

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER, on behalf of
[STUDENT],¹

Date Issued: January 14, 2012

Petitioner,

Hearing Officer: Ternon Galloway Lee

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE
OSSE

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENT ("Parent"), through her attorney, under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, Parent alleges (i) that the September 9, 2011 proposed IEP is inappropriate for numerous reasons; (ii) that Student was denied a Free Appropriate Public Education ("FAPE") because District of Columbia Public Schools ("DCPS") failed to based Student's IEP on recommendations in Independent Educational Evaluations ("IEEs"); and (iii) that compensatory education is warranted for denial of FAPE during a portion of the 2010/2011 school year and

¹ Personal identification information is provided in Appendix A.

from September 9, 2011, to present. Parent seeks an order directing DCPS to hold an IEP meeting and revise Student's IEP such that it includes the following:

- (i) 22.5 hours of academic instruction per week outside the general educational setting;
- (ii) goals consistent with those proposed by Advocate K in her October 17, 2011 letter to DCPS;
- (iii) 30 minutes of direct speech-language services per week outside the general educational setting and 30 minutes of these services per week within the general educational setting;
- (iv) 30 minutes per week of Occupational Therapy ("OT") consultation; and
- (v) a notation that Student is eligible for Extended School Year ("ESY") services.

Student, an AGE pre-teen, is a resident of the District of Columbia and is eligible for special education services under the disability category, Specific Learning Disability ("SLD"). Parent's Due Process Complaint, filed on November 7, 2011, named DCPS as respondent. I was appointed on December 6, 2011. The parties met for a resolution session on November 30, 2011. No agreement was reached and the parties decided that the case should proceed to a due process hearing. I telephonic prehearing conference convened on December 19, 2011, and concluded on December 20, 2011, to discuss the hearing date, issues to be determined and other matters.

I held the due process hearing on January 3, 2012, at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Parent appeared in person, stated she was ill, and requested along with her attorney that she be allowed to leave the hearing. DCPS did not object.² Parent left the hearing shortly after her arrival and did not provide witness testimony. Parent was represented

² At the time the hearing was scheduled to begin, Parent had not arrived. Her attorney represented that Parent was in route, ill, and would not be testifying. DCPS' attorney argued that if the parent failed to appear, he would move for dismissal of the matter. The Parent did arrive briefly for the hearing.

by counsel at the hearing. Respondent DCPS was represented by counsel. On behalf of the parent, two witnesses testified – the psychologist who conducted the Comprehensive Psychological Evaluation and Parent’s advocate. On behalf of DCPS, three witnesses testified – an occupational therapist, Student’s special educational case manager, and the Special Education Coordinator (“SEC”). Parent’s Exhibits P-1 through P-29 were admitted, as well as, DCPS’ Exhibits R-1 through R-6.³

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES

The issues to be determined are as follows:

- 1) DID DCPS FAIL TO PROVIDE AN APPROPRIATE IEP AT THE SEPTEMBER 2011 IEP MEETING?
- 2) DID DCPS FAIL TO PROVIDE THE STUDENT WITH AN IEP BASED ON THE IEEs’ RECOMMENDATIONS?
- 3) IS THE STUDENT ENTITLED TO COMPENSATORY EDUCATION “CE” FROM (i) PRIOR TO THE HOD IN APRIL 2011, UNTIL THE DATE OF THAT DECISION AND (ii) FROM THE SEPTEMBER 2011 MEETING TO PRESENT?

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. Student is an AGE resident of the District of Columbia. She is enrolled as a 6th grader at B Educational Center. **(Exhibit R-3)**.

³ Parent, through counsel, objected to the admission of DCPS’ exhibits because a hard copy of those exhibits were not provided to me by December 27, 2011, under the Prehearing Order. After hearing arguments, the objection was overruled.

2. During 2006 and 2007, DCPS completed several assessments on the student which included a Psycho-educational Occupational Therapy, Educational, and Speech and Language evaluations. Student was then initially identified as a child with a disability requiring special education services under the classification SLD. (Exhibit P-24, p.14).

3. The MDT/IEP team convened on February 2, 2010, to discuss triennial evaluation and determine if student remained eligible for special education and related services under the category of SLD. It concluded that formal assessments were unnecessary because there was no change in Student's disability clarification. The analysis of existing data report generated during the meeting revealed Student had deficits in mathematics, reading, communication/speech-language, and motor skills. The IEP developed during the meeting provided for 15 hours of specialized instruction outside the general educational setting, 30 minutes OT services per week, and 60 minutes Speech-Language services per week. (Exhibit P-21, pp. 6-7).

