

**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
September 03, 2013

Parent,¹ on behalf of,
Student,*

Petitioner,

Date Issued: September 1, 2013

Hearing Officer: Melanie Byrd Chisholm

v.

Case No:

District of Columbia Public Schools,

Respondent.

Hearing Dates: August 6 & 20, 2013

Rooms: 2004; 2006

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a five (5) year old _____, who is attended School A for the 2012-2013 school year. On May 14, 2013, the student was identified as a student with disabilities and individualized education program (IEP), created after _____ eligibility determination, lists Autism Spectrum Disorder (Autism) as _____ primary disability and provides for him to receive five (5) hours per week of specialized instruction within the general education environment, two (2) hours per month of speech-language pathology within the general education environment, thirty (30) minutes per month of occupational therapy (OT) consultation services and thirty (30) minutes per month of specialized instruction consultation services.

On June 4, 2013, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to find the student eligible for special education and related services in September 2012 and failing to propose an appropriate program and placement for the student for the 2012-2013 school year. As relief for this alleged denial of FAPE, Petitioner requested that DCPS reimburse the parents for Applied Behavior Analysis (ABA) therapy services provided to the student for the 2012-2013 school year.

On June 14, 2013, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that: DCPS held an eligibility meeting for the student on

October 2, 2012, at which time all existing evaluations for the student were reviewed; on October 2, 2012 it was determined that the student was not eligible for special education and related services because the student did not meet the eligibility criteria reviewed; based on the data available on October 2, 2012, the determination was appropriate; the parent signed consent for the student to be evaluated on January 9, 2013; after obtaining additional data, DCPS found the student eligible for special education and related services on May 14, 2013; the parent refused DCPS' offer of FAPE; even if the parent is able to prove a denial of a FAPE, the period of the denial would be November 24, 2012 through May 14, 2013; ABA therapy is not specialized instruction; the student does not require ABA; the student does not require behaviors to be shaped through ABA; the student's difficulties with peer interactions can be addressed through accommodations, modifications, counseling and behavior supports; the Petitioner failed to comply with the requirements of 20 USC 1412(a)(10)(C) and its implementing regulations at 34 CFR 300.148; the student was offered an appropriate IEP; and the parents have indicated their desire for the student to remain in the private school.

On June 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 July 5, 2013, following the conclusion of the 30-day resolution period, and originally ended on August 18, 2013.

On July 17, 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 July 18, 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 July 30, 2013, the Petitioner filed an Unopposed Motion to Continue based on the unavailability of one of Petitioner's and one of Respondent's witnesses during the dates discussed during the prehearing conference. On August 2, 2013, the Chief Hearing Officer issued an Interim Order on Continuance Motion, granting Petitioner's request for the 45-day timeline to be extended by 14 calendar days. Therefore, the Hearing Officer Determination (HOD) is due on September 1, 2013.

On July 30, 2013, Petitioner filed Disclosures including thirty-nine (39) exhibits and four (4) witnesses.² On July 30, 2013, Respondent filed Disclosures including nine (9) exhibits and eight (8) witnesses.

The due process hearing commenced at approximately 9:09 a.m.³ on August 6, 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.

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

³ At 9:00 a.m., the scheduled time to begin the hearing, the Petitioner's attorney, the father, the Respondent's attorney and the Hearing Officer were present. The hearing began after the mother arrived.

Petitioner's Exhibits 1-39 were admitted without objection. Respondent's Exhibits 1-7 and 9 were admitted without objection. Respondent's Exhibit 8 was not admitted because there was no evidence presented which suggested that the journal article was used by or given to the student's IEP Team. Additionally, the journal does not provide the full range of interventions available for student with Autism.

At the close of Petitioner's case, the Respondent requested that the Hearing Officer exclude Petitioner's Exhibits 11, 25 and 35. The Respondent argued that the ABA Coordinator offered testimony that the exhibits were based on evaluations and data sheets not included in the Petitioner's exhibits. The Petitioner argued that the data from the evaluations and data sheets are included in Petitioner's Exhibits 11 and 35. The Hearing Officer stated that the ABA Coordinator's testimony was that Petitioner's Exhibit 11 was the written report resulting from the evaluation but that there was an evaluation related to Petitioner's Exhibit 35 which was not included in the record and indicated that the lack of the evaluation in the record, as required by 34 CFR §300.512 would be considered in the weight of Petitioner's Exhibit 35. The Hearing Officer concluded that data sheets are not an "evaluation" as defined by 34 CFR §300.512.

