

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

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

OSSE
Student Hearing Office
July 29, 2014

STUDENT, ¹)	Date Issued: 7/28/14
through his Parent,)	
Petitioner,)	Hearing Officer: Keith L. Seat, Esq.
)	
v.)	
)	
District of Columbia Public Schools)	
("DCPS"),)	
Respondent.)	
)	
)	
)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, mother of Student, filed a due process complaint on 5/9/14, alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because Student needs specialized instruction outside general education in his Individualized Education Program ("IEP") due to problems from his hearing loss. DCPS asserted that Student's challenged IEPs were appropriate and that general education is best for Student.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 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.

¹ Personally identifiable information is provided in Appendix A.

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Procedural History

Following the filing of the due process complaint on 5/9/14, this Hearing Officer was assigned to the case on 5/13/14. DCPS filed a timely response to the complaint on 5/16/14 and made no challenge to jurisdiction.

Neither party waived the resolution meeting, which took place on 5/22/14. At that time, the parties neither settled the case nor agreed to end the resolution period early, so the standard 30-day resolution period concluded on 6/8/14. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 10-day continuance, which requires a Hearing Officer Determination (“HOD”) by 8/2/14.

A prehearing conference was held on 6/19/14 and a Prehearing Order was issued on 6/19/14.

The due process hearing, which was closed to the public, took place on 7/9/14 beginning at 9:30 a.m., 7/10/14 beginning at 9:30 a.m., and 7/23/14 beginning at 1:00 p.m. Petitioner was represented by Miguel Hull, Esq. DCPS was represented by Tanya Chor, Esq. Spanish language interpreter Janet McFadden interpreted the proceedings for Petitioner throughout the three days of the due process hearing, except for a short period when Petitioner was not able to participate. Petitioner and Father were present for much of the first day of hearing (7/9/14), and Petitioner was on the telephone on the other days (7/10/14 and 7/23/14) with interpreter, who was at the hearing.

Neither party objected to the testimony of witnesses by telephone.

The parties made no admissions and agreed on no stipulations.

Petitioner’s Disclosure statement, filed on 7/2/14, consisted of a witness list of 4 witnesses and documents P-1 through P-15; Petitioner’s documents were admitted into evidence without objection.²

Respondent’s Disclosure statement, filed on 6/25/14, consisted of a witness list of 8 witnesses and documents R-1 through R-16; Respondent’s documents were admitted into evidence without objection.³

Petitioner presented 3 witnesses in her case-in-chief (*see* Appendix A):

1. Petitioner
2. Educational Advocate

² Pursuant to the Prehearing Order issued in this case, failure to note objections to the opposing party’s disclosures results in the disclosures being admitted without objection.

³ *Id.*

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3. Private Audiologist – qualified over objection as an expert in Audiology and Speech-Language Pathology

Respondent presented 4 witnesses in its case (*see* Appendix A):

1. Teacher
2. School Audiologist – qualified over objection as an expert in Educational Audiology, Appropriate Diagnosis and Determination of Educational Programming for Students with Hearing Concerns
3. Speech-Language Pathologist
4. Psychologist

Petitioner did not present any rebuttal witnesses.

At the due process hearing, Petitioner withdrew one of her two issues,⁴ so the remaining issue to be determined in this Hearing Officer Determination is:

Issue – Whether DCPS denied Student a FAPE by failing to develop and implement appropriate IEPs (dated 4/29/14 and 6/13/13) and placement where Student (a) has speech/language and auditory deficiencies, (b) struggles academically in the general education classroom, and (c) had low scores on portions of the May 2013 YCAT.

Petitioner requested the following relief:

1. Development of an IEP requiring specialized instruction in reading, writing and mathematics outside general education.
2. Any other appropriate relief.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁵ are as follows:

⁴ The issue that Petitioner withdrew with prejudice was:

“Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP which provides for ESY for the summer of 2014 where Student is at risk of regression during the summer.”

⁵ 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

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1. Student is a resident of the District of Columbia. Petitioner is Student's mother ("Mother"). Mother speaks only Spanish, while Student's father speaks both Spanish and English. Student has lived in the U.S. all his life and is bilingual in Spanish and English.⁶

2. Student's disability is Speech and Language Impairment; IEPs were developed for him on 6/13/13 and 4/29/14.⁷ Student has not been found eligible for Developmental Delay. Student is in general education at School and receives no specialized instruction; he is pulled out 60 minutes a week for speech-language services and receives 30 minutes a month of audiology support.⁸

3. Student was in pre-Kindergarten in 2012/13⁹ and in Kindergarten in 2013/14, but is being retained in Kindergarten and not advancing to 1st grade with his peers.¹⁰ Student's Kindergarten class had 21 students, with Teacher, one aide and sometimes an ESL person.¹¹

4. Student has serious hearing loss in one ear, while the other ear is close to normal.¹² Student received a hearing aid for his right ear on 2/26/13, but has not been consistent in its use.¹³ Student needs to wear his hearing aid all the time to get used to it and benefit from it, but sometimes does not even bring it to school.¹⁴ As recently as 6/2/14, Student was wearing his hearing aid only 60% of the time and reporting when it was not working only 60% of the time.¹⁵ School Audiologist's testimony was credible and uncontroverted that it takes consistent use over a period of about 6 months for a human brain to become accustomed to a hearing aid. Student was also provided an FM system to be able to hear his teacher more clearly without the distraction of background noise.¹⁶

5. With his hearing problems, Student is missing information about what his teacher is saying. While Student's hearing aid may be amplifying sound sufficiently, hearing

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.

