE]...either because it would not help or because [the student] has flourished in his current placement. *Phillips v. District of Columbia*, 55 IDELR 101 (D.D.C. 2010) citing *Thomas v. District of Columbia*, 407 F. Supp. 2d 102, 44 IDELR 246 (D.D.C. 2005). See also *Gill v. District of Columbia*, 55 IDELR 191 (D.D.C. 2010) (“The court agrees that there may be situations where a student who was denied a FAPE may not be entitled to an award of compensatory education, especially if the services requested, for whatever reason, would not compensate the student for the denial of a FAPE.”)

Here, the Petitioner’s request for compensatory education goes well beyond the identified denial of FAPE. Had DCPS included the required consultative services on the student’s January 30, 2013 IEP, the student would have likely developed successful strategies to turn in homework and retain information to utilize while completing homework. However, the record indicates that School A implemented strategies, in addition to those included on the student’s IEP, which assisted the student in progressing in her current placement. Therefore, the Hearing Officer concludes that compensatory education is not warranted in this case because it would not compensate for the denial of FAPE related to DCPS failure to include consultative services on the student’s January 30, 2013 IEP. The appropriate remedy is for DCPS to either reconvene the student’s IEP Team or amend the student’s IEP to include an additional 50 minutes per week of consultation services for the student. The Hearing Officer also urges School A to consider

removing the student from regular education math to receive specialized instruction for math rather than removing the student from another subject area to receive specialized instruction for math.

ORDER

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

1. Issues #2, #3, #4, #5 and #6 are **dismissed** with prejudice.
2. Within 10 school days of the date of this Order, DCPS shall revise the student's IEP to provide an additional 50 minutes per week of consultation services to develop and implement strategies to address the student's ADHD behaviors within all classes and to ensure the implementation of classroom accommodations in all of the student's classes.
3. All other relief sought by Petitioner herein is **denied**.

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).

Date: May 30, 2013


Hearing Officer