

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

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

OSSE
Student Hearing Office
April 14, 2014

PARENT, on behalf of
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving a _____ student with a speech or language impairment.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on January 17, 2014 in regard to the Student. This Hearing Officer was appointed to preside over this case on January 23, 2014.

A response was filed by the District denying these contentions on January 23, 2014. This response was timely filed. A resolution meeting was not held in this case. The resolution period ended on February 16, 2014.

On February 7, 2014, Petitioner moved to strike Respondent’s response and/or to limit the defenses for Respondent. Petitioner alleged that Respondent’s response is insufficient.

Respondent filed an amended response on February 21, 2014.

On February 22, 2014, this Hearing Officer held a prehearing conference.

A prehearing conference order issued on February 23, 2014 outlining the summarizing the rules to be applied in this hearing and identifying the issues in the case. The order also denied Petitioner's motion to strike in its entirety.

On March 11, 2014, Petitioner again moved to strike the response and to compel student records. On March 14, 2014, via conference call, this IHO issued a verbal order again denying the application to strike the response and directing Respondent to provide records requested by Petitioner.

A hearing date proceeded on March 18, 2014. The matter did not finish on this date. Accordingly, Respondent moved for a 10 day continuance, which was granted by this IHO on March 23, 2014. The decision date was extended from April 2, 2014 to April 12, 2014.

The hearing was continued on April 2, 2014. Briefs were submitted by the parties in support of their positions on April 4, 2014.

Petitioner entered into evidence exhibits 1-26; Respondent entered into evidence exhibits 1-10. Petitioner presented as witnesses: Petitioner; Witness A, an advocate; Witness B, an occupational therapist; and Witness C, an independent audiologist and speech and language pathologist. Respondent presented: Witness D, a family care coordinator; Witness E, an LEA Representative; Witness F, a speech and language pathologist, and Teacher A, the Student's current teacher.

JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

ISSUES

As identified in the Prehearing Conference Summary and Order, the issues to be determined are as follows:

1. Did DCPS fail to implement the Student’s IEP from March 13, 2013 through to the end of the 2012-2013 school year? If so did DCPS deny the Student a FAPE?

2. Did DCPS fail to implement the Student’s IEP for the 2013-2014 school year? If so, did DCPS deny the Student a FAPE? If so, did DCPS deny the Student a FAPE?

3. On February 2, 2013, did DCPS fail to offer the Student an appropriate IEP in regard to present levels of performance, goals, speech and language therapy and ESY services? If so, did DCPS deny the Student a FAPE?

4. On December 11, 2013, did DCPS fail to offer the Student an appropriate IEP in regard to “consideration of special factors,” present levels of performance, goals, speech and language therapy, ESY services and occupational therapy? If so, did DCPS deny the Student a FAPE?

5. Did DCPS fail to appropriately respond to the Petitioner’s request for records? If so, did DCPS deny the Student a FAPE? If so, did DCPS deny the Student a FAPE?

FINDINGS OF FACT

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

1. The Student is eligible for services as a Student with a speech or language impairment. (P-14-1)

3. The Student has severe speech articulation problems that directly affect her in the classroom. (P-18-2; Testimony of Petitioner)

4. The Student had about 3-5 words in her vocabulary at 17 months. (P-10-2-3)

5. An early intervention plan provided the Student with 1 session of speech and language therapy weekly, for 60 minutes, from August 11, 2011 through January 11, 2013. (P-10-5)

6. Respondent met to conduct an evaluation of the Student on January 2, 2013. (P-12-1)

7. Testing on the Clinical Assessment of Articulation and Phonology Test (CAAP) on January 14, 2013 indicated that the Student scored 68, in the 3rd percentile, in articulation. It was noted that the Student was less than 50 percent intelligible in connected speech. (P-18-2)

8. Her articulation skills were considered "severely delayed" and it was indicated that these skills would "negatively impact her ability to be understood by others, demonstrate learned knowledge, participate in class and get her needs and wants appropriately met in her educational environment." (P-18-2)

9. Also on January 14, 2013, the Student scored a 94, in the 34th percentile, in receptive language. She scored a 99, in the 47th percentile, in expressive language. (P-18-3)

10. At this time, support strategies that were recommended for the Student were using peer and adult models, using books and songs that use repetitive verse, using games and strategies that involve minimal pair choices, using auditory bombardment strategies throughout the day during snack, selected reading, nursery rhymes, offering a multi-sensory approach to sound production that is fun and encourages participation, and modeling appropriate speech versus correcting errors. (P-18-5)

11. An IEP was created for the Student on February 13, 2013. This IEP provides for 2 hours of speech per month, a fifty percent reduction from the services that were provided by Early Intervention. No ESY services are recommended. The IEP indicates that the Student has severe articulation issues that negatively affect her in the classroom. Goals related to producing the letters /t, d, m, and n/ at the beginning of single syllable words, and reducing the occurrence of the “phonological process final consonant deletion.” The baseline for these goals is less than 25 percent success. (P-13-2-3)

12. There was no explanation as to why the speech services were reduced.
(Testimony of Petitioner)

13. No transportation was offered at the February, 2013 meeting. (Testimony of Witness D)

14. The parent was unable to bring the Student to the services because of work.
(Testimony of Witness D)

15. The parent did not bring the Student to any speech therapy from February, 2013 through June, 2013. (Testimony of Petitioner)

16. The Student was then accepted at School A through a lottery in June, 2013. She went to register at the school, was given a package and an application, which she sent back by August, 2013. (Testimony of Petitioner)

17. She is now in a class with 15 children. (Testimony of Teacher A)

18. The Student then received speech in a group size of 4-8 for 120 minutes in September, 2013; in a group size of 4-8 for 90 minutes in October, 2013, with 30 minutes in a group size of 2-3; was offered 155 minutes of speech in November, 2013, 80 minutes in a group of 4-8, 45 minutes in a group of 2-3, and 30 minutes in a group of 9 or more; in December, 2013, 30 minutes in a group of 4-8. (P-19)

19. At School A, the Student's speech is concerning to her teacher. She sometimes does not listen, she sometimes cannot get words out, and will be frustrated and go in the corner. (Testimony of Petitioner)

20. An IEP meeting was held on December 11, 2013. At the IEP meeting, the teacher shared her concerns about the Student's speech. She did note that she was making progress. (R-2-1-2)

21. An IEP was created for the Student on December 11, 2013. This IEP provides for 2 hours of speech per month. The IEP indicates that the Student's overall speech intelligibility is less than 50 percent in "connected speech" but that she has made some progress in sounds. Goals related to producing the letters /t, d, m, n/ at the end of single syllable words in addition to the two goals on the February 13, 2013 IEP. The baselines for the goals are indicated in the IEP. (P-14-1-3)

22. Her teacher, Teacher A, thought she needed more speech and that another 30 minutes was a good idea. (Testimony of Teacher A, Transcript, 179-180)

23. At her current school, there are complaints about the Student crying and peeing on herself. (Testimony of Petitioner)

24. The Student has made progress in speech, and is now working on different sounds. She has improved in terms of the letters K and G. (Testimony of Witness F)

25. She gets 30 minutes a week in a group setting, and individual. (Testimony of Witness F)

26. She is working well in small group instruction. (Testimony of Teacher A)

27. The Student's pre-school report card dated November 12, 2013 indicated that the Student is listening to and understanding increasingly complex language, using language to express thoughts and needs, and using appropriate conversational and other communication skills. (P-21-1)

28. The progress report for the second reporting period indicated progress in speech intelligibility by increased production of the sounds /t, d, m. She also demonstrated the ability to increase the range of motion of tongue, lips, and jaw. She continued to omit ending sounds in words. (R-1-2-3)

29. The report card indicates that they would like to help her respond appropriately to specific vocabulary and simple statements, questions and stories; help her describe the use of many familiar items; help her progress so that she is understood by most familiar people; help her tell simple stories about objects, events, and people not presents; help her engage in conversation of at least three exchanges. (P-21-1)

30. The report card indicates that she is beginning to use some words and word-like sounds and is understood by most familiar people. (P-21-1)

31. The parent never got a complete copy of the student's records; she asked for the records at the IEP meeting. Does not know what is missing. (Testimony of Petitioner)

32. The parent now can understand the Student 50 percent of the time. (Testimony of Petitioner)

33. I found all the witnesses credible in this proceeding.

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:

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR Sect. 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

In S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the Court found that the measure and adequacy of an IEP must be determined as of the time it was offered to the student. Citing to Circuit court decisions, the Court found that an IEP should be judged prospectively to avoid "monday morning quarterbacking." See Thompson

R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990).

1. IEP, February 2013.

Petitioner contends that Respondent did not create an appropriate IEP for the Student in February, 2013 and did not implement that IEP appropriately.

Petitioner argues that the IEP had inappropriate present levels of performance because it lacked data; that the goals on the IEP are not measurable; that there are insufficient hours of speech and language services offered per month; and that no Extended School Year services are offered (ESY).