4. On November 10, 2010, the parent's attorney requested comprehensive evaluations including, but not limited to a Comprehensive Psychological Evaluation, a Functional Behavior Assessment, and a Speech and Language Evaluation (Exhibit P-21, p.7).

5. On January 7, 2011 the IEP team developed and implemented an IEP (Exhibit P-23, p.1).

6. By March 4, 2011, DCPS had not obtained the parent's informed consent to reevaluate student. (Exhibit P-21, p.12). Also on that date parent, through her attorney, filed a due process complaint alleging DCPS denied student a free appropriate public education ("FAPE") on several grounds. Hearing Officer Justice ("HO" Justice) who was assigned this case determined the issues before her were as set forth below:

- (i) Did DCPS deny Student a FAPE because it failed to reevaluate Student once every three (3) years in violation of 34 C.F.R. §300.303(b)(2)?;
- (ii) Did DCPS deny Student FAPE because it failed to reevaluate Student within a reasonable period of time of receiving parent's November 10, 2010 request for reevaluation in violation of 34 C.F.R. §300.303(a)(2) and 34 C.F.R. §300.305(d)(2); and
- (iii) Did DCPS deny Student a FAPE because it failed to reevaluate Student to determine whether Student continues to be a child with a disability and to determine the student's educational needs, prior to revising Student's February 2, 2010 IEP?

(Exhibit P-21, p. 3).

7. HO Justice issued her HOD on April 29, 2011. She found DCPS denied Student a FAPE because it failed to reevaluate Student (i) at least every 3 years; (ii) within a reasonable time after parent's request; and (iii) to determine if Student continued to be a child with a disability and what the educational needs of Student were, prior to initiating a change in Student's IEP. Further, in determining that DCPS denied Student a FAPE, HO Justice found DCPS failed to provide Parent with a written notice, under 34 C.F.R. §300.503(a)(1), of the proposed change in the frequency of Student's OT services before initiating the proposed action.

(Exhibit P-21, pp. 15, 17 -18).

8. HO Justice also determined that due to the denial of FAPE, compensatory education was possibly warranted. But because current evaluations on Student were not available, HO Justice concluded it was premature to determine compensatory education relief. She then provided the directive and remedy listed below:

If the Respondent has not conducted, completed, and provided Petitioner a copy of assessments requested by the Petitioner on November 10, 2010, as of the date of this decision, the Respondent shall fund independent comprehensive evaluations, and upon receipt of the assessments, review and revise the student's IEP, as appropriate. Once the student's

evaluations are reviewed and a determination made regarding the student's special education and related service needs, the Petitioner may request due process hearing before the Hearing Officer, for the sole purpose of determining the nature and amount of compensatory education services the student is entitled to receive for violations occurring during the 2010/11 school year, and as identified herein.

The Petitioner must file an administrative due process complaint notice, within sixty (60) calendar days of the eligibility determination. Petitioner's failure to file a timely request for a hearing will result in this decision serving as the final agency decision in this matter. Should the Petitioner request a due process hearing for this purpose, both parties shall attend the hearing prepared to present evidence of the nature and amount of compensatory education services to student is entitled to receive, consistent with the standard established in *Reid v. District of Columbia*, 401 F.3d 516 (D.C.Cir. 2005).

(Exhibit P-21, p. 19).

9. HO Justice concluded her decision with the following relevant orders:
 1. **ORDERED**, that if the Respondent has not conducted, completed, and provided the Petitioner a copy of assessments requested by the Petitioner on November 10, 2010, as of the date of this decision, within five (5) school days of the date of this decision, the Respondent shall issue to the parent an Independent Education Evaluation (IEE) letter authorizing the parent to obtain an independent Comprehensive Psychological Evaluation, to assess the student's academic, developmental, and functional needs and assist in determining the educational needs of the student; a Functional Behavioral Assessment to assess the student's social/emotional needs; a Speech Language Evaluation; and an Occupational Therapy Evaluation, and it is further
 2. **ORDERED**, that within fifteen (15) school days of receipt of the final independent evaluation, the respondent shall convene a MDT/IEP team meeting with the parent, to review the student's independent evaluations, and revise the student's January 7, 2011 IEP, based on findings and recommendations in the independent evaluations; order any additional evaluations recommended in the independent evaluations; and develop a Behavioral Intervention Plan (BIP) for the student, based on findings and recommendations in the FBA.

