

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
February 3, 2015

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: February 3, 2015
Petitioner,)	
)	Hearing Officer: John Straus
v.)	
)	
District of Columbia Public Schools)	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

The Petitioner, who is the mother of the Student, filed a due process complaint notice on November 20, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) by the District of Columbia Public Schools (“DCPS”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged that DCPS had failed to determine the Student is a student with either an Other Health Impairment (“OHI”) and/or an Emotional Disturbance (“ED”) under the IDEA at the October 16, 2013 meeting and failed to authorize an Independent Education Evaluation (“IEE”); specifically a Function Behavior Assessment (“FBA”), after the November 3, 2014 meeting.

DCPS argued the conclusions reached by its eligibility team on October 16, 2013 were supported and the Petitioner agreed with the team’s ineligibility decision at that time. DCPS further alleges they issued an authorization letter to the parent on November 20, 2014, and fully intends to review the information contained in the assessment once it is provided. DCPS denies any allegation regarding a failure to provide a requested independent assessment. DCPS asserts that this issue is not ripe.

Subject Matter Jurisdiction

¹ Personal identification information is provided in Appendix A.

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Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on November 20, 2014. This Hearing Officer was assigned to the case on November 25, 2014. DCPS timely filed a response to the complaint on November 25, 2014 and made no challenges to jurisdiction. A prehearing conference took place on December 11, 2014 and a Prehearing Order was issued on the same day.

Neither Petitioner nor Respondent waived the resolution meeting. The resolution meeting took place on December 9, 2014. At the resolution meeting, parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on December 20, 2014, the 45-day timeline to issue a final decision began on December 21, 2014 and the final decision is due by February 3, 2014.

The due process hearing was a closed hearing that took place on January 14, 2015.

Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in the hearing in person.

The Respondent’s Disclosure Statement, dated January 7, 2015 consisted of a witness list of two witnesses and documents R-1 through R-13 and were admitted into evidence without objection. The Petitioner’s Disclosure Statement, dated January 7, 2015, consisted of a witness list of seven witnesses and documents P-1 through P-41. On January 8, 2015, DCPS filed Respondent’s Objections to Petitioner’s Disclosure. DCPS’ objections were addressed at the due process hearing. Exhibits P-10 and P-34 were admitted in to the record over DCPS’ objection; P-28 through P-32 were withdrawn by the Petitioner and the Hearing Officer sustained DCPS’ objections to P-36 and P-37. The remainder of the Petitioner’s disclosures were admitted into evidence.²

The Petitioner presented the following three witnesses in her case in chief: (1) Petitioner; (2) Psychologist who was certified as an expert in clinical psychological assessments for special education services and eligibility; and (3) Educational Advocate (“Advocate”). DCPS presented two witness in its case in chief: (1) School Psychologist who was certified as an expert in administration and interpretation of comprehensive psychological assessments for the purposes of special education eligibility determination and (2) Social Worker.

DCPS made a Motion for Directed Finding at the conclusion of the Petitioner’s case in chief. The motion was overruled due to the fact that the Petitioner’s exhibits were entered in to

² Pursuant to the Prehearing Order issued on December 11, 2014, failure to note objections to the opposing party’s disclosures would result in the disclosures being admitted without objection.

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the record at the outset of the hearing and the hearing officer had not reviewed all of the evidence and the Petitioner did not stipulate to any of the facts.

The two issues³ to be determined in this Hearing Officer Determination are as follows:

1. **Whether Respondent denied the Student a FAPE by failing determine the Student is a student with either an OHI and/or an ED under the IDEA at the October 16, 2013 meeting.**
2. **Whether Respondent denied the Student a FAPE by failing to authorize an IEE; specifically a FBA, after the November 3, 2014 meeting.**

The relief requested by Petitioner is as follows:

- (1) A finding of a denial of a FAPE;
- (2) DCPS to either conduct or fund a FBA;
- (3) DCPS to convene an IEP team meeting to review the FBA and independent assessments, determine whether the Student is a student with a disability under the IDEA, if eligible, develop an Individualized Education Program (“IEP”) and Behavior Intervention Plan (“BIP”) and determine a placement where the IEP may be implemented;
- (4) Alternatively, the Hearing Officer to determine the Student is a student with either OHI or ED under the IDEA; and
- (5) DCPS to fund compensatory education to redress the lack of special education and related services as a result of its failure to determine the Student is a student with a disability under the IDEA in a timely manner.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer’s Findings of Fact⁴ are as follows:

1. The Student currently resides with his mother in the District of Columbia where he attends Middle School. The Student did not attend Kindergarten and was promoted to first grade after testing. The Student attended Elementary School from first grade to fifth grade. He attended another Middle School for Sixth grade. He enrolled in Middle School at the beginning of his seventh grade year.⁵

³ Issues 1 and 4 in the Due Process Complaint were withdrawn by the Petitioner at the Prehearing Conference.

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer’s determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁵ P-12, P-13, Petitioner

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2. On April 17, 2012, the Student took the DC-CAS and received a proficient score.⁶
3. The Student received three As, one B, one C and two Ds during the 2012-2013 school year. The teachers noted the Student exhibited poor behavior.⁷
4. On September 4, 2013, the Student's teachers were interviewed and on September 9, 2014, the Petitioner was interviewed as part of a FBA. The interviewees reported there were no behavior concerns in school. On September 4 and 6, 2013, the Student was observed in the classroom. During the second observation, the Student was on task for a third of the observation period; however, he got back on task when he was redirected. The evaluator recommended the Student not receive a Behavior Intervention Plan ("BIP").⁸
5. On September 30, 2013, the Student received a psychological assessment. The assessment included an interview with the Student's teacher. The teacher reported the Student often has a lot of trouble with self-control and needs to be redirected frequently during every class period. He exhibits attention seeking behavior. Another teacher stated the Student has difficulty staying focused on his in-class assignments. At the end of the class period, he becomes distracted and does not fully complete assignments. A third teacher stated the Student is an excellent student. However, he makes simple mistakes by rushing through problems or skipping steps. During a classroom observation, the Student played with markers and made paper airplanes. However, he completed the activity when redirected and completed his work when redirected. The assessment included the Reynolds Intellectual Assessment Scales ("RAIS") which yielded below average scores on Verbal Intelligence Index, average scores on the Nonverbal Intelligence Index and Composite Intelligence Index and significantly above average scores on the Composite Memory Index. The assessment also included the Woodcock-Johnson Tests of Achievement Third Edition ("WJ-III") which yielded average scores in all areas except passage comprehension which was low average, academic skills and brief achievement which were high average and letter word identification which was superior. The School Psychologist stated despite reported difficulties with impulsivity, it does not impede the Student's ability to produce grade level material. The test results measuring social-emotional behavioral functioning suggest that the Student has symptoms related to Attention Deficit Hyperactivity Disorder ("ADHD"). However, the Student's processing scores and total achievement did not reflect a significant discrepancy when compared to current estimates of general intellectual functioning. The Connors Behavior Rating scales and other scales indicate concerns especially in the areas of impulsivity and hyperactivity. However, current information from a FBA did not reveal disruptive behaviors in the school setting. The School Psychologist recommended that the Student's pediatrician review the assessment to provide DCPS a medical diagnosis of ADHD.⁹

⁶ P-15

⁷ P-16, School Psychologist

⁸ P-13, R-3, Social Worker

⁹ P-12, R-4, School Psychologist

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6. On October 16, 2013, the IEP team reviewed the FBA and psychological assessment. The team noted the Student's biggest issue is staying focused. The team determined the Student is not a student with either an OHI or a Specific Learning Disability ("SLD") under the IDEA. However, the team determined the Student is a student with a disability under Section 504 of the Rehabilitation Act. The Petitioner was present at the meeting and agreed with the team's decision.¹⁰
7. The Student received a C in Health and Physical Education, a C- in English, a D in Pre-Algebra and Fs in US History and Geography and Science during the first advisory of the 2014-2015 school year.¹¹
8. On November 3, 2014, the IEP team convened. The teachers reported the Student does not focus in class and walks around. The teachers further stated the Student is playful, defiant and oppositional; causing his behavior to impede his academic development and progress. The Petitioner requested a copy of the Student's educational records and an independent educational evaluation; including a clinical assessment, clinical psychological assessment, social history assessment. The Petitioner did not request an independent FBA.¹²
9. On November 20, 2014, DCPS authorized the Petitioner to obtain an independent comprehensive psychological assessment. The authorization did not include an independent FBA.¹³
10. On November 25 and December 10 and 15, 2014, the Student received a Psychological Assessment. The Psychologist conducted the assessment and noted the Student has difficulty sitting still and following directions and that he has been known to touch others inappropriately such as pulling hair. The Student was observed at school during three consecutive class periods. During the observation, in each of his classes, the Student was off task on several occasions. However, he was redirected by the teacher. The assessment included a Wechsler Intelligence Scale for Children ("WISC") that yielded high average scores on the perceptual reasoning index, average scores on the Verbal Comprehension and Working Memory Indexes and Full Scale Intelligence Quotient and high average scores on the Processing Speed Index. The assessment also included the WJ-III which yielded high average scores in Spelling, low average scores in Calculation and Passage Comprehension and average scores in all other areas. The assessment also included the Connors test which did not indicate inattentive behaviors in the performance test and self-report; although the Petitioner reported hyperactivity and impulsivity behaviors. The Psychologist stated the Student is a student with ADHD, Reading Disorder, Mathematics Disorder and Adjustment Disorder. The Psychologist recommended the Student be identified as a student with an OHI and a SLD under the IDEA and that the student be placed in a small class. The Psychologist further

¹⁰ P-23, P-24, P-25, R-5, R-6, R-7, School Psychologist

¹¹ P-18

¹² P-22, R-8

¹³ P-26, R-10, Psychologist

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recommended the student receive a FBA. However, the Psychologist testified that she was not authorized to conduct a FBA.¹⁴

11. On January 6, 2015, the Petitioner provided verbal consent to have DCPS to conduct a FBA. The assessment will include three to four classroom observations. The Social Worker has already conducted one classroom observation.¹⁵

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:

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

DCPS did not deny the Student a FAPE by failing determine the Student is a student with either an OHI and/or an ED under the IDEA at the October 16, 2013 meeting

The overall purpose of the IDEA is to ensure that all children with disabilities¹⁶ have available to them a free appropriate public education that emphasizes special education¹⁷ and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1. To that end, DCPS must have procedures in place to ensure that all children with disabilities residing within the District of Columbia, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located and evaluated and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services. And, this obligation extends to children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. § 300.111, 5 D.C.M.R. E-3002.1(d).

ADHD is not a specific disabling condition under the IDEA, although a student with ADHD may be eligible as OHI. 34 C.F.R. § 300.8(c)(9). The classification of ADHD depends

¹⁴ P-10, Psychologist

¹⁵ R-12, Social Worker

¹⁶ Child with a disability means a child who is evaluated as having one of the defined disabilities under the IDEA, and who, by reason thereof, needs special education and related services. 34 C.F.R. § 300.8(a). Disability includes, but is not limited to Emotional Disturbance, Hearing Impairment, Specific Learning Disability, and Other Health Impairment.

¹⁷ Special education means specially designed instruction, to meet the unique needs of the child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability, and ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39.

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on the particular presentation of the disorder in an individual student and must be determined on a case-by-case basis. In other instances, a student with ADHD may be eligible for services under the classification of an ED. It is important to note that a student with ADHD will not qualify for a classification of ED unless he meets the specific eligibility criteria for ED.

A student needs to exhibit one of the five criteria of the definition of ED listed in 34 C.F.R. § 300.8(c)(4) over a long period of time¹⁸ and to a marked degree¹⁹ to be so classified, provided that his educational performance is thereby adversely affected. *See, e.g. Lapidus v. Coto*, 559 IDELR 387 (N.D. Cal. 1988). The five criteria are 1) An inability to learn that cannot be explained by intellectual, sensory, or health factors; 2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers; 3) Inappropriate types of behavior or feelings under normal circumstances; 4) A general pervasive mood of unhappiness or depression; 5) A tendency to develop physical symptoms or fears associated with personal or school problems.

In this case, the October 16, 2013 IEP team had information indicating that the Student exhibited poor behavior during the 2012-2013 school year. However, the FBA indicated the teachers were not concerned about the Student's behavior. The FBA included two classroom observations and during the second classroom observation, the Student was on task for a third of the observation period and he got back on task when he was redirected. The September 30, 2013, psychological assessment states the Student often has a lot of trouble with self-control and needs to be redirected frequently during every class period. He exhibits attention seeking behavior. Another teacher stated the Student has difficulty staying focused on his in-class assignments. At the end of the class period, he becomes distracted and does not fully complete assignments. A third teacher stated the Student is an excellent student. However, he makes simple mistakes by rushing through problems or skipping steps. During a classroom observation, the Student played with markers and made paper airplanes. However, he completed the activity when redirected and completed his work when redirected. None of these concerns give rise to meet any of the five factors under 34 C.F.R. § 300.8(c)(4). Therefore, the hearing offer finds that the October 16, 2013 IEP made a reasonable determination that the Student is not a student with ED under the IDEA.

A student could have a qualifying OHI by reason of ADHD if the disorder limits the student's ability to attend to a specific academic task by causing him to be overly alert to his environment in general. In other words, if the student's disability-related distractibility adversely affects his educational performance, he has limited alertness. *See e.g. Letter to Cohen*, 20 IDELR 73 (OSEP 1993) (Limited alertness must be viewed in terms of its effect on educational performance.) The regulations at 34 C.F.R. 300.8(c)(9) define an OHI as including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment.

¹⁸ According to OSEP, a generally acceptable definition of a long period of time is a range of time from two to nine months, preliminary interventions have been implemented and proven ineffective during that period. *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989).

¹⁹ OSEP takes the position that "to a marked degree" generally refers to the frequency, duration or intensity of a student's emotionally disturbed behavior in comparison to the behavior of his peers and can be indicative of either degree of acuity or pervasiveness. *Letter to Anonymous*, 213 IDELR 247 (OSEP 1989).

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In this case, the School Psychologist stated the Student had difficulties with impulsivity. The test results measuring social-emotional behavioral functioning suggest that the Student has symptoms related to ADHD. The Behavior Rating scales indicated concerns especially in the areas of impulsivity and hyperactivity. Therefore, the October 16, 2013 IEP team may have had a reason to determine the Student is a student with OHI under the IDEA.

However, regardless of the existence of ADHD, it is only a qualifying disability under the IDEA if the disability adversely affects a child's educational performance. 34 C.F.R. § 300.8(c)(9)(ii). Here, the IEP team made a reasonable determination that the ADHD did not adversely affect his academic performance. The School Psychologist stated despite reported difficulties with impulsivity, it does not impede the Student's ability to produce grade level material. The Student received passing grades and a proficient score on the DC CAS. Therefore, the evidence illustrates that the Student is not a student with a disability under the IDEA either under the category of ED or OHI. The Petitioner failed to meet her burden of proof by a preponderance of the evidence that the IEP team erred in not determining the Student is a student with a disability under the IDEA.

DCPS did not the Student a FAPE by failing to authorize an IEE; specifically a FBA, after the November 3, 2014 meeting.

Pursuant to 34 C.F.R. § 300.502(a)(3)(i), an IEE means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. Under the IDEA, an evaluation is procedures used to determine whether a child has a disability and the nature and extent of the child's need for special education and related services. 34 C.F.R. § 300.15. While an assessment is a tool used to gather relevant functional, developmental and academic information about the child. 34 C.F.R. § 300.304(b)(1). In *K.B. v. Haledon Board of Education*, 54 IDELR 230 (D. N.J. 2010), the U.S. District Court for the District of New Jersey clarified the definition of an IEE. The court held that the parent of a teenager with an adjustment disorder was entitled to independent psychological, educational and functional behavioral evaluations at public expense because she requested them based on her disagreement with the district's own assessments. Therefore, an IEE refers an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

The parents of a child with a disability have the right to obtain an IEE of the child at public expense if the parent disagrees with an evaluation obtained by the public agency. Pursuant to 34 C.F.R. § 300.502(b), if a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate; or ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria.

In this case, DCPS conducted a FBA on September 4 and 9, 2013 and a psychological assessment on September 30, 2013. The Petitioner requested an independent clinical psychological assessment, psychoeducational assessment and social history assessment at the

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November 3, 2014 IEP team meeting. Seventeen days later, DCPS authorized a comprehensive psychological assessment on November 20, 2014. However, DCPS did not authorize a FBA and the psychologist was not authorized to conduct a FBA as part of the comprehensive psychological assessment.²⁰

However, the Petitioner did not request an independent FBA. DCPS cannot be expected to provide independent evaluators a blank check regarding which assessments are authorized. Therefore, DCPS is not obligated to fund an independent FBA under 34 C.F.R § 300.502. The Petitioner failed to meet her burden of proof by a preponderance of the evidence that DCPS denied the Student a FAPE by failing to provide an independent FBA.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered: The complaint is DISMISSED with prejudice.

All requested relief is denied.

IT IS SO ORDERED.

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 U.S.C. §1415(i).

Date: February 2, 2015

/s/John Straus
Hearing Officer

²⁰ DCPS lists a reimbursement fee for Comprehensive Psychological assessments but does not list a reimbursement fee for FBAs. See, *November 2011, Obtaining an Independent Educational Evaluation (IEE) for Your Child, A DCPS Office of Special Education Guide*, page 17.