The hearing concluded at approximately 5:31 p.m. on August 20, 2013. Because the hearing did not conclude until after business hours, the Hearing Officer requested that the parties submit written closing arguments. The written closing arguments were limited to three and one half (3 ½) pages in a standard, 12 point font. The written closing arguments were to be submitted to the Hearing Officer by 5:00 p.m. on August 26, 2013.

The Petitioner submitted a written closing argument by the deadline and within the limits imposed by the Hearing Officer. The Respondent submitted an eight page closing argument with an additional 17 pages of attachments at 6:10 p.m. on August 26, 2013. The Petitioner objected to Respondent's closing argument because it did not meet the requirements set by the Hearing Officer. The Respondent resubmitted its closing argument at 9:03 p.m., having reformatted the original document, making the closing argument three and one half pages in length. The Hearing Officer communicated to the parties that the Respondent would be granted leniency in the late submission but the Hearing Officer would only review the first three and one half pages of the original document.

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 denied the student a FAPE by failing to find the student eligible for special education and related services in September 2012?

2. Whether DCPS denied the student a FAPE by failing to develop and implement and IEP for the student from October 2012 – May 2013?
3. Whether, in the absence of the provision of a FAPE from October 2012 – June 2013, ABA services were appropriate for the student?

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. In late 2011, School A informed the student's parents of concerns regarding the student's development. (Petitioner's Exhibit 2; Mother's Testimony)
2. In late 2011, School A was concerned that the student was not engaging with other children. (Petitioner's Exhibit 3; Mother's Testimony)
3. In December 2011, the student often played with other children however the student did not meet skill level expectations for playing cooperatively with other children. (Petitioner's Exhibit 2)
4. In May 2012, the student received a psychological evaluation in order to clarify a diagnosis, identify strengths and weakness and to assist with treatment planning. (Petitioner's Exhibit 3)
5. The student has Above Average verbal abilities, Average nonverbal reasoning skills and spatial abilities in the High range. (Petitioner's Exhibit 3; Mother's Testimony; Teacher's Testimony)
6. The student's intelligence quotient (IQ) is in the Very Superior range. (Respondent's Exhibit 16)
7. During the May 2012 evaluation, the student was easily distracted and had difficulty with impulse control, however performed in the Average to Very Superior range on visual and auditory attention, working memory skills and impulsivity. (Petitioner's Exhibit 3)
8. In May 2012, the student had mild to moderate problems with social awareness, social communication, social motivation and autistic mannerisms. (Petitioner's Exhibit 3)
9. In May 2012, the student met the criteria for autism on the Communication and Reciprocal Social Interaction domains of the Autism Diagnostic Observation Scheduled-Module 2 (ADOS). (Petitioner's Exhibit 3)
10. In May 2012, the student was diagnosed with Asperger's Disorder. (Petitioner's Exhibits 3, 4, 5, 6, 7, 8, 10, 13, 24, 26 and 28; Respondent's Exhibits 1 and 2)
11. The student needs to participate in a classroom where can receive special education services and supports as well as children who are high-functioning and cognitive peers. (Petitioner's Exhibit 3)
12. The May 2012 evaluator recommended that the student receive instruction from teachers experienced in autism disorders and behavioral interventions such as Pivotal Response Treatment (PRT). (Petitioner's Exhibit 3)
13. PRT is a variant of ABA and targets a few pivotal behaviors. (Petitioner's Exhibit 3)