(Exhibit P-21, p.20).

10. The MDT/IEP team convened a meeting on May 6, 2011, to review student's existing evaluations and IEP to revise the IEP if warranted and to discuss services including

compensatory education. (Exhibits P-16, p.1; P-13). During the meeting, student's disability category was changed from SLD to Intellectual Disability. School psychologist expressed student had several psychological evaluations since attending Elementary School and they justified the change in classification. (Exhibit P-16, p.2). The team also recommended removing OT services as DCPS' recent OT evaluation reflected services were no longer needed. Advocate C objected to the meeting stating the meeting was premature because all IEEs had not been received and insufficient data existed for review.⁴ (Exhibits P-13 p., p., P-16, p.2).

11. The IEEs and recent DCPS' evaluations were completed between spring 2011 and summer 2011. (Exhibits P-20, 25, 26, and 27).

12. Techniques administered to conduct the Comprehensive Psychological Evaluation included, among others, the Woodcock-Johnson III – Test of Cognitive Abilities and Achievement. This testing measured Student's academic skills in reading, math, and written languages. Testing showed Student's full scale IQ was 74, which falls in the borderline intelligence range.

Regarding Student's reading, the testing results showed her standard score is 59 in "broad reading" which reflects she is reading at a first grade and six months level. Subtests measuring Student's reading ability revealed her decoding, reading fluency, and reading comprehension skills were severely deficient and at the same grade equivalent level.

⁴ The parties disagree regarding whether Parent understood what occurred during the meeting and agreed to it. Parent's advocate contends parent does not understand the IEP process due to low cognitive functioning and a reported brain tumor. (Testimony of Advocate K). Advocate K and counsel for Parent support this position by noting HO Justice's finding that Parent does not understand the process. DCPS and the SEC assert Parent understood what occurred during the meeting and does not endorse the advocate's position. (Testimony of SEC).

Parent appeared briefly for the hearing and did not testify. I find the evidence insufficient to determine Parent's ability to understand, make decisions, and provide meaningful input regarding Student's education and the provision of FAPE.

In the area of math, testing results showed Student's standard score is 80 in "broad math," reflecting her overall math skills at a second grade and eight months level. Subtests comprising the broad math evaluation were calculation, math fluency, applied problems.

Concerning Student's written expression achievement, testing results showed a standard score of 54, a first grade and four months level. Subtests in this domain included spelling, writing fluency, and writing samples. Student's scoring in this area showed severe deficits.

(Exhibit P-24, p.5; Testimony of Psychologist/Expert Witness).

13. The psychologist who administered the Comprehensive Psychological Assessment opined that the testing results established Student qualified for special educational services under the "Learning Disability" category. Further, she recommended, among other things, that the MDT/IEP team increase Student's hours of academic instruction outside the general educational setting. **(Exhibit P-24, p. 15).**

14. Language testing indicated Student's abilities to communicate are severely deficient. **(Exhibit 25-P, p. 5).**

15. On her OT evaluation, Student's standard score reflected she performed in the averaged range among her peers. **(Exhibits P-26, p.4 and 20).**

16. All IEEs had been completed by September 9, 2011. So the MDT/IEP team met again on that date to review all evaluations, reevaluate Student, review and revise her IEP if warranted. Student's eligibility was also reviewed and changed back to SLD. **(Exhibit P-5; Exhibit R-3).**

17. The proposed IEP that resulted from the September 9, 2011 MDT/IEP meeting contained the following reading goals:

Goal 1- [Student] will identify meanings, pronunciations, alternate word choices, correct spellings, and parts of speech of words using dictionaries and thesauri (printed and electronic) 4 out of 5 times, as measured by student work samples with 80% accuracy.

Goal 2- [Student] will identify the author's purpose and summarize the critical details of expository text, maintaining chronological or logical order 4 out of 5 times, as measured by student work samples with 80% accuracy.

Goal 3- [Student] will identify the author's purpose and summarize the critical details of expository text, maintaining chronological or logical order 4 out of 5 times, as measured by student work sampled with 80% accuracy.