The record shows that the Student then had a severe articulation problem that put her in the 3rd percentile of the population, and that the team knew of this issue at the time of the review. The record indicates that the Student was so impacted by the articulation issue at the time that she was not intelligible except by her mother. This articulation issue, according to the IEP itself, was going to have a significant impact on the Student in the classroom.

Yet Respondent chose to provide the Student with a minimal level of service, only 30 minutes of speech and language therapy per week. There is no reason in the record as to why this level of service was provided, and the parent was provided with no reason at the time as to why there was a decrease from the hours provided during early intervention. Petitioner, on contrast, presented persuasive testimony from a speech and language expert (Witness C) to the effect that the Student requires 30 minutes of speech and language therapy *per day*, rather than per week.

Additionally, Respondent offered these services to the Student without considering delivery of the services. Respondent's position is that the parent needed to bring the Student to School A during the day. However, the Petitioner works and is unable to do so. Even though the Petitioner lived near the school, Respondent should have made allowances so that this working parent could be accommodated. As indicated in the regulations: "(r)elated services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education." 34 CFR Sect. 300.34(a).

Respondent also appears to argue that that the Student was not enrolled in one of Respondent's schools. As Petitioner points out, the caselaw makes clear that receipt of special education services cannot be conditioned on attendance at a DCPS school. In Hawkins v. District of Columbia, 539 F.Supp.2d 108 (D.D.C. 2008), DCPS indicated that it could not conduct a meeting for a Student because the Student was not enrolled. The Court held that DCPS violated the IDEA by not convening a meeting, indicating that "the possibility that [the Student] may not have been registered in any school does not, by itself, eradicate DCPS's IDEA obligations since D.C. was previously identified for an eligibility determination." 539 F. Supp. at 114-15; see also District of Columbia v. Abramson, 493 F.Supp.2d 80, 85 (D.D.C. 2007)(Student was enrolled in school in Connecticut and DCPS argued that the Student was not eligible; held that Student was eligible).¹

¹ Petitioner's other allegations are not persuasive to this IHO in connection to the February, 2013 IEP. The contention that the goals did not have adequate baselines is without merit. There is no requirement in the IDEA that goals have baselines – and these goals did in fact have reasonable baselines, i.e., that the Student had succeeded less than 25 percent of the time in regard to the activities targeted by the goals. Petitioner contends that the goals do not contain anticipated dates of achievement, but does not explain how this omission materially deprived the Student of a FAPE in this context. Petitioner contends that the IEP did not contain appropriate present levels of performance, but the IEP describes the Student's deficiency area (i.e., articulation) adequately.

Parenthetically, it is noted that Petitioner characterizes this issue as a “failure to implement” claim. To this IHO, the problem lies in the fact that the IEP itself did not provide the Student with services that were necessary to the delivery of the speech and language services.

Finally, with respect to ESY services, Petitioner argues that the testimony of Witness A was sufficient to establish a need for services on this point. ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.” Shank, 585 F.Supp.2d at 68–69; see also Johnson v. D.C., 873 F. Supp. 2d 382, 386 (D.D.C. 2012)

Witness A testified that the Student needed the ESY services because there was a significant risk of regression. Witness A qualified as an expert in special education during the hearing. There is nothing in the record to establish that Respondent even considered giving the Student ESY services. Respondent did not argue this point in its brief. I find that the preponderance of the evidence supports the Petitioner on this issue.

As a result of the foregoing, I find that Respondent denied the Student a FAPE by its February, 2013 IEP, through to the start of school in 2013.

2. IEP, December, 2013.

Petitioner contends that the December, 2013 IEP was inadequate for the Student. Petitioner contends that the “consideration of special factors” section of the IEP was incorrect, that the IEP does not describe how the Student’s disability affects her access to the general curriculum, that the baselines for the goals are not appropriate, that there are insufficient hours of speech and language services provided, that no occupational therapy is prescribed, and that no

ESY services are provided. Petitioner also contends that the Student's IEP was not implemented.

In regard to the main issue – whether 30 minutes of speech and language therapy weekly are sufficient for this 3 year old child with a severe articulation problem – I am constrained to agree with Respondent. Witness F testified that the Student made meaningful progress during the first part of the 2013-2014 school year. This is reported in the IEP meeting notes and has been corroborated by Teacher A. Moreover, Petitioner's brief does not clearly address this argument. Though there is some evidence in the record that this Student would benefit from more than 30 minutes a week of speech and language therapy, Petitioner has not met her burden on this issue.