14. In July 2012, the parent provided DCPS with the May 2012 Psychological Evaluation. (Mother's Testimony)
15. In August 2012, DCPS began the initial evaluation process for the student. (Petitioner's Exhibits 4 and 6; Respondent's Exhibits 1 and 2; Mother's Testimony; Evaluation Coordinator's Testimony; Psychologist's Testimony)
16. As a part of the initial evaluation, DCPS conducted assessments (evaluations) of the student in physical therapy, speech-language and occupational therapy. (Petitioner's Exhibits 4, 5 and 6; Respondent's Exhibits 1 and 2; Evaluation Coordinator's Testimony; Psychologist's Testimony; Speech Language Pathologist's Testimony; Occupational Therapist's Testimony)
17. The assessments included an observation of the student in School A classroom and an observation of the student at DCPS' School C. (Petitioner's Exhibits 5 and 7 Respondent's Exhibits 1 and 2; Evaluation Coordinator's Testimony; Psychologist's Testimony; Speech Language Pathologist's Testimony; Occupational Therapist's Testimony)
18. As a part of the initial evaluation, a DCPS psychologist also reviewed the May 3, 2012 Psychological Evaluation. (Petitioner's Exhibit 7; Respondent's Exhibits 1 and 2; Psychologist's Testimony)
19. In August 2012, the student did not display sensory seeking behaviors or sensory sensitivities during occupational therapy evaluation. (Respondent's Exhibit 6; Occupational Therapist's Testimony)
20. During the initial evaluation process, DCPS did not assessments regarding the student's social/emotional functioning in the School A classroom, pragmatic speech-language components, an OT sensory profile or an observation by an autism specialist. (Petitioner's Exhibits 12 and 14; Evaluation Coordinator's Testimony)
21. On October 2, 2012, the multidisciplinary team (MDT) who conducted the initial evaluation included the parents, a special education teacher/coordinator, a family care coordinator, a speech-language pathologist, a school psychologist, an occupational therapist and a physical therapist. (Petitioner's Exhibit 8; Respondent's Exhibit 1; Mother's Testimony; Evaluation Coordinator's Testimony; Psychologist's Testimony; Speech Language Pathologist's Testimony; Occupational Therapist's Testimony)
22. On October 2, 2013, the MDT determined that the student was not eligible for special education and related services based on data indicating that although the student was identified as having difficulty with transitions, changes in routine and limited imagination/pretend play skills, the observation conducted at School A and the interview with the teacher indicated that, with prompting, the student was able to adjust to changes and interact with peers and that difficulties did not impact educational performance. (Petitioner's Exhibits 7, 8, 9 and 10; Respondent's Exhibit 1; Mother's Testimony; Evaluation Coordinator's Testimony; Psychologist's Testimony; Speech Language Pathologist's Testimony; Occupational Therapist's Testimony)
23. On October 2, 2012, the parents disagreed with the eligibility determination. (Petitioner's Exhibits 8 and 10; Respondent's Exhibit 1; Mother's Testimony)

24. In October 2012, the parent contacted Program A to provide ABA services to the student at School A to target increasing peer interactions and social play. (Petitioner's Exhibit 11; Mother's Testimony; ABA Coordinator's Testimony)
25. In October 2012, Program A conducted assessments of the student and summarized that the student demonstrated good skills during the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP), group instruction and classroom routine but performed below age level in the social interactions domain. (Petitioner's Exhibit 11; ABA Coordinator's Testimony)
26. In October 2012, Program A recommended 10-20 hours per week of ABA therapy within the classroom. (Petitioner's Exhibit 11; ABA Coordinator's Testimony)
27. In December 2012, Program A began providing ABA services to the student for six hours per week at School A. (Petitioner's Exhibit 25; Mother's Testimony; Teacher's Testimony; ABA Coordinator's Testimony)
28. A resolution session was held pursuant to the parents' pending Complaint on December 21, 2012. (Stipulated Fact)
29. As an outcome of a December 21, 2012 Resolution Meeting conducted pursuant to the parent's December 5, 2012 Complaint, DCPS agreed to "revisit" the student's eligibility determination after conducting "the components of the evaluations not previously done," including assessments regarding the student's social/emotional functioning in the School A classroom, pragmatic speech-language components, an OT sensory profile and an observation by an ABA coach. (Petitioner's Exhibit 14; Evaluation Coordinator's Testimony)
30. On December 21, 2012, DCPS became aware that the student was receiving services from Program A. (Petitioner's Exhibit 20; Evaluation Coordinator's Testimony)
31. On January 4, 2013, the parents provided DCPS consent to evaluate the student. (Petitioner's Exhibit 15; Respondent's Exhibit 4)
32. Throughout the evaluation processes, the parents provided all requested information to DCPS. (Mother's Testimony; Evaluation Coordinator's Testimony)
33. From December 2012 through February 2013, Program A focused on direct and continuous prompting and modeling for the student to engage in activities. (Petitioner's Exhibit 25; ABA Coordinator's Testimony)
34. From December 2012 through February 2013, the student did not respond well to the individual therapist or the mode of prompting however made some progress with goals however did not demonstrate the level of progress toward goals as expected. (Petitioner's Exhibit 25; ABA Coordinator's Testimony)
35. From December 2012 through February 2012, the student independently approached peers, engaged in pretend play and responded to peers in less than 10% of intervals. The student independently attended to peers and initiated to peers in less than 20% of intervals. The student independently engaged in parallel play and sustained play in less than 30% of intervals. (Petitioner's Exhibit 25)
36. In February 2013, Program A changed the student's therapist and altered the mode of prompting from direct and continuous to one-time suggestive prompting. (ABA Coordinator's Testimony)
37. The strategies used by the Program A therapist could be taught to and delivered by the student's teacher. (ABA Coordinator's Testimony)