Goal 4- [Student] will identify the plot and its components (e.g., main events, conflict resolution) 4 out of 5 times, measured by student work samples with 80% accuracy.

Goal 5 – [Student] will recognize high-frequency words and irregular sight words (e.g., the have said, come, give, of) 4 out of 5 times, as measured by student work samples with 80% accuracy.

(Exhibit P-5, pp 4-5).

18. The proposed IEP contained the following math goals:

Goal 1- [Student] will identify polygons based on their properties, including types of interior angles, perpendicular or parallel sides, and congruence of sides (e.g., squares, rectangles, rhombuses, parallelograms, and trapezoids; isosceles, equilateral, and right triangles) 4 out of 5 times, as measured by student work samples with 80% accuracy.

Goal 2- [Student] will be able to apply the concepts of perimeter and area to the solution of problems involving triangles and rectangles and apply formulas where appropriate 4 out of 5 times, as measured by student work samples with 80% accuracy.

Goal 3- [Student] will define and apply the concepts of mean to solve problems 4 out of 5 times, as measured by student work samples with 80% accuracy.

Goal 4- [Student] will be able to add and subtract fractions (including mixed number) with like and unlike denominators (of 2,3,4,5 and 10), and express answers in the simplest form 4 out of 5 times, as measured by student work samples with 80% accuracy.

Goal 5- [Student] will replace variables with given values, evaluate and simplify (e.g., $2(O) + 3$ when $O=4$), 4 out of 5 times, as measured by student work samples with 80% accuracy.

(Exhibit P-5, pp 3-4).

19. The proposed IEP contained among other writing goals the following:

[Students] will recognize that a word performs different functions according to its position in the sentence 4 out of 5 times, as measured by students work with 80% accuracy.

(Exhibit P-5, p. 6).

20. The proposed IEP also indicated Student did not require Extended School Year ("ESY") services. **(Exhibit P-5, p. 12).**

21. The September 9, 2011 IEP also proposed 16 hours of specialized instruction per week and 120 minutes per month of Speech and Language services. No OT services were proposed. **(Exhibit P-5, pp. 8-9).**

22. Evaluation Summary Report resulting from the September 9, 2011 MDT/IEP meeting indicates that Student demonstrates weaknesses in the areas, among others, noted below:

(i) In math Student shows deficits in subtracting and regrouping, multiplication, division calculations, and multi-step applied problems;

(ii) In reading Student shows weaknesses in her thinking and verbal abilities. Her decoding skills are poor and she knows some of the first grade dolch sight words; and

(iii) Student's receptive and expressive language skills are moderately to severely deficient.

(Exhibit P-7).

23. The Advocate K received a copy of the proposed IEP at the conclusion of the September 9, 2011, for review. On or about October 17, 2011, she forwarded the SEC a letter regarding her concerns with the proposed IEP. **(Testimony of Advocate K).**

24. On November 3, 2011, DCPS invited Parent and Advocate K to a follow-up meeting to finalize the IEP. DCPS scheduled that meeting for November 22, 2011. Parent and Advocate K declined to participate in the meeting, because they believed DCPS was unwilling to increase the number of Student's specialized hours of instruction to 22.5. **(Exhibit R-4, pp.1-2).**

25. Parent is not receptive to Student participating in a summer school program. **(Testimony of SEC).**

26. Student is not a behavior problem and does not impede the learning of other students. Her progress has been slow and steady. (Testimony of Case Manager).

27. Student's most recent progress during the last marking period was average. Student's progress has not regressed. (Testimony of SEC; Exhibit P-13, p. 3).

CONCLUSIONS OF LAW

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

DISCUSSION

The Burden of proof in a due process hearing is the responsibility of the party seeking relief, in this case, Parent. See D.C. Regs. tit. 5-E, § 3030.3. See, also, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F. Supp.2d 71, 76 (D.D.C. 2006). Below, I examined the issues and evidence to determine if Parent has met her burden.

ISSUE ONE: DID DCPS FAIL TO PROVIDE AN APPROPRIATE IEP AT THE SEPTEMBER 9, 2011 IEP MEETING?

Parent contends the proposed IEP is inappropriate for several reasons noted below:

- (i) Its reading, math, and writing goals are not appropriate;
- (ii) It fails to provide OT services;
- (iii) It does not provide adequate Speech and Language Services;
- (iv) It fails to provide for ESY services; and
- (v) It fails to provide adequate specialized instruction.

Are the Goals appropriate?

Once a local educational agency determines a child is eligible for special education and related services, it must provide FAPE by an IEP designed to meet the specific needs of the child

with a disability. Among other requirements, the IEP must contain a statement of measurable annual goals designed to meet the child's needs. 34 C.F.R §300.320 (a)(2)(i).

I now consider Parent's claim that DCPS proposed September 9, 2011 IEP goals are inappropriate. Parent's advocate, Advocate K, testified that Student did not know basic arithmetic, and thus math goal 1 was too advanced and therefore not appropriate for Student. Also, Advocate K testified that reading goals 4 and 5 were too advanced for Student and therefore inappropriate. She emphasized Student's data show that Student has difficulty decoding and does not know the entire first grade Dolch sight words. In addition, Advocate K testified that writing goal 4 failed to address Student's deficits and it too is inappropriate.

In contrast to Advocate K's testimony, Student's case manager testified that the proposed goals are suitable. The case manager testified she attended the IEP meetings on May 6, 2011, and September 9, 2011. In addition this witness noted that she developed Student's IEP goals in reading, language arts, and math. The case manager reported she teaches Student reading and language arts and another special education teacher provides Student's instruction in math. The case manager testified that before drafting the math goals, she consulted with Student's math teacher. Regarding Student's progress, the case manager reported Student is making "slow but steady progress" and contends the goals are appropriate.⁵

The evidence shows that the case manager is a special education teacher and she has been employed as a special education teacher for 31 years with DCPS. What is more, she has known Student for 3 years and provided direct services to her for 2 years. Also, as Student's case manager, she attends IEP meetings, tests Student, and assists in developing the IEPs by, among other things, developing goals for Student. The case manager's testimony mentioned above was corroborated by the SEC and I find it credible.

⁵ I do note that the evidence shows that some goals had not been introduced as of October 28, 2011. (Exhibit R-6).

I am also mindful that the evidence shows that Advocate K is a former special education elementary teacher with DCPS, and has acquired a Masters in Early Childhood Education. She also attends meetings with parents as their advocate and participates in IEP meeting (including assisting in developing IEPs). Advocate K, however, was not qualified as an educational expert. And Parent presented no educational expert to say what goals would or would not be suitable. That said, should I accept Parent's position, the adjudicator would in effect substitute her judgment for that of the school educators. This, I decline to do. *See MM Ex Rel. DM v. Schl. Dist Of Greenville County*, 303 F.3d 523, 531-533 (4th Cir. 2002) (reversing the lower court for finding that the IEP was inadequate when the lower court (i) failed to consider the actual educational progress made by the child and (ii) substituted its judgment for that of the educators).

Hence for the above reasons, I find Parent has not met her burden and shown the goals are deficient.

Should Speech and Language Services be Reduced?

Next, parent argues the proposed IEP is deficient because the speech- language services are inadequate. Parent contends student should receive 240 minutes per month instead of 120 minutes and that services should be offered inside and outside of the general educational setting.

A review of the speech-language evaluations shows Student's core language scores on DCPS' evaluation and the IEE were 58 and 67, respectively. The scores reflect Student's communication skills are moderately to severely deficient. DCPS' evaluator recommended continued speech-language services. The IEE evaluator recommended 60 minutes per week of these services, to be provided within and outside the general educational setting.

Progress reports from the period March 26, 2011, to June 17, 2011, show slow and steady progress in Student's speech-language goals. Progress reports from the grade period August 22,

2011 to October 28, 2011, show Student mastered one of her three speech-language goals. She was progressing in the other two.

Considering the above – testing showing deficiencies in speech-language, Student mastering one of her goals and progressing in others -I do not find the proposal to reduce services denies Student a FAPE.⁶

Are OT and Extended School Year Services (“ESY”) Required?

Not only does Parent assert certain goals are inappropriate, but also contends the exclusion of certain services is improper.

First I consider Parent’s claim that the removal of Occupational Therapy (“OT”) services from Student’s IEP denies FAPE. Specifically parent argues Student should receive 120 minutes per month of these services. Parent bases its position on a recommendation in the Independent OT Evaluation, which suggested Student would benefit from consult school based OT services. Assessment tools used for this evaluation included clinical observations, handwriting samples, standardized testing to determine Student’s visual motor integration skills and motor visual perceptual skills.

