DC Office of the State Superintendent of Education
Office of Compliance and Review
Student Hearing Office

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Confidential

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OSSE
STUDENT HEARING OFFICE

STUDENT[1], by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.	**HEARING OFFICER DETERMINATION** **Date: September 11, 2009** **Hearing Officer: Wanda I. Resto, Esquire**

[1] Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

On July 17, 2009 , parent's counsel filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to provide an appropriate educational placement, failing to reconvene a multidisciplinary team ("MDT") to address the Student's need for Extended School Year ("ESY") services or the Student's lack of academic progress; and failing to implement the Student's individualized education program ("IEP") by failing to provide services in an out of general education setting as specified by the Student's program.

The Petitioner requested the Respondent be deemed to have denied the Student a FAPE and ordered to convene an MDT/IEP meeting to address the Student's need for ESY services and lack of progress. The Petitioner also requested the Student be provided an appropriate special education program with related services, and that the Respondent provide a compensatory education plan in the form of one to one tutoring services.

On July 28, 2009, the DCPS filed a Response to the Parent's Administrative Due Process Complaint. The Respondent asserted a multidisciplinary team ("MDT") meeting convened for the Student on January 29, 2009, with the participation of both parent and the educational advocate; the Student's progress was discussed, and an IEP developed. The Respondent also asserted that while ESY was an item that should have been discussed; the Student does not warrant ESY services. The Respondent contends that the Student has made progress both academically and social-emotionally during the 2008-2009 school year at the DCPS. The Respondent further asserted that the Student has not been denied a FAPE and compensatory education is not warranted at this time.

The Hearing Officer made various attempts to convene a telephonic pre-hearing conference call for the above reference matter. Counsels did not agree on a date and time. [2]

On August 27, 2009, an Order required the Petitioner to demonstrate at the hearing how the educational program was not implemented appropriate. The Petitioner had to show that ESY services were not discussed and that the services were required by the Student. The Petitioner had to prove how the alleged failures caused the Student or Petitioner harm. In the Order the Petitioner was also made aware of her burden to sustain the request for a compensatory education award the Petitioner had to prove (1) that as a result of Respondent' violation of the IDEIA, Petitioner suffered an educational deficiency, (2) that but for the violation, the Student would have progressed to a certain academic level, and (3) that there exists a type and amount of compensatory education services that could bring the Student to the level the Student would have been but for the Respondent's violation. The Petitioner had an obligation to establish the need and reasonableness of the amount of compensatory education requested and how the hours would be integrated into the Student's current educational program.

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[2] The PHC was scheduled for August 19, 2009, Counsel for the Respondent was not available and the Hearing Officer offered the attorneys the opportunity to agree on a time and date for the PHC, after many E-mail exchanges Counsels did not agree on a date and time.

The Respondent had to demonstrate at the hearing that the program was appropriately implemented. The Respondent also had to prove; that although not discussed; the ESY services were not necessary and that the Student was not denied a FAPE.

A hearing was held on September 3, 2009. The Petitioner presented a disclosure letter dated August 26, 2009 to which eighteen documents were attached, labeled P-1 through 18 and which listed four witnesses. Two witnesses testified. The Respondent presented a disclosure letter dated August 27, 2009 identifying fifteen witnesses and to which three documents were attached, labeled DCPS1 through 3 and supplemented on August 28, 2009 attaching to additional documents labeled DCPS 4 and 5. No witness testified. The documents were admitted without objections except Petitioner's documents 13 and 14 which were excluded for lack of relevancy to the facts in this Complaint.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

II. ISSUE(S)

1. Did the Respondent fail to reconvene to discuss the Student's need for ESY services and or progress?

2. Is the Student entitled to ESY?

3. Was the Student's IEP not implemented?

4. Was the Student denied a FAPE?

III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student was attending a DCPS during the 2008-2009 and continued during the 2009-2010 school year.[3]

2. The Student is a student with disabilities under the IDEIA. The Student's most recent IEP is dated January 29, 2009 and provides 15 hours of specialized instruction outside the general education setting; and 1 hour per week of occupational therapy. The Student's primary disability is identified as specific learning disability. The Student's IEP indicates that the Student eligibility for ESY would be determined at a later date. [4]

3. The Mother works daily with the Student on his homework; and she sees that he cannot capitalize letters and has difficulties identifying cents and dollars. The only improvement she has seen is his handwriting. Because he cannot work with four digits only with two

[3] P# 2 Complaint filed July 17, 2009.

[4] P# 3 January 29, 2009, IEP.

digit numbers. The Student according to the Petitioner requires ESY services so that he does not forget what he has learned during the regular school year.[5]

4. During a MDT meeting held January 29, 2009, the Student's teacher indicated the Student has improved focus and is performing to his fullest in the classroom. The Student has progressed tremendously in class in regards to his behavior and social functioning; he has made huge progress and is a lot more attentive in the classroom. The MDT decided that the Student's improvement in all areas of academics and social and emotional functioning in his academic setting, and therefore no need for a change in placement or his academic program.[6]

5. The Student's third grade report card from school year 2008 indicates that the Student was and the developing stage of all his skills. The Student's IEP progress report dated June 4, 2009; indicates that the Student has in the fourth advisory period mastered all his IEP goals. The notes indicate the Student has a wonderful presence in class because of his eagerness to learn and grow. The report indicates that the Student has made steady progress in writing simple sentences. The occupational therapy third reporting; indicates that the Student is active and a willing participant in sessions has adapted well to the therapy session. The Student began participating in a structured handwriting program to develop proper letter formation and improve his line orientation. [7]

6. During the January 2009 MDT meeting the Student's attention issues were discussed. The Education Advocate observed the Student for approximately one hour in the afternoon; he was in a small group paired with high functioning peers, and he received extra time to complete tasks. She has reviewed the Student's report cards, IEPs, and spoken with the Petitioner and has concluded the Student has a history of low retention when he returns from summer breaks. She did not contact the school to request a meeting to discuss ESY services. The Petitioner mentioned her interest that the Student receives summer school class; however, the education advocate did not attempt to coordinate a meeting. There were no ESY services included in the Student two prior IEPs.[8]

7. The Respondent did not convene a meeting to discuss ESY.[9]

IV. CONCLUSIONS OF LAW

FAPE Determination

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

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[5] Petitioner's testimony

[6] P# MDT notes - January 29, 09

[7] DCPS# 2 and 4

[8] P# 7 IEP 5/21/07 and P# IEP 5/1/08

[9] Petitioner's and Educational Advocate testimony

The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.

The Respondent has met its legal obligation under the IDEIA. Here is why.

In this case, the Petitioner claimed that the Respondent failed to meet its obligation to provide the Student an opportunity to obtain extended school year services ("ESY") and provide the services as prescribed in his IEP in violation of the IDEIA. The Respondent disputes the contention, claiming that the Student does not require the ESY services and all his IEP services have been appropriately provided.

Extended school year services

Pursuant to the IDEIA and 34 CFR **§ 300.106** each public agency must ensure that extended school year services are available as necessary to provide FAPE.

(a)...

(2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

(3) ...

(b) Definition. As used in this section, the term extended school year services means special education and related services that—

(1) Are provided to a child with a disability—

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP and

(iii) At no cost to the parents of the child; and

(2) Meet the standards of the SEA.

The requirement to provide ESY services to children with disabilities who need such services in order to receive FAPE reflects a longstanding interpretation of the IDEIA by the courts. The right of an individual child with a disability to receive ESY services is based on that child's entitlement to FAPE under section 612(a)(1) of the Act.[10]

It is essential that an Individualized Education Program ("IEP") be developed for each disabled child. The development of each IEP requires consideration of the disabled child's

[10] See: 20 U.S.C. § 1400-1485, Discussion and comments at Federal Register / Vol. 71, No. 156 at 46582

unique needs for special education and any related services. One of the related services that must be considered, and included in a disabled child's IEP when appropriate, is an extended school year program.[11]

In *Reusch v. Fountain,* 872 F. Supp. 1421, 1425 (D. Md. 1994) the Court addressed ESY and its role in the Student's receiving a FAPE. The Court reiterated the development of each IEP requires consideration of the disabled child's unique needs for special education and any related services. The Court further indicated one of the issues that must be considered, and included in a disabled child's IEP when appropriate, is an extended school year program. The provision of ESY as part of an IEP is not simply the extension of time in school. Rather, it is the inclusion of extended services designed for the particular child as part of that child's individualized education program. While there is no requirement that all disabled children have ESY in their IEP, there is a legal obligation to consider and fairly evaluate the appropriateness of ESY in developing every IEP for every disabled child.

In the present matter, on January 29, 2009, the school system developed an IEP for the Student. The IEP classified the Student with specific learning disability and recommended 15 hours of services in specialized instruction, with one hour per week of occupational therapy. At the meeting, the team developed an IEP; however, they did not discuss and determine whether the Student was entitled to ESY services; rather decided that ESY would be determined at a later date.

The Respondent did not convene to discuss the Student's ESY services needs during the 2008-2009 school year.

In essence ESY are special education and related services offered by the District beyond the normal school year if necessary to provide Student with a FAPE. The regulations give the IEP Team the flexibility to determine when ESY services are appropriate, depending on the circumstances of the individual child.34 C.F.R. § 300.106. Whether a child qualifies for ESY must be raised at every IEP team meeting. The Hearing Officer determines the Respondent has violated a procedural obligation to discuss the Student's ESY services.

Individualized education program

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the Respondent to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living.[12]

There was no credible evidence that the Student did not receive the special education and related services as specified by the Student's program.

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[11] Id. at 46582

[12] See: id. § 1400(d)(1)(A).

The IDEIA at 20 U.S.C. § 1414 (E) (ii), and as provided in 34 C.F.R. § 300.513(a) regarding hearing officer decisions on procedural issues, "[I]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education [FAPE] only if the procedural inadequacies—

i. impeded the child's right to a free appropriate public education;
ii. significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or

iii. caused a deprivation of educational benefits."

As indicated above, the Respondent violated its procedural obligations by failing to reconvene to discuss the Student's ESY services. However, an IDEA claim based on procedural violations is viable only if those procedural violations affected the Student's *substantive* rights. *See, e.g., Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error"); *C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) ("[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education where procedural faults committed by Board did not cause the child to lose any educational opportunity).

The Petitioner did not provide credible evidence that the Student is impacted negatively because he did not receive ESY services. The Petitioner failed to provide any evidence on how the Student was deprived of educational benefit or that he was harmed. The Petitioner acknowledged spoke to her education advocate about summer school and the advocate did not act upon her concern. There was no evidence the Petitioner was impeded in her opportunity to participate in the decision making process regarding the provisions of a FAPE.

V. SUMMARY OF DECISION

The Petitioner proved the Respondent failed to discuss and make a determination on the necessity of ESY services for the Student. The Petitioner did not prove that the services were required nor that harm was caused upon the Student or the Petitioner because of the failure to discuss the services. The Petitioner did not prove the Student's IEP services were not provided. The Student was not denied a FAPE and compensatory education is not warranted.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has not denied the Student a FAPE and issues the following:

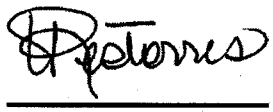
VI. ORDER

ORDERED, the Petitioner's request for relief is DENIED.

This order resolves all matters presented in the Petitioner's July 17, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516).



Signed: September 11, 2009

Wanda Iris Resto - Hearing Officer