38. Following the changes to the student's mode of prompting in February 2013, the student independently approached peers in 26.39% of intervals, engaged in parallel play in 77.6% of intervals, sustained play in 43.13% of intervals, engaged in pretend play in 30.15% of intervals, attended to peers in 67.85% of intervals, responded to peers in 67.96% of intervals and initiated to peers in 45.61% of intervals. (Petitioner's Exhibits 25)
39. An eligibility meeting was held on April 30, 2013 in which the student was found eligible for special education as a student with Autism. (Stipulated Fact)
40. On April 30, 2013, DCPS presented a draft IEP and the parents agreed to the initial provision of special education and related services. (Petitioner's Exhibits 27 and 28; Evaluation Coordinator's Testimony)
41. On April 30, 2013, the parents' attorney posed questions regarding an individual services plan (ISP) and informed the MDT that the parents had not yet decided whether to continue the student's enrollment in School A. (Petitioner's Exhibit 28)
42. By May 2013, the student's average level of independent engagement in the desired activities had notably decreased however the student's level of engagement with one prompt only slightly decreased in the desired activities with the exception of attending to peers which slightly increased. (Petitioner's Exhibit 35)
43. Overall, the student's participation with peers significantly increased. (Petitioner's Exhibit 35; Teacher's Testimony; ABA Coordinator's Testimony)
44. The student's decrease in desired behaviors was attributed to seasonal allergies. (Petitioner's Exhibit 35)
45. On May 14, 2013 the student's IEP Team met to review the draft IEP provided to the parents on April 30, 2013. (Petitioner's Exhibits 29, 30 and 31; Respondent's Exhibit 9; Mother's Testimony; Psychologist's Testimony; Evaluation Coordinator's Testimony)
46. The May 14, 2013 IEP included goals for the student to initiate conversation with peers, participate in cooperative play with peers, sustain engagement in an activity with peers, attend to responses of peers, work independently during leisure activities and initiate peer interactions. (Petitioner's Exhibit 31; Respondent's Exhibit 9)
47. The May 14, 2013 IEP prescribed five hours per week of specialized instruction within the general education environment, two hours per month of speech-language pathology within the general education environment, 30 minutes per month of consultative services with the Autism team for occupational therapy and specialized instruction. (Petitioner's Exhibit 31; Respondent's Exhibit 9)
48. On May 14, 2013, services were immediately available to the student. (Petitioner's Exhibits 30 and 31; Respondent's Exhibit 9; Psychologist's Testimony; Evaluation Coordinator's Testimony)
49. On May 16, 2013, DCPS reminded the parents via electronic communication that feedback on the May 14, 2013 IEP was welcome. (Petitioner's Exhibit 32; Evaluation Coordinator's Testimony)
50. On May 24, 2013, DCPS finalized the student's IEP because the parents had not provided any feedback on the IEP. (Petitioner's Exhibit 32; Evaluation Coordinator's Testimony)
51. The Teacher provided generally creditable testimony. The Teacher's testimony regarding comments to the DCPS evaluators during the first eligibility process was

