

**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
2012 JAN -6 PM 4:42

Parent, on behalf of
Student,¹

Date Issued: January 6, 2012

Petitioner,

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a _____ year old male, who is currently a _____ grade student attending School A. The student's current individualized education program (IEP) lists Intellectual Disability (formerly known as Mental Retardation) as his primary disability and provides for him to receive twenty-nine and one quarter (29.25) hours per week of specialized instruction outside of the general education setting, sixty (60) minutes per week of behavioral support services outside of the general education setting, sixty (60) minutes per week of speech-language pathology services outside of the general education setting, sixty (60) minutes per week of occupational therapy outside of the general education setting and extended school year (ESY) services.

On October 28, 2011, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to provide tutoring as a supplemental service² on

¹ Personal identification information is provided in Appendix A.

² The Due Process Complaint and the December 1, 2011 Prehearing Order identified tutoring as a "supplemental service." However, 34 CFR 300.42 defines supplemental services as supports that are provided "...to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate." