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STUDENT HEARING OFFICE
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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

STUDENT,[1] through the Parent,	)	
	)	Date Issued: August 27, 2011
Petitioner,	)	
	)	Hearing Officer: Virginia A. Dietrich
v.	)	
	)	Case No:
District of Columbia Public Schools	)	
	)	
Respondent.	)	Hearing Date: August 10, 2011
	)	Room: 2009

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of year old Student, filed a due process complaint notice on June 13, 2011 alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

Petitioner alleged that DCPS failed to revise Student's Individualized Education Program ("IEP") in March 2010 to reflect the agreed upon services, DCPS failed to provide Student with pull-out services since March 2010 and any special education services for a brief period in the Fall of 2010, DCPS failed to provide Student with a full-time IEP and placement in May 2011, DCPS failed to properly invite and include Petitioner in an IEP meeting in May 2011 and DCPS failed to hold a placement meeting to determine a school placement for the 2011-2012 school year because Student's school was closing.

DCPS asserted that despite it's failure to revise the 03/16/10 IEP to reflect a combination of inclusion and pull-out specialized instruction services, Student received both types of services since March 2010, DCPS provided compensatory education to Student for missed behavioral support services, and Student's slow progress was due to Student's high absenteeism rate and not due to a lack of special education services. DCPS denied that Student required a full-time IEP and placement.

[1] Personal identification information is provided in Appendix A.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("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; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The due process complaint notice was filed on 06/13/11. This Hearing Officer was assigned to the case on 06/14/11. A resolution meeting took place on 07/01/11 at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. Therefore, the 30-day resolution period ended on 07/13/11, the 45-day timeline to issue a final decision began on 07/14/11, and the final decision was due on 08/27/11.

The due process hearing was a closed hearing that took place on 08/10/11. Petitioner was represented by Alana Hecht, Esq. and DCPS was represented by Laura George, Esq. Neither party objected to the testimony of witnesses via telephone. Petitioner participated in the hearing in person.

Petitioner presented four witnesses: Petitioner; Student; Educational Advocate and Admissions Director at DCPS presented three witness: DCPS special education coordinator ("SEC"); DCPS special education teacher ("SET"); and DCPS social worker.

Petitioner's disclosures dated 08/03/11, containing a witness list and Exhibits P-1 through P-22, were admitted into evidence without objection. P-6 was mislabeled as P-8-1 through P-8-14 and the correction was made on the record. DCPS' disclosures dated 08/03/11, containing a witness list and Exhibits R-1 through R-9, were admitted into evidence without objection.

The five issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS denied Student a FAPE by failing to revise Student's IEP on 03/16/10 to include 5 hours/week of specialized instruction in general education and 5 hours/week of specialized instruction outside of general education and provide those services.

Whether DCPS denied Student a FAPE by failing to implement Student's Individualized Education Program ("IEP") during the 2010-2011 school year by failing to (a) provide specialized instruction and (b) behavioral support services.

Whether DCPS denied Student a FAPE by failing to invite and include Petitioner at the IEP meeting on 05/19/11.

Hearing Officer Determination

Whether DCPS denied Student a FAPE by failing to develop an IEP on 05/19/11 with 100% specialized instruction and failing to provide a placement that could implement a full-time IEP.

Whether DCPS denied Student a FAPE by failing to convene a meeting to determine Student's placement for the 2011-2012 school year.

For relief, Petitioner requested a finding of a denial of a FAPE on the issues presented, a determination that Student requires 100% specialized instruction outside of general education and DCPS to amend Student's IEP accordingly, DCPS to fund and place Student at a private special education school for the denial of a FAPE and as compensatory education for missed specialized instruction, and an award of compensatory education for missed counseling services.

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. At the Multidisciplinary Team ("MDT") meeting on 04/07/09, the team agreed that Student needed more intensive services than the 15 hours/week of specialized instruction inside general education that he had been receiving. The team agreed that the 15 hours/week of specialized instruction should be split between 7.5 hours/week of specialized instruction inside general education (inclusion services) and 7.5 hours/week of specialized instruction outside of general education (pull-out services).[2] The IEP that was finalized on 04/07/09 was not included in the record.