- not supported by the exhibits or the testimony of other witnesses. However, the remainder of the Teacher's testimony was supported by the exhibits and testimony of the other witnesses.
52. The Mother provided credible testimony. Her testimony was consistent with the exhibits and testimony of other witnesses.
 53. The ABA Coordinator was qualified as an expert in ABA and provided credible testimony. Her testimony was consistent with the exhibits and testimony of other witnesses.
 54. The Principal provided credible testimony. However her testimony was not necessary to inform the issues to be determined in this matter.
 55. The Psychologist was qualified as an expert in school psychology and evaluation and provided credible testimony. Her testimony was consistent with the exhibits and testimony of other witnesses.
 56. The Speech Language Pathologist was qualified as an expert in speech-language pathology and evaluation and IEP development related to speech-language therapy and provided credible testimony. Her testimony was consistent with the exhibits and testimony of other witnesses.
 57. The Occupational Therapist provided credible testimony. Her testimony was consistent with the exhibits and testimony of other witnesses.
 58. The Evaluation Coordinator was qualified as an expert in IEP development and educational assessments and provided credible testimony. Her testimony was consistent with the exhibits and testimony of other witnesses.

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).

Issue #1

Under the IDEA, a state must provide a “free appropriate public education” to children with disabilities. *See* 20 U.S.C. §1412(a)(1)(A). 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). Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. 34 CFR §300.8(c)(1)(i).

In late 2011, School A informed the student’s parents of concerns regarding the student’s development. At the time, School A was concerned that the student was not engaging with other children. Although the student often played with other children, the student did not meet skill level expectations for playing cooperatively with other children. In May 2012, the student received a psychological evaluation in order to clarify a diagnosis, identify strengths and weakness and to assist with treatment planning.

The May 2012 evaluation revealed that the student has Above Average verbal abilities, Average nonverbal reasoning skills and spatial abilities in the High range. On an executive functioning assessment, the parents reported that the student had significant hyperactivity and the teacher reported that the student had problems with flexibility and problems with emotional control. During the evaluation, the student was easily distracted and had difficulty with impulse control, however performed in the Average to Very Superior range on visual and auditory attention, working memory skills and impulsivity. On the Social Responsiveness Scale, both the parent and the teacher noted mild to moderate problems with the student’s social awareness, social communication and social motivation. In autistic mannerisms, the parent scored the student in the severe range while the teacher scored the student in the mild to moderate range. On the ADOS, the student met the criteria for autism on the Communication and Reciprocal Social Interaction domains. As a result of the assessments conducted by the evaluator in May 2012, the student was diagnosed with Asperger’s Disorder.

In July 2012, the parent provided DCPS with the May 2012 Psychological Evaluation. Based on the evaluation, DCPS began the initial evaluation process for the student. As a part of the initial evaluation, DCPS conducted assessments (evaluations) of the student in physical therapy, speech-language and occupational therapy. The assessments included an observation of the student in School A classroom and an observation of the student at DCPS’ School C. The DCPS psychologist also reviewed the May 3, 2012 evaluation.

On October 2, 2012, an MDT met to review the student's assessments (evaluations) and determine eligibility for the student. The MDT who conducted the initial evaluation included the parents, a special education teacher/coordinator, a family care coordinator, a speech-language pathologist, a school psychologist, an occupational therapist and a physical therapist. The MDT acknowledged that the student was diagnosed with Asperger's Disorder however ultimately found that the student was not eligible for special education and related services. The Team's decision was based on data indicating that although the student was identified as having difficulty with transitions, changes in routine and limited imagination/pretend play skills, the observation conducted at School A and the interview with the teacher indicated that, with prompting, the student was able to adjust to changes and interact with peers and that difficulties did not impact educational performance.

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."

Additionally, as a part of an initial evaluation (if appropriate), the IEP Team and other qualified professionals must- (1) review existing evaluation data on the child including- (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine- (i)(A) Whether the child is a child with a disability and the educational needs of the child; (ii) The present levels of academic achievement and related developmental needs of the child; (iii) Whether the child needs special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed. *See* 34 CFR 300.305.

In September 2012, DCPS was aware of the student's diagnosis of Asperger's Disorder. DCPS conducted a review of the student's May 3, 2012 Psychological Evaluation, an interview with the parent, an interview with the student's teacher, observations of the student, a physical therapy assessment (evaluation), a speech-language assessment (evaluation) and an occupational therapy assessment (evaluation). The Hearing Officer concludes that while the quantity of the assessment tools used DCPS for the student's initial evaluation constituted a "variety," the quality of the assessments tools was not sufficient to gather all relevant functional and developmental information regarding the child in order to assess the student in all areas related to suspected disability. Specifically, DCPS did not conduct adequate assessments regarding the student's social/emotional functioning in the School A classroom, pragmatic speech-language components, an OT sensory profile and an observation by an autism specialist.

Further, the IDEA requires that the MDT include appropriate IEP Team members and other qualified professionals. Here, DCPS should have included an autism specialist on the MDT in order for the team to appropriately review the information gathered regarding the child and identify the proper types of assessments needed to fully evaluate the child to determine if was in need of special education. The Evaluation Coordinator testified that the initial MDT did not “feel” that an autism specialist was warranted based on the observations of the student and the evidence of the lack of educational impact. However, having an autism specialist on the MDT would have provided the professional knowledge of autism required to conduct an adequate observation of the student, professionally interpret the results of the observations and appropriately address the possible educational impact.

Failing to use an adequate variety of assessment tools and including an autism specialist on the MDT represent procedural violations. The IDEA regulations at 34 CFR §300.513(a)(2) state that in matters alleging a procedural violation, a hearing officer may find that a child did not receive a 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. In this matter, the procedural violations constitute a substantive violation if the student should have been found eligible for special education and related services on October 2, 2012.

It is uncontested that the student had a diagnosis of Asperger’s Disorder on October 2, 2012. However the student’s diagnosis of Asperger’s Disorder did not automatically qualify him for special education and related services. 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); *see also S. v. Wissahickon Sch. Dist.*, No. 05-1284, 2008 WL 2876567 (E.D. Pa. July 24, 2008) *aff’d sub nom. Richard S. v. Wissahickon Sch. Dist.*, 334 F. App’x 508 (3d Cir. 2009) (finding that even a medical diagnosis of ADHD would not automatically qualify a student for special education where there was an absence of evidence that the student was eligible for special education).

It is also uncontested that the student was functioning far above peers academically on October 2, 2012. The Court in *D.S. v. Neptune Twp. Bd. of Educ.*, 264 F. App’x 186, 189 (3d Cir. 2008) found that, “the statute should not be read to protect children with an impairment but not requiring special education.” *See also K.M. v. Wappingers Central Sch. Dist.*, 688 F. Supp. 2d 282 (SDNY 2010) (although the child had social and emotional difficulties as a result of ADHD, Asperger syndrome, and generalized anxiety disorder, the district correctly found the student ineligible for IDEA services because while the student’s disabilities might impede her social and emotional functioning, they did not impede her ability to obtain an educational benefit.) However, the Court in *G.D. ex rel. G.D. v. Wissahickon Sch. Dist.*, 832 F. Supp. 2d 455, (E.D. Pa. 2011) found that a district has an obligation to look beyond a child’s cognitive potential or academic progress and to address attentional issues and behaviors that have been identified as impeding progress. Ultimately, there is no precise standard for determining whether a student is in need of special education, and well-settled precedent counsels against

invoking any bright-line rules for making such a determination. *W. Chester Area Sch. Dist. v. Bruce C.*, 194 F. Supp. 2d 417, 420 (E.D. Pa. 2002).

DCPS argued that the student was not denied a FAPE because the data reviewed at the October 2, 2012 MDT meeting did not provide sufficient evidence that the student met the criteria as a student with disabilities in need of special education because the student's disability did not have an impact on educational performance. The Hearing Officer agrees that the data presented at the October 2, 2012 MDT meeting did not provide sufficient data to find the student eligible for special education and related services. However, had DCPS properly assessed the student, as the LEA did in February – April 2013, and had DCPS included an autism specialist on the MDT, as the LEA did in April 2013, DCPS would have had sufficient data to find the student eligible for special education and related services on October 2, 2012. Therefore, the Hearing Officer concludes that the procedural violations impeded the child's right to a FAPE and caused a deprivation of educational benefit.

The Hearing Officer concludes that DCPS denied the student a FAPE by failing to find the student eligible for special education and related services on October 2, 2012.

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

Issue #2

The Petitioner also alleged that DCPS denied the student a FAPE by failing to develop and implement an IEP for the student from October 2012 – May 2013.

Under the IDEA, a state must provide a “free appropriate public education” to children with disabilities. *See* 20 U.S.C. §1412(a)(1)(A). A state must, *inter alia*, identify and evaluate children with disabilities, and develop an “individual education program” for each child with a disability. *See* 20 U.S.C. §§1412(a)(3)(A),(a)(4). Pursuant to 5 DCMR §E-3007.1, the IEP Team shall meet and develop an IEP for a child with a disability within thirty days of a determination that a child needs special education and related services.