In regard to Petitioner's other claims in connection to the December, 2013 IEP, I am not persuaded that any such claim can result in a finding of FAPE denial. Petitioner contends that the "consideration of special factors" section of the IEP incorrectly indicated that the Student did not have speech and language issues, but does not explain how any such error was anything more than procedural in nature. Petitioner contends that that the IEP does not describe how the Student's disability affects her access to the general curriculum, but again fails to indicate why this should be considered a substantive violation that can result in a finding of FAPE denial. Petitioner contends that the baselines for the goals are not appropriate, but a review of the goals indicates that there are specific baselines in the goals. Moreover, there is no requirement that goals have baselines. Finally, Petitioner contends that the Student requires occupational therapy, but an occupational therapy assessment from February, 2013 indicated that the Student did not require occupational therapy services. (Exh. 17)

However, as with the February IEP, I agree that ESY services should have been included here. Witness A testified that the Student needed the ESY services because there was a significant risk of regression. Witness A qualified as an expert in special education during the hearing. There is nothing in the record to establish that Respondent even considered giving the Student ESY services. Respondent did not argue this point in its brief. I find that the preponderance of the evidence supports the Petitioner on this issue.

In regard to implementation of the IEP for 2013-2014, districts may be held liable on a "failure to implement" theory. "Failure to implement" claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must indicate that substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 2012 WL 548173 (D.D.C. 2012)(holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007).

A review of the service trackers here indicates that the Student was offered the appropriate amount of service hours for the months of September, October and November, 2013. There is nothing in the record to suggest that any imperfection in services delivered during this school year had any adverse impact on the Student. Moreover, Petitioner indicated that she did not have a particular complaint about the amount of services delivered in 2013-2014. I will deny the Petitioner's claim in this connection.

In sum, I find that the December, 2013 IEP denied the Student a FAPE because it failed to recommend ESY services.

3. Records.

Petitioner contends that she was denied access to student records for the 2013-2014 school year. Petitioner contends that Respondent has denied access to the Student's "communication log" and "student history."

Regarding the Petitioner's request for records, the IDEA regulations provide in pertinent part: "(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to -- the identification, evaluation, and educational placement of the child and the provision of FAPE to the child." 34 C.F.R. Sect. 300.501(a). The term "education records" means the type of records covered under the definition of "education records" in 34 C.F.R. Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. Sect. 1232g (FERPA))." 34 C.F.R. Sects. 300.611-300.625. Education records as defined under FERPA are "directly related to a student" and "maintained by an educational agency or institution or by a party acting for the agency or institution." The term does not include: "records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the "record". "Record" means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm and microfiche. 34 C.F.R. Sect 99.3.

The record is unclear on exactly what the parent wants in this record. Petitioner did not testify clearly about what records still need to be produced after the Respondent has provided the records. Moreover, Petitioner has not shown that any such lack of production denied the Student a FAPE. I will deny this claim since Petitioner has not met her burden on this issue.

4. Remedy.

Petitioner also seeks compensatory education for the period of FAPE denial. One of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award "educational services. . . to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, 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. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award." Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524. Specifics regarding the type of relief sought may not be required by Courts if witnesses have identified where the Student was before FAPE denial, where the Student should be after FAPE denial, the number of hours of compensatory education needed for the Student, and what program would get the student where he should be, and what it would consist of. Cousins v. District of Columbia, 2012 WL 3090265 (D.D.C. 2012).

Witness A, an expert in special education, testified that she has reviewed the Student's records and has determined that 11 hours of speech and language therapy by an independent provider are appropriate to make up for the Student's FAPE deprivation for the 2012-2013 school year. The amount of hours requested are reasonable given that the Student did not receive services at all from February, 2013 through August, 2013. I find that this request is sufficiently in sync with the Reid standard. However, no rationale is stated to order these services through an independent provider. Accordingly, I will not require Respondent to provide these services through an independent provider.

Petitioner also requests independent psychological, speech and language, occupational therapy, audiological, auditory processing, speech-motor, and verbal apraxia assessments for the Student. I find that there is nothing in the record to suggest that the Student has had any issues in school except for speech articulation issues. Moreover, the Student was recently subject to a speech and language assessment. I find all these assessments to be unnecessary. I will deny the request for such assessments.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, I order Respondent to provide the following:

1. Respondent will provide the Student with 11 hours of speech and language services as compensatory education. Services shall be provided by the end of the 2014-2015 school year;
2. The current IEP is hereby amended to include ESY services;
3. Petitioner's other claims are denied.

Dated: April 12, 2014

Michael Lazan
Impartial Hearing Officer

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: April 12, 2014

Michael Lazan
Impartial Hearing Officer