⁶ Mother.

⁷ P-2; P-5; P-13-2.

⁸ Speech-Language Pathologist; P-2-6; R-11-1; Psychologist.

⁹ All dates in the format "2012/13" refer to school years.

¹⁰ Mother; Teacher.

¹¹ Teacher.

¹² Private Audiologist; P-8-2.

¹³ Educational Advocate; P-2-3; P-8-2.

¹⁴ School Audiologist.

¹⁵ R-16-15.

¹⁶ School Audiologist.

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sound is not enough, as it is critical whether he is able to process the sounds.¹⁷ However, best practices, the American Speech-Language-Hearing Association, and DC guidelines provide for testing auditory processing only in children who are 7 years old or older, and Student in only 6.¹⁸

6. Student was very shy at the beginning of 2013/14 and it took him a long time to warm up to his Kindergarten teacher. At the beginning of the school year, Student would not answer questions and never raised his hand. Student “blossomed” over the year and by April 2014 was a “completely different” student, as he was interacting well with his classmates and would raise his hand if he was sure of the answer, and would often attempt an answer if called on.¹⁹

7. While school begins at 8:45 a.m., School policy gives leeway and only counts students as late when they are very late.²⁰ Even so, Student was counted as late on 22 days (as well as being absent another 17 days, mostly for excused illnesses or medical appointments).²¹ Even after Student arrives in class, it takes him another 6-7 minutes to get started, as he needs to put his belongings down and then he goes to the restroom every morning before beginning work.²²

8. Student’s tardiness is important because Phonics class, which Student badly needs, begins at 9:00 a.m. every day for only 30 minutes. Student often misses much of his phonics lesson. Student is not getting enough practice with phonics to become independent from Teacher. Phonics is critical as Teacher credibly explained, as it carries over to reading and writing.²³

9. School has taken a number of steps to try to address Student’s tardiness, including several discussions with Mother and recommendations about how to get Student to school on time. Mother said that Student often watches television and gets to bed late, so Teacher recommended turning the television off at a set time. Teacher has also addressed the tardiness issue directly with Student. Teacher encouraged Mother to bring Student early for breakfast at School so he would be present to hear the curriculum, even if he was still eating.²⁴

10. Hearing loss doesn’t necessarily mean there is an educational impact beyond needing the equipment to be able to hear. Student’s Educational Assessment does not

¹⁷ Private Audiologist.

¹⁸ School Audiologist.

¹⁹ Teacher.

²⁰ *Id.*

²¹ R-2-1.

²² Teacher.

²³ *Id.*

²⁴ *Id.*

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show an educational need for specialized instruction.²⁵ As part of the Educational Assessment, the Young Children's Achievement Test ("YCAT") indicated on 5/9/13 that Student was "at risk for academic failure," but the overall Educational Assessment concluded that Student was not recommended for special education services for academic support since Student had "only recently gotten his hearing aids," had been "making a lot of progress," and his classroom teacher found his performance acceptable.²⁶

11. The programming recommendation from Psychologist in Student's Psychological Report was that Student would do best in general education, as long as his speech and language concerns are being addressed; his assessment showed he is in the same range as his peers.²⁷ Small group or even one-on-one attention wouldn't necessarily help Student with his academic challenges.²⁸

12. Student is making progress without specialized instruction. Specialized instruction was discussed at both IEP Team meetings in June 2013 and April 14; but, as assessed, Student did not qualify for specialized instruction, although he might later on.²⁹ The IEP Team meeting notes from 4/29/14 indicate that the Team does plan to consider next year whether Student needs "a special teacher of the deaf and hard of hearing."³⁰ A deaf/hard of hearing teacher would also determine whether new assessments are needed. A deaf/hard of hearing teacher was not present at the IEP Team meetings in June 2013 or April 2014, as there was no need based on Student's current assessments.³¹

13. Student had poor grades in Reading and Writing & Language, and is being retained in Kindergarten, but his grades in the other 8 categories were better, with most "Proficient" and one "Advanced."³² Similarly, the more detailed breakouts on his Report Card show progress.³³

14. Student also made significant speech-language progress during 2013/14 and can both be understood much better and express himself much better than in the past.³⁴

²⁵ School Audiologist; P-10.

²⁶ P-10-1,3.

²⁷ Psychologist.

²⁸ Teacher.

²⁹ R-8-2; School Audiologist.

³⁰ P-3-2.

