

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

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

OSSE
Office of Dispute Resolution
October 27, 2014

STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This is a case involving a _____ male who was eligible for services as a Student with a speech and language impairment.

A Due Process Complaint (“Complaint”) was received by the Office of Dispute Resolution pursuant to the Individuals with Disabilities Education Act (“IDEA”) on July 28, 2014 in regard to the Student. On August 19, 2014, Respondent filed a response. A resolution meeting was held in this case on August 21, 2014.

After the prehearing conference, District of Columbia Public Schools (“DCPS” or “Respondent”) indicated that it was served on August 4, 2014. It was posited that the timelines should therefore be adjusted so that they run from an August 4, 2014 file date. There was no objection from Petitioner. Accordingly, the HOD due date was set to October 18, 2014.

On September 5, 2014, Petitioner moved for default judgment and/or for a substituted answer and a reallocation of the burden of production based on the brevity of Respondent’s

response. Petitioner contended that it did not have adequate notice of Respondent's position in this case. Respondent opposed this motion on September 9, 2014.

A prehearing conference order issued on September 8, 2014 outlining the summarizing the rules to be applied in this hearing and identifying the issue in the case.

On September 9, 2014, Respondent submitted objections and comments to the prehearing conference order in regard to jurisdiction, appearances at the prehearing conference, the date of receipt of the Complaint, DCPS's position with regard to the issues, and witnesses.

Disclosures were made by both sides on September 9, 2014. Respondent submitted objections to Petitioner's disclosure on September 10, 2014. On September 12, 2014, Petitioner submitted objections to Respondent's disclosure.

A hearing date followed on September 15, 2014. This was a closed proceeding.

Petitioner entered into evidence exhibits 1-19. Respondent entered into evidence exhibits 1-12. Respondent's objections to Exhibits 5-19 based on relevance were overruled. The documents were deemed to be relevant. Objections to Exhibits 20-21 based on timeliness of disclosure were sustained. Petitioner's objections to Exhibit 12 were based on the fact that this document was premised on settlement negotiations. This objection was overruled because such documents are admissible in special education hearings.

At the hearing, the IHO denied the motion for default judgment and/or for substituted answer and for reallocation of the burden of persuasion. The IHO found that there was no basis

for this motion in the caselaw, and that Petitioner had an opportunity to explore the basis for Respondent's positions at the prehearing conference.

Petitioner presented as witnesses: Petitioner; Witness A, Associate Professor; Witness B, Assistant Director of School A; Witness C, an auto instructor at School A; and Witness D, a service provider. Respondent presented no witnesses.

Just hours before the decision was to issue, on October 15, 2014, Petitioner moved for leave to submit proposed findings of fact and conclusions of law. Respondent opposed the motion on October 15, 2014. This motion was denied because Petitioner did not have permission to file such motion, which was filed after the deadline set by the prehearing conference order.

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.

ISSUE

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issue to be determined is as follows:

Did DCPS fail to implement the Student's IEP from February, 2013 through June, 2013 by failing to provide sufficient special education hours, related services and a transition plan? 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 a _____ eligible for services as a student with a specific learning disability. (P-3-1)
2. The Student has extremely low academic levels of functioning. In 2012, he was tested on the Woodcock-Johnson tests of Achievement as functioning on a 2.8 grade level equivalent in broad math, K.9 grade level equivalent in broad writing, and the 2.0 grade level equivalent in broad reading. (P-3-1-2)
3. The Student can be disruptive in the classroom, does not interact with others in a mature manner, and requires counseling. (P-3-6)
4. The Student would like to be an auto mechanic. (Testimony of Student)
5. The Student's IEP for April 23, 2012 calls for 450 minutes per week of special education in each of the following subjects: reading, written expression, and mathematics. (P-5-5)
6. The IEP also calls for behavioral support services for 60 minutes per week. (P-5-6)
7. The Student has been incarcerated on two different occasions for car theft. (P-2-2)
8. He was incarcerated in the District of Columbia jail system for portions of the 2011-2012 and 2012-2013 school years. (Testimony of Petitioner)(P-4)
9. An HOD by IHO James Mortensen dated February 19, 2013 found that DCPS materially failed to implement an IEP from September, 2011 through January, 2012, and again from June 25, 2012 through July 2, 2012, and again from July 31, 2012 through to the date of the Mortenson HOD. (P-4-16-17)

10. IHO Mortensen found that only minimal services had been provided to Student since December, 2012. These services were not in conformity with the IEP. (P-4-17)
11. The HOD by Mortensen ordered the Department of Corrections, OSSE, and Respondent to work together to implement the IEP as written. (P-4-21)
12. The HOD also awarded the Student 12 months of compensatory education, among other relief. (P-4-21)
13. The Student was in prison from February, 2013 through July, 2013. (Testimony of Petitioner)
14. During this time, he was at School B in the District of Columbia jail system for 4 hours a day, three days a week during this time. (Testimony of Petitioner)
15. The Student was assigned one teacher per day. He did not receive behavioral support services. (Testimony of Petitioner)
16. Classwork was mainly a computer program, with a teacher available if he needed help. (Testimony of Petitioner)
17. At School B, the Student attended “off and on”. (Testimony of Petitioner)
18. On some days, he could not go to school because the jail was in lockdown. On other days, he could not go because corrections officer could not escort him or give him a pass. (Testimony of Petitioner)
19. He did not receive homework when he was at School B. (Testimony of Petitioner)
20. He did not receive a report card while at School B. (Testimony of Petitioner)
21. He did not receive any transition services at School B. (Testimony of Petitioner)
22. There were no books at School B. (Testimony of Petitioner)
23. He was escorted to class by corrections officers. (Testimony of Petitioner)