As discussed in Issue #1, DCPS should have found the student eligible for special education and related services on October 2, 2012. Thus, an IEP should have been developed and implemented for the student by November 1, 2012.

As an outcome of a December 21, 2012 Resolution Meeting conducted pursuant to the parent's December 5, 2012 Complaint, DCPS agreed to “revisit” the student's eligibility determination after conducting “the components of the evaluations not previously done,” including assessments regarding the student's social/emotional functioning in the School A classroom, pragmatic speech-language components, an OT sensory profile and an observation by an ABA coach. On April 30, 2013, an MDT met to evaluate the student. The MDT found the student eligible for special education and related services and presented a draft IEP and the parents agreed to the initial provision of special education and related services. On April 30, 2013, the parents' attorney posed questions regarding an ISP and informed the MDT that the parents had not yet decided whether to continue the student's enrollment in School A.

On May 14, 2013 the student's IEP Team met to review the draft IEP provided to the parents on April 30, 2013. The May 14, 2013 prescribed specialized instruction and related services for the student. The notes from the May 14, 2013 meeting indicated that services were immediately available to the student. On May 16, 2013, DCPS reminded the parents via electronic communication that feedback on the May 14, 2013 IEP was welcome. Having received no feedback from the parents regarding the May 14, 2013, DCPS finalized the IEP on May 24, 2013.

The Hearing Officer concludes that DCPS denied the student a FAPE by failing to develop and implement an IEP for the student from November 1, 2012 through May 14, 2012. DCPS should have found the student eligible for special education and related services on October 2, 2012 and pursuant to 5 DCMR §E-3007.1, an IEP should have been developed and implemented for the student by November 1, 2012. DCPS ultimately found the student eligible for special education and related services on April 30, 2013 and subsequently developed and offered to implement an IEP for the student on May 14, 2013.

The Petitioner met its burden with respect to Issue #2 for the period of November 1, 2012 through May 14, 2013.

Issue #3

The Petitioner requested that the Hearing Officer find that in the absence of the provision of a FAPE for the student from October 2012 through June 2013, ABA services were appropriate for the student.

The evaluator who conducted the student's May 2012 Psychological Evaluation recommended that the student participate in a classroom where can receive special education services and supports as well as children who are high-functioning and cognitive peers. The evaluator also recommended that the student receive instruction from teachers experienced in autism disorders and behavioral interventions such as PRT. PRT is a variant of ABA and targets a few pivotal behaviors.

In October 2012, the parent contacted Program A to provide ABA services to the student at School A to target increasing peer interactions and social play. Program A conducted assessments of the student and summarized that the student demonstrated good skills during the VB-MAPP, group instruction and classroom routine but performed below age level in the social interactions domain. Program A recommended 10-20 hours per week of ABA therapy within the classroom.

In December 2012, Program A began providing ABA services to the student for six hours per week at School A. From December 2012 through February 2013, Program A focused on direct and continuous prompting and modeling for the student to engage in activities. The student did not respond well to the individual therapist or the mode of prompting however made some progress with goals however did not demonstrate the level of progress toward goals as expected. The student independently approached peers, engaged in pretend play and responded to peers in less than 10% of intervals. The student independently attended to peers

and initiated to peers in less than 20% of intervals. The student independently engaged in parallel play and sustained play in less than 30% of intervals.

In February 2013, Program A changed the student's therapist and altered the mode of prompting from direct and continuous to one-time suggestive prompting. Following the changes, the student independently approached peers in 26.39% of intervals, engaged in parallel play in 77.6% of intervals, sustained play in 43.13% of intervals, engaged in pretend play in 30.15% of intervals, attended to peers in 67.85% of intervals, responded to peers in 67.96% of intervals and initiated to peers in 45.61% of intervals. By May 2013, the student's average level of independent engagement in the desired activities had notably decreased however the student's level of engagement with one prompt only slightly decreased in the desired activities with the exception of attending to peers which slightly increased. The student's decrease in desired behaviors was attributed to seasonal allergies. Overall, the student's participation with peers significantly increased. The ABA Coordinator testified that the strategies used could be taught to and delivered by the student's teacher.