#2. On 03/16/10, an IEP was finalized that prescribed 10 hours/week of specialized instruction inside general education, 30 minutes/week of speech and language services and 30 minutes/week of behavioral support services. DCPS' MDT Notes do not reflect any discussion about a reduction in service hours from 15 to 10 or the elimination of pull-out services. Petitioner's advocate's notes of the meeting reflect a discussion about 10 hours/week of specialized instruction being split between 5 hours/week of inclusion services and 5 hours/week of pull-out services.[3]

#3. At the MDT meeting on 06/10/10 that was attended by Petitioner and Petitioner's advocate, no mention was made of the 06/10/10 IEP failing to include both inclusion and pull-out services; however, on 06/11/10, Petitioner's advocate sent written correspondence to DCPS requesting such a correction to the IEP. This request for a correction was never addressed by DCPS.[4]

#4. Despite the failure of the 03/16/10 IEP to specify an equal spilt of inclusion and pull-out services, Student received appropriate inclusion and pull-out services from 03/16/10 until the

[2] P-17-4, P-18-3.
[3] P-13, P-14, P-15.
[4] P-9-1, P-9-2, Advocate.

end of the 2009-2010 school year.[5] Despite the failure of the 06/10/10 IEP and 05/19/11 IEP to specify an equal split of inclusion and pull-out services, Student received appropriate pull-out services in mathematics and appropriate inclusion services in Language Arts during the 2010-2011 school year except for a 6-8 week period of time from Sep – Nov 2010 when the school did not have a special education teacher.[6]

#5. During the 2010-2011 school year, Student's IEP mandated the provision of 30 minutes/week of behavioral support services outside of general education.[7] DCPS failed to provide 13 sessions (6.5 hours) due to the lack of a service provider. On 07/01/11, DCPS provided authorization for 4 hours of behavioral support services as compensatory education for 4 hours of missed services.[8] During the academic year, Student did receive 10 sessions (5 hours) of behavioral support services and Student was absent or unavailable for 11 sessions (5.5 hours).[9] Student was not a behavior problem in school. The purpose of the behavioral support services was to help Student learn to speak up and advocate for himself.[10]

#6. During the 2010-2011 school year, Student was not opposed to receiving services in the inclusion setting or the pull-out setting and he did not feel stigmatized by being a special education student.[11] Student was able to function satisfactorily with inclusion services in his English/Language Arts class, but he definitely needed pull-out instruction for mathematics.[12] Student made progress towards achieving his IEP goals in mathematics, reading, written expression, and speech and language and he made progress towards or mastered social emotional IEP goals from 01/22/11 – 03/25/11.[13] Student also made progress on his grade reports from the 1st to the 2nd advisories by holding steady with grades of "C" in 3 classes and improving his grades from "D" to "C" in his core curriculum classes of language arts, world geography, mathematics and science.[14] Student did not receive specialized instruction in social studies or science class, but he was able to effectively participate in social studies due to modifications in the curriculum and direct assistance from the general education teacher. The SET also provided advice to the social studies and science teachers on how to modify the curriculum for Student.[15]

#7. During the 2010-2011 school year, Student was absent from school at least 50% of the time.[16] In May 2011, Student was performing below grade level due to his learning disability and poor attendance.[17] Student showed some growth as measured by a classroom assessment given to Student at the beginning and end of the 2010-2011 school year, but his growth and achievement were marred by his high absenteeism rate. It was impossible to determine whether Student's failure to make more progress was due to insufficient services or his high absenteeism

[5] P-9-1, SEC.
[6] SEC, SET, Student.
[7] P-4, P-10.
[8] P-1-1, P-6.
[9] P-7.
[10] SEC, social worker.
[11] Student, social worker.
[12] SET.
[13] R-7.
[14] P-8.
[15] SEC, SET, Student.
[16] *Id.*
[17] R-4.

rate.[18] During the summer of 2011, Student failed to attend the Extended School Year services that had been confirmed by DCPS and Petitioner.[19]

#8. Both DCPS and Petitioner agreed to hold the annual IEP review meeting on 05/11/11, but it was cancelled the day before by Petitioner due to the unavailability of essential DCPS personnel, i.e., the social worker and general education teacher. DCPS immediately tried to reschedule the meeting for 5/18/11 or 5/19/11 by sending e-mail correspondence to Petitioner's advocate on 5/12/11 and 5/13/11.[20] Petitioner's advocate did not respond to DCPS' e-mail scheduling request until the evening of 05/18/11 and indicated that she would not be available until June. Within 30 minutes of receiving this e-mail response from Petitioner's advocate, DCPS requested parental telephone participation for a meeting the next day[21] and then held the meeting anyway on 05/19/10 without getting a response from Petitioner's advocate because it was the end of the school year, the IEP was due to expire on 06/10/11 and convening a full IEP team was proving to be increasingly difficult as the school year neared its end. DCPS never offered to reschedule the meeting to include Petitioner because a full team could not be convened at the end of the school year or during the summer.[22]

#9. The IEP that was developed on 05/19/11, without the presence of Petitioner, prescribed 10 hours/week of specialized instruction inside general education, 2 hours/month of speech-language services and 30 minutes/week of behavioral support services.[23] If Petitioner had been present, she would have requested an increase in services as well as a split between inclusion and pull-out services.[24]

#10. At least since December 2010, Petitioner was aware that Student's school was closing at the end of the school year and that all students would be relocated to Emery Education Campus.[25] Emory Education Campus became Langley Education Campus ("Langley") and that is where Student is slated to attend the 8th grade in the Fall of 2011 if Petitioner enrolls Student there. Langley provides special education services primarily using the inclusion model, but provides pull-out services to students on an as-needed basis. Langley has a full complement of related services providers and a social worker on staff. At the time of the due process hearing, the enrollment at Langley for 8th grade was very small with only 13 students.[26]

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:

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[18] SET.
[19] R-8, R-9, P-3.
[20] P-5.
[21] R-2.
[22] SEC, Advocate.
[23] P-4-7.
[24] Petitioner, Advocate.
[25] Petitioner, SEC, P-22.
[26] SEC.

Hearing Officer Determination

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education 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.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. 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. 34 C.F.R. 300.513(a).

"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).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to revise Student's IEP on 03/16/10 to include 5 hours/week of specialized instruction in general education (inclusion) and 5 hours/week of specialized instruction outside of general education (pull-out) and provide those services.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch .Dist. of the City of Newark,* 336 F.3d 260, 264 (3d Cir. 2003). At a minimum, the IEP must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Chambers v. Philadelphia Bd. of Educ.,* 587 F.3d 176, 182 (3d Cir. 2009).

34 C.F.R. 300.320(a)(4) mandates that the IEP provide a description of the special education and related services...that will be provided to enable the child to advance appropriately towards attaining the annual goals and to be involved in and make progress in the general education curriculum.

On 03/16/10, DCPS violated the IDEA by failing to revise Student's IEP to reflect a 50/50 split of the 10 hours of specialized instruction between inclusion and pull-out services. However, there was no harm done because Student received the appropriate amount of inclusion and pull-out services for the remainder of the 2009-2010 school year and for the 2010-2011 school year when Student was in school and when a service provider was available.[27] And, although the record did not contain a finalized copy of the 03/16/10 IEP and there was a discrepancy between the notes of DCPS and Petitioner's advocate as to whether or not the team

[27] Findings #3, #4, #7.

agreed that services should be split between inclusion and pull-out services,[28] it was more likely than not that Student was to receive pull-out services because the MDT notes of 04/07/09 indicated that Student definitely required pull-out services in 2009[29] and Student definitely required pull-out services in mathematics during the 2010-2011 school year.[30] Petitioner failed to meet her burden of proof that Student was denied a FAPE by DCPS' failure to revise Student's IEP on 03/16/10 to reflect a combination of inclusion and pull-out services.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to implement Student's IEP during the 2010-2011 school year by failing to (a) provide specialized instruction and (b) behavioral support services.

34 C.F.R. 300.323(c)(2) requires that special education and related service be made available to Student as soon as possible following the development of the IEP.

A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing the IEP, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). *See Catalan ex rel E.C. v. District of Columbia*, 478 F. Supp 2d 73, 75 (D.C.C. 2007).

The Hearing Officer must determine whether the deviations from the IEP's stated requirements are material. The IDEA is violated when a school district deviates materially from a student's IEP. And, the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail on a failure-to-implement claim. Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811 (2007).

For period of approximately 6-8 weeks between Sep – Nov 2010, DCPS failed to provide Student with 10 hours/week of specialized instruction consisting of 5 hours/week of inclusion services and 5 hours/week of pull-out services. This was a material failure to implement the IEP and Student was denied a FAPE. Although Student's attendance records were not provided as part of this record, Student was only absent or unavailable twice for behavioral support services during this time period[31] and the Hearing Officer infers that Student was present in school for most of this time period.

DCPS also violated the IDEA by failing to provide Student with 6.5 hours of behavioral support services; however, DCPS provided Student with 4 hours of compensatory behavioral support services on 07/01/11. Petitioner failed to prove that DCPS' failure to provide the

[28] Finding #2.
[29] Finding #1.
[30] Finding #6.
[31] P-7.

remaining 2.5 hours of behavioral support services resulted in harm. Student had missed as many sessions as he had received behavioral support services due to his absences from school.[32] Moreover, Student was not a behavior problem in school; he needed behavioral support services in order to learn how to speak up and advocate for himself, and Student had made progress towards or mastered his social emotional goals.[33] Petitioner failed to meet her burden of proof that Student was harmed and denied a FAPE as a result of 2.5 hours of missed behavioral support services.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to invite and include Petitioner at the IEP meeting on 05/19/11.

The Hearing Officer determines that DCPS conducted the annual IEP review meeting on 05/19/11 without proper notice to Petitioner. The agreed upon meeting on 05/11/11 was cancelled because DCPS could not convene a full IEP team. Pursuant to 34 C.F.R. 300.321, Petitioner was entitled to have an IEP team that included the general education teacher and social worker because Student participated in the general education curriculum and Student participated in behavioral support services and these personnel were essential for proper educational planning. Pursuant to 34 C.F.R. 300.322, DCPS must take proper steps to include Petitioner in an IEP meeting, and that requires proper notice to Petitioner. The Hearing Officer determines that DCPS failed to take the proper notice steps; instead DCPS hurriedly held the IEP review meeting on 05/19/11 because team members were becoming scarce towards the end of the school year and Student's IEP was due to expire on 06/09/11; however, DCPS still had time to convene a meeting that would allow Petitioner to participate. DCPS never offered to reconvene the meeting because a full team could not be convened over the summer. The IEP that was developed on 05/19/11 without Petitioner present again failed to include pull-out services, and the record was clear that Student definitely needed pull-out services in mathematics.[34] Petitioner's right to participate in educational decision making was clearly denied and Student was harmed because the IEP developed on 05/19/11 did not accurately reflect the services that he needed to access the curriculum. Petitioner met her burden of proof that Student was denied a FAPE.

The fourth issue to be determined is whether DCPS denied Student a FAPE by failing to develop an IEP on 05/19/11 with 100% specialized instruction and by failing to provide a placement that could implement such an IEP.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114(a)(2).

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[32] Finding #5.
[33] Finding #6.
[34] Findings #6, #8, #9.

Hearing Officer Determination

Petitioner alleged that Student required 100% specialized instruction because he is six years behind grade level and a part-time IEP is insufficient to enable him to make academic progress. Student was able to show some growth and academic progress during the 2010-2011 school year with less than a full-time IEP. He was able to function satisfactorily with inclusion services in his English/Language Arts class and he was also able to participate satisfactorily in his social studies class with no inclusion services when lessons were modified for him. Not only was Student's academic progress significantly hindered by his high absenteeism rate of at least 50% for the school year, his extremely high absenteeism rate makes it impossible to determine exactly what level of services Student actually needs. Until Student's attendance drastically improves, it will be difficult for Petitioner to advocate successfully for a full-time IEP and placement. Student must attend school regularly so that his performance with services can be accurately measured. Petitioner failed to meet her burden of proof that Student required a full-time IEP and placement.

The fifth and last issue to be determined is whether DCPS denied Student a FAPE by failing to convene a meeting to determine Student's placement for the 2011-2012 school year.

The placement is the setting and the location where the IEP is implemented. 34 C.F.R. 300.116. "Placement" refers to points along the continuum of placement options available for a child with a disability, and "location" refers to the physical surrounding, such as the classroom in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that the determination is consistent with the decision of the group determining placement. School administrators have the flexibility to assigning a child to a particular school or classroom, provided that the assignment is made consistent with the child's IEP and the decision of the group determining placement. Maintaining a child's placement in an educational program that is substantially and materially similar to the former placement is not a change of placement. Comments to Federal Register, Vol. 71, No. 156. p. 46588-46589.

As early as December 2010, Petitioner was aware that Student's school would be closing at the end of the 2010-2011 school year and that Student would be relocated to another public school. This was a school wide relocation.[35] Although the initial notice to parents indicated that class size at the newly designated school would likely exceed the class size at Student's current school, these concerns could have been ironed out at a meeting with DCPS. As it turns out, the class size for Student at the school designated for Student to attend for the 2011-2012 school year will be smaller than the class size at the school he attended this past year. Moreover, DCPS presented credible evidence that the new school can provide the amount of inclusion and pull-out services that Student would need. Petitioner failed to meet her burden of proof that a change of placement occurred by DCPS changing the location of services to Langley.

[35] Finding #10, P-22, R-1.

Summary

Petitioner proved by a preponderance of the evidence that Student was denied a FAPE when DCPS failed to provide 10 hours/week of specialized instruction for approximately 8 weeks during the Fall of 2010 and when DCPS failed to invite and include Petitioner in the annual IEP review meeting on 05/19/11. Petitioner did not prove that Student required a full-time IEP or placement to receive educational benefit. Petitioner did not prove that Student was harmed by not receiving 2.5 hours of behavioral support services.

"When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place." The qualitative standard for determining compensatory education is that "compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid v. District of Columbia, 43 IDELR 32 (2005).*

In this case, the measurement of harm to Student as a result of 8 weeks of missed specialized instruction was elusive because Student had an extremely high absenteeism rate for the school year and his academic achievement levels could not be assessed at the end of the year due to his absences.[36] Insofar as Student is entitled to compensatory education, a day for day calculation for missed services will be utilized because there is no other reliable instrument of measure available.

ORDER

(1) DCPS shall begin scheduling efforts to convene an IEP meeting with all necessary personnel, with proper notice to Petitioner, to review and revise Student's IEP, within 5 business days of the date of this Order;

(2) DCPS shall convene the meeting described in (1) above, within 30 calendar days;

(2) No later than 10 business days from the date of this Order, DCPS shall provide to Petitioner, through Petitioner's Attorney, authorization for funding for 80 hours of independent tutoring in academics as compensatory education for missed specialized instruction from Sep – Nov 2010; and

(4) Any delay by Petitioner or Petitioner's representatives shall extend any deadline for DCPS, day for day.

All other requests for relief are DENIED.

IT IS SO ORDERED.

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[36] SET.

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: August 27, 2011

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner's Attorney: Alana Hecht, Esq. (electronically)
DCPS' Attorney: Laura George, Esq. (electronically)
DCPS (electronically)
SHO (electronically)