24. The educational services the student received starting in February, 2013 were the same as the services he had received previously. In other words, after the issuance of the Mortenson HOD, the Student's educational services did not change. (Testimony of Petitioner)

25. An IEP was written for the Student on April 18, 2013. (P-3-1)

26. This IEP recommends 450 minutes per week of special education in reading, written expression, and mathematics, with 360 minutes per month of behavioral support services. The IEP contains a post-secondary transition plan which required, among other things, for the Student to meet with a representative from the DC Rehabilitative Services Administration, for mock interviews for thirty minutes per month, and for investigating employment opportunities for thirty minutes per month. (P-3-6)

27. Services did not change after the April 18, 2013 IEP. The Student continued to get four hours a day of instruction, three days a week, and no transition services and no behavioral support services. (Testimony of Petitioner)

28. For the 2013-2014 school year, the Student attended School A. (P-1-1)

29. School A was "like a regular school." (Testimony of Petitioner)

30. He received the services of a 1:1 aide at School A. (Testimony of Petitioner)

31. At School A, he received classes in reading, writing, auto mechanics, and received counseling. (Testimony of Petitioner)

32. Also at School A, he had a "career" class where he filled out job applications and was involved in related activities. (Testimony of Petitioner)

33. The Student started doing better in School A after a few months. He started getting good grades, won a certificate, they gave him a job, and he received a stipend.

34. The Student needs a driver's license to be able to work. (Testimony of Witness A)

35. 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 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; Schaffer 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 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 CFR Sect. 300.513(a).

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).

The record makes it clear that the Student missed a significant amount of instruction during the time period in question, which is February 2013 through June, 2013.

In regard to special education instruction, the Student was mandated to receive 450 minutes of instruction per week in math, reading, and written expression. This is a total of at least 1350 minutes per week of instruction. The Student's un rebutted testimony establishes that he received only 720 minutes of instruction per week, which instruction was primary computer-based work without the assistance of a teacher. This instruction was not regularly provided, since there were events at the jail such as lockdowns which prevented school from occurring. The Student received no homework in connection to this instruction.

The Student was also mandated to receive behavioral support services at this time. He was scheduled to receive sixty minutes per week of services until the April 18, 2013 IEP – which increased services to 360 minutes per month. The Student's un rebutted testimony establishes that he never received any of these services.

The April 18, 2013 IEP also contains a post-secondary transition plan which required the Student to meet with a representative from the DC Rehabilitative Services Administration, for thirty minutes of mock interviews monthly, and for thirty minutes per month of investigating employment opportunities online. The Student's un rebutted testimony establishes that he never received any of these services, either.

In sum, the Student received less than half of his special education hours, no mandated counseling, and no transition plan during the period February, 2013 through June, 2013. There is no argument there the fact that Petitioner was incarcerated relieves Respondent of its duty to provide Respondent with a FAPE. Given such a significant loss of hours, it is reasonable to deduce that Respondent's failure to provide the Student with required services resulted in a deprivation of educational benefit to the student. I find that Respondent denied the Student a FAPE denial during this period.

As a remedy, Petitioner asserts that appropriate relief in this matter is to order tutoring and job coaching.

When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated:

The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confer broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.

School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

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).

Petitioner seeks one hundred hours of academic tutoring and eighty hours of job coaching by Witness D and her company to compensate him for the FAPE denial outlined above.

I found Witness D to be credible in her presentation. Witness D's approach focused on getting the Student to be able to remediate academically so that he can pass his driver's education test and receive his driver's education license. Witness D estimated that for the Student to make meaningful academic progress over a short period of time, one hundred hours was necessary. The record suggests that this kind of academic progress should have taken place

while the Student was at School B from February, 2013 through June, 2013. Witness D's calculation is sufficiently connected to the past deprivation to satisfy Reid. Under the circumstances, I find it fair to award the Student one hundred hours of academic tutoring, to be provided by Witness D's company.

I found Witness D less persuasive in regard to the proposed job coaching relief. There was no transition plan in the IEP until April 18, 2013. That IEP does not specify transition plan hours other than to assign thirty minutes of job coaching in mock interviews per month and thirty minutes a month in regard to investigating employment opportunities online. Witness D did not explain how she arrived at the number of eighty hours. I will therefore reduce the amount of job coaching hours to twenty hours total, also to be provided by Witness D's company.

ORDER

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent is adjudged to have denied the Student a FAPE by failing to implement the Student's IEPs from February, 2013 through June, 2013;
2. Petitioner is hereby awarded one hundred hours of academic tutoring and twenty hours of job coaching from Witness D's company, Company A.

Dated: October 15, 2014

Corrected: October 23, 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: October 15, 2014

Corrected: October 25, 2014

Michael Lazan
Impartial Hearing Officer