In contrast, the OT evaluation performed for DCPS (“DCPS OT Evaluation”) concluded that OT services were not warranted. Assessments tools included classroom teacher interview, student interview, review of records, clinical observations and assessments and similar standardized testing performed by the independent OT examiner.

Considering these two evaluations I find DCPS’s superior because assessment tools included a classroom teacher interview, a review of records⁷, a student interview as well as

⁶ Parent also argued the speech-language goals were either inappropriate or not measurable but failed to provide evidence to meet its burden.

⁷ The independent evaluator stated in her OT report that background information was limited during the time of the evaluation with Student.. Also, the report does not reflect she reviewed any records. **(Exhibit P-26, p.1).**

applicable standardized testing. While the IEE examiner did administer relevant standardized tests, she did not review records or interview a classroom teacher. Also DCPS presented testimony from its occupational therapist. This witness had observed Student on one occasion. She also attended the September 9, 2011 IEP meeting and had reviewed both the Independent OT Evaluation as well as DCPS's OT Evaluation for that meeting. Moreover, she had reviewed handwriting samples from both evaluations. Based on the information she obtained about Student, this witness concluded OT services were not warranted.

Considering the above, I find this witness' testimony persuasive. Thus, I find OT services are not required for the provision of FAPE.

Second Parent asserts the IEP is inappropriate because it indicates ESY services are not required. ESY services must be provided where a child's IEP team determines that they are necessary for the provision of FAPE. 34 C.F.R. § 300.106(a). ESY services are necessary to a FAPE when the benefits a disabled child gains during a regular schools year will be significantly jeopardized if he is not provided with an educational program during the summer months. See *S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp.2d 56, 68-69 (D.D.C. 2008); *MM v. Sch. Dist. Of Greenville County* 303 F 3d 523, 537-38 (4th Cir. 2002). No evidence was adduced at the hearing that Student's gains during regular school year would be jeopardized if she were not provided with an educational program during the summer. To the contrary the evidence was presented showing no regression and that the IEP team determined ESY was not appropriate.⁸ Thus, the Parent has not met her burden.

**Should the IEP Provide for All Academic
Instruction Outside the General Educational Setting?**

⁸ I also note DCPS presented uncontradicted testimony from Student's case manager and former teacher that student's mother has declined to allow child to attend summer school/ESY.

Lastly, parent contends Student should receive all academic instruction outside the general educational setting. According to Parent's calculation, total specialized instruction would require DCPS to provide Student with 22.5 hours of special education services per week. As discussed previously here, parent in support of her position presented evidence showing that Student's cognitive and achievement test results illustrate Student is functioning 3 to 4 grade levels below age expectation. Parent emphasizes that Student only knows some first grade commonly used sight words and experiences difficulty decoding and comprehending passages. Moreover, she notes Student has difficulty with regrouping when subtracting and multiplication. Her written language skills are moderately to severely deficient.

In addition, Parent solicited expert testimony from the psychologist who performed the Independent Comprehensive Psychological Evaluation. The total time the expert spent with Student was 3 hours and this was to conduct the evaluation. The expert did not observe Student in the educational setting. The expert witness opined that due to Student's severe deficits and measured IQ of 74 which reflected borderline intelligence, Student requires extensive supports such as individualized instruction and an educational environment where a low teacher/student ratio exists. She further opined that Student requires fulltime specialized instruction.

By contrast Student's case manager and DCPS' special education coordinator testified that the 16 hours of specialized instruction provided for in the September 9, 2011 IEP are appropriate. The case manager testified that the allotted 16 hours provides Student with sufficient time to work on her goals. Further she testified that Student is making slow, but steady progress, and that progress has also been verbally acknowledged by Parent. In addition, the case worker stated that she has observed Student in the general educational setting. According to the case worker, Student talks to her classmates, gets along with and obtains help from them.

Further, the case worker noted that to accommodate Student's learning disability, she usually works with other students in small groups in the general educational setting. The evidence also shows Student is not a behavior problem and does not impede the progress of others.

Having considered the above, I do not find convincing the expert's opinion that Student requires fulltime specialized instruction. This is so because she only spent 3 hours with Student and has not observed the student in the educational setting. Further, Student is progressing without the provision of total specialized instruction, learning from her non-disabled peers, and not impeding the progress of others in the general educational setting.

Moreover DCPS must comply with the Least Restrictive Environment requirement of IDEA. Under the facts of this case, requiring fulltime specialized instruction would violate the LRE mandate under 20 U.S.C. §1412(a)(5). *Roark ex rel. Roark v. District of Columbia*, 460 F. Supp 2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.") Thus, I find Parent has not shown fulltime instruction or 22.5 hours of specialized instruction is warranted.

ISSUE TWO: DID DCPS FAIL TO PROVIDE THE STUDENT WITH AN IEP BASED ON THE IEES RECOMMENDATIONS?

In effect Parent asks me to find the proposed IEP denied Student a FAPE because it fails to formulate the IEP solely on the IEEs recommendations.

When developing an IEP for a child with a disability, the IEP team must consider:

- (i) the strengths of the child;
- (ii) the concerns of the parents for enhancing the education of their child;
- (iii) the results of the initial or most recent evaluation of the child; and
- (iv) the academic, developmental, and functional needs of the child.

34 C.F.R. §300.324 (a)(1).

Also, the team must consider certain special factors, to include, but not limited to the communication needs of the child and the needs for assistive technology devices and services. 34 C.F.R. §300.324 (a)(2). Based on this large-scale consideration to be undertaken and the determination of the child's educational needs, an IEP is developed as defined under 34 C.F.R. §300.320. Thus, not just one source or classification of data is utilized to formulate the IEP. Further, it is the IEP team that develops the IEP. Under controlling authority, the IDEA, this team is not required to adopt recommendations from any evaluations, including those set forth in IEEs.

The Parent, in effect, has asked me to affirm its position that the recommendations in the IEEs dictate the (i) statement of goals set forth in the IEP and (ii) the statement of special education and related services to be provided.⁹ Assuming this to be the case, the IEP team's function (that being to play an integral role in designing a child's FAPE) would be severely diminished if not practically eliminated. Then the requirements of IDEA would be violated. 34 C.F.R. §§300.320 through 300.324

I do not adopt parent's position and further find that DCPS has not denied Student a FAPE because the IEP team did not base the IEP on recommendations in the IEEs.

ISSUE THREE: IS THE STUDENT ENTITLED TO COMPENSATORY EDUCATION "CE" FROM (i) PRIOR TO THE HOD IN APRIL 2011, UNTIL THE DATE OF THAT DECISION AND (ii) THE SEPTEMBER 2011 MEETING TO PRESENT?

Parent requests compensatory education for denial of FAPE during the 2010/2011 school year and for denial of FAPE from September 9, 2011, to present. I have found no denial of

⁹ Recommendations in the IEEs suggest, in addition to or in lieu of what is set forth in the IEP, increased Speech and Language Services, OT services, increased specialized instruction, and additional or revised goals.

FAPE subsequent to HOD issued April 29, 2011. Hence compensatory education is not warranted subsequent to the HOD.

Accordingly, below I only focus on what if any compensatory education is due for the period prior to the HOD up to April 29, 2011.

Hearing officers have discretion to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. A compensatory award cannot be arbitrary but instead must rely on an individualized assessment of the child's needs after a fact specific inquiry by the hearing officer. *Reid v. District of Columbia*, 401 F. 3d 516, 524 (D.C. Cir. 2005). Further in formulating the compensatory award, a hearing officer must determine what services the student requires to put her in the position she would have occupied but for the school district's failure to provide a FAPE. *Stanton v. Dist. Of D.C.*, 680 F. Supp. 2d 201, 206 (D.D.C. 2010) (citations omitted). A parent's conduct is also appropriate to consider in determining equitable relief. *See Parents of Student W. v. Puyallup School Dist.*, No. 3 31 F. 3d 1489, 1497 (9th Cir. 1994).

In the HOD issued April 29, 2011, HO Justice found DCPS denied Student a FAPE due to procedural violations. Specifically she noted that procedural violations - the failure to reevaluate Student, timely respond to Parent's request for reevaluation, and provide proper notices to Parent - had occurred over an extended period of time. HO Justice determined those violations had (i) impeded the student's right and (ii) significantly impeded the parent's opportunity to participate in the decision making process and provide meaningful input in all decisions regarding the student's education. Hence, she found a denial of FAPE and that Student was entitled to compensatory services for violations occurring during the 2010/2011 school year.

I now undertake the analysis required to determine if any compensatory education is due for the denial of FAPE during the 2010/2011 school year up to April 29, 2011. First, I consider Student's needs as shown by the facts. Student is enrolled as a sixth grader at B Educational Center. Standardized testing reflects Student is functioning between first grade and second grade levels in reading and written language. Student has severe deficiencies in decoding words and reading fluently. Moreover, she knows only some of the first grade Dolch sight words. In math, testing showed that she is functioning between second and third grade levels. What is more, the evidence shows that because of these deficits, Student needs classroom and testing accommodations and intense supports. A non-exhaustive list of those supports include (i) increased opportunities to practice tasks, (ii) repetition, (iii) working one on one and in small groups as needed, and (iv) increased review of material.

Second, I consider what compensatory services would put Student in the position she would have been in but for DCPS' failures. The evidence shows that during a portion of the 2010/2011 school year (from September 2010, to January 7, 2011), the Student's then current IEP provided the following services:

- (i) 15 hours of specialized instruction per week outside the general educational setting;
- (ii) 30 minutes OT services per week; and
- (iii) 60 minutes Speech- Language services per week.

Student's IEP was revised on January 1, 2011. And from January 7, 2011, to the end of the 2010/2011 school year, Student's then current IEP provided the same specialized instruction and speech- language services. However, Student's OT services were reduced to 30 minutes a month. The January 1, 2011 IEP remained effective until the IEP team reviewed the IEEs on September 9, 2011, developed an IEP, and implemented it on November 22, 2011.

The November 22, 2011 IEP provides the following services:

- (i) 16 hours of specialized instruction per week outside the general educational setting; and
- (ii) 120 minutes speech-language services outside the general educational setting.

I have found the September 9, 2011 IEP, which the evidence shows is identical to the implemented November 11, 2011 IEP, is appropriate. Under the November 11, 2011 IEP, I note related services were reduced. The only increase in services was with specialized instruction as Student now receives one additional hour of this service. This increase was not significant.

Considering (i) the implemented IEPs from the 2010/2011 school year to present, (ii) services were reduced or not significantly increased during this period, (iii) and my finding that the September 9, 2011 IEP is appropriate, I find Student received services she needed despite DCPS' failures determined in the April 29, HOD. Thus, I find a compensatory education award is not warranted.¹⁰

I now focus on Parent's argument for compensatory education. Parent argues that Student's deficits as noted above require her to receive all academic instruction outside the general educational setting. Parent contends that had DCPS timely reevaluated Student, it would have determined Student's deficits and presumably determined she required all academic instruction outside the general educational setting. Parent calculates the total time per week for this instruction is 22.5 hours weekly and asks me to award 4 hours per week of tutorial services for 80 weeks to compensate for DCPS' failures.

¹⁰ As previously mentioned, the parties' conduct can also be considered in determining if compensatory education is due. The evidence shows that Parent has not been receptive to sending Student to a summer school program/ESY.. Further, I note efforts were made to convene a follow-up IEP meeting after September 9, 2011, but Parent and her advocate declined to attend.

As noted above, compensatory education is not appropriate and Parent's request is denied.

DECISION AND ORDER

I have reviewed and considered all the evidence of record whether specifically mentioned in this decision or not. Based upon the above Findings of Fact and Conclusions of Law I find the following:

(i) that the proposed IEP dated September 9, 2011 is appropriate as Parent failed to meet her burden and show that goals were inappropriate, ESY and OT services are warranted, and Speech-Language Services and academic instructional hours outside the general educational setting should be increased;

(ii) that Student has not been denied a FAPE because the IEP team did not adopt the recommendations provided in the IEEs; and

(iii) that compensatory education is not warranted.

I deny the relief requested by Parent.

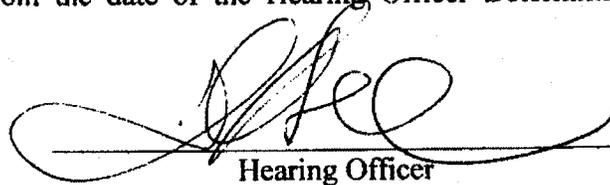
Moreover, having found I have/had jurisdiction to decide the issues presented, I have denied DCPS' Motion to Dismiss. Further, I have denied DCPS' motion for partial directed finding because at the conclusion of Parent's case it was not conclusively apparent that Parent had proven no cause of action against DCPS.

Prevailing Party on all issues is DCPS.

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: _____
January 14, 2011



Hearing Officer