³¹ School Audiologist.

³² P-6-1.

³³ P-6-2, 3, 4.

³⁴ Speech-Language Pathologist.

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Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

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." 20 U.S.C. § 1400(d)(1)(A).

"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 (3d Cir. 2010), quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and is the primary vehicle for providing FAPE. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

Importantly, DCPS must ensure that to the maximum extent appropriate, children with disabilities are 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 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). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

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“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 is on the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005).

Issue – Whether DCPS denied Student a FAPE by failing to develop and implement appropriate IEPs (dated 4/29/14 and 6/13/13) and placement where Student (a) has speech/language and auditory deficiencies, (b) struggles academically in the general education classroom, and (c) had low scores on portions of the May 2013 YCAT.

Petitioner has not met her burden of proof on this issue, as she has not shown that the 6/13/13 and 4/29/14 IEPs were not reasonably calculated to provide educational benefit to Student. The appropriateness of the IEPs were the sole focus of this due process hearing, and specifically whether Student needed specialized instruction, in addition to monthly audiology support for his hearing and weekly speech-language pathology services.

In analyzing the appropriateness of the 6/13/13 and 4/29/14 IEPs, the focus must be on the situation at the time the IEPs were developed and not how things unfolded over the subsequent months, for “the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated” to provide benefit. *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008) (citation and internal quotations omitted).

Without doubt, Student has been facing serious challenges from his hearing loss, which impacted his speech and language, resulting in low grades in 2013/14 and ultimately being retained in Kindergarten. But it was not clear in June 2013 or even in April 2014 that specialized instruction was needed. Indeed, it is not at all certain even with the benefit of hindsight that specialized instruction was what Student needed.

Instead, the evidence at the due process hearing was that it takes some 6 months with consistent usage for a human brain to get used to processing the new auditory information generated by a hearing aid. However, that time may be lengthened if use of the hearing aid is not consistent. Here, Student had lapses and was not consistent in his use of his hearing aid, which is entirely understandable in a 6-year-old child. But there was no evidence that DCPS failed to do anything it should have done to encourage Student’s regular use of his hearing aid, which impacted his ability to understand in the classroom during Kindergarten. Moreover, since Student did not even obtain his hearing aid until February 2013, it is quite likely that his pre-Kindergarten year was not as helpful to Student as it should have been, which may have undermined his Kindergarten year as well.

Further, Student was not receiving all of the phonics lessons that he needed to work on his language skills, even though DCPS was making those lessons available to

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Student. Student was frequently late to class and often missed much of the 30-minute phonics class, which was the first subject of the day. School took efforts to encourage Student to arrive on time: Teacher spoke with Mother to encourage her to get Student to bed on time. Teacher suggested that Student have breakfast at school to ensure that he would be present when his phonics instruction began. Teacher spoke directly to Student about being on time. But Student's tardiness continued throughout the year.

Despite these hurdles, as well as possible challenges from being an English Language Learner, Student did make considerable progress at School in 2013/14. In addition to improving grades over the course of the year, Teacher noted that at the beginning of the school year Student would not answer questions and never raised his hand, but that he "blossomed" over the year. By April 2014 Student was "completely different" and was interacting well with his classmates and would raise his hand if he was sure of the answer and would attempt answers when called on.

While Petitioner puts great weight on Student's low YCAT scores, the overall Educational Assessment, which included the YCAT, concluded that Student was making a lot of progress, considering that he had only had his hearing aids for a couple of months, and did not recommend special education services for academic support.

Another consideration supporting the conclusion reached herein is the legal requirement to keep Student with his nondisabled peers to the maximum extent appropriate. *See, e.g., Smith v. District of Columbia*, 846 F. Supp. 2d 197, 200 (D.D.C. 2012) (IDEA requires that children with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate.) Here, Student is doing well with his peers in general education and might be less successful if pulled out of general education more often.

The retention of Student in Kindergarten notwithstanding, the evidence at the due process hearing established that Student is receiving far more than *de minimis* benefits by being in general education at School, as his Teacher noted that he developed well over the year, and his grades improved. Thus, this Hearing Officer concludes that Student's 6/13/13 IEP and 4/29/14 IEP were both reasonably calculated to provide Student educational benefits and that Petitioner has not met her burden of proof by demonstrating that the IEPs were inappropriate.

Student's IEP Team is well aware of the ongoing need to monitor Student. The Team's meeting notes on 4/29/14 indicate that the Team does plan to consider next school year whether Student needs "a special teacher of the deaf and hard of hearing" (P-3-2), which reinforces this Hearing Officer's conclusion that the IEP team appropriately considered Student's needs when developing his current IEP, and will increase support for Student if that is needed.

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Clearly, this is just one step along the path of Student's education. While Mother is understandably concerned about Student being retained in Kindergarten, it may be what he needs to give him a strong foundation in order to do well and succeed in Kindergarten and far beyond.

ORDER

Petitioner has failed to meet her burden of proof on the issue in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
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 U.S.C. § 1415(i).