On May 14, 2013, DCPS convened an MDT meeting to review the student's proposed IEP. The IEP included goals for the student to initiate conversation with peers, participate in cooperative play with peers, sustain engagement in an activity with peers, attend to responses of peers, work independently during leisure activities and initiate peer interactions. The IEP prescribed five hours per week of specialized instruction within the general education environment, two hours per month of speech-language pathology within the general education environment, 30 minutes per month of consultative services with the Autism team for occupational therapy and specialized instruction. On May 16, 2013, DCPS reminded the parents to provide any feedback on the proposed IEP and on May 24, 2013, having not received feedback from the student's parents, DCPS finalized the student's IEP.

Although the May 2012 evaluator recommended PRT, nothing in the statute or regulations requires an IEP Team to adopt the recommendation of a student's private physician or psychologist. The IDEA does not require school districts to consult with outside experts or to adopt their recommendations. The failure to do so does not automatically constitute a serious deficiency in the IEP. *Renner v. Bd. of Educ. of the Public Sch. of the City of Ann Arbor*, 185 F.3d 635 (6th Cir. 1999) (holding that school district's failure to consult with the plaintiff's expert or to adopt the number of hours she recommended for a particular therapy did not render the IEP substantively deficient). Pursuant to the IDEA regulations, decisions regarding a student's educational program and placement must be made by a team of educators and the student's parents. 20 U.S.C. § 1414(d)(1)(B); 34 CFR §300.324.

The Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley* at 200-203.

The Hearing Officer concludes that although ABA services were not necessary for the student, ABA services were appropriate for the student. The ABA Coordinator acknowledged

that the strategies used were strategies that could have been taught to and delivered by a teacher. Nevertheless, the strategies were utilized by a Program A therapist and the student demonstrated progress in desired behaviors. On May 14, 2013, DCPS offered an IEP which addressed the behaviors in the plan utilized by Program A and provided for specialized instruction similar in frequency to the services provided by Program A. The Hearing Officer also concludes that the student's May 14, 2013 IEP was appropriate for the student. In the absence of a FAPE offer by DCPS from November 1, 2012 through May 14, 2013, ABA services were appropriate.

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 matter, the parents seek an award of reimbursement for ABA services provided to the student during the 2012-2013 school year. A board of education *may* be required to reimburse parents for their expenditures for private educational services obtained for a student by or her parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parents' claim. (emphasis added). *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2d Cir. 2005).

The first step in the *Burlington/Carter* analysis is to determine if the services offered by the board of education were inadequate or inappropriate. The Hearing Officer has determined that DCPS failed to develop and implement an IEP for the student from November 1, 2012 through May 14, 2013. Therefore, the services offered by DCPS from November 1, 2012 through May 14, 2013 were inadequate in that they were nonexistent. The Hearing Officer determined that the services offered by DCPS on May 14, 2013 were appropriate for the student therefore the period of the potential reimbursement is from November 1, 2013 through May 14, 2013. The Hearing Officer has also determined that the services selected by the parent were appropriate.

The final step in the *Burlington/Carter* analysis is to consider the equity of the parent's claim. Here, in the absence of the provision of services for the student, the parent sought services recommended by the May 2012 evaluator. The parent's clearly disagreed with the student's eligibility determination in October 2012, challenged the eligibility determination in December 2012, provided DCPS a consent to evaluate the student in January 2013, provided DCPS all requested information and informed DCPS that Program A was providing services to the student. The parents have requested \$8612.50 for services rendered December 2012 through June 1, 2013 and \$1593.75 for the month of June 2013. However, the parents only provided the invoice for June 2013. Additionally, while the parents provided copies of checks written on December 16, 2012, April 14, 2013, June 2, 2013, June 23, 2013 and July 17, 2013, only the

June 2, 2013, April 14, 2013 and December 16, 2012 appear to have been processed. Equity supports the parents' claim for reimbursement with the caveat that the parents can provide supporting documentation for the requested amount of reimbursement and evidence that the invoices were paid.

ORDER

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

1. Within 45 business days, DCPS reimburse the parents for the ABA services provided to the student from December 2012 through May 14, 2013. DCPS' reimbursement is contingent upon the parent providing invoices from Program A for the time period of the denial of FAPE and cancelled checks equal to the amount listed on the invoices.
2. All other relief sought herein 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: September 1, 2013


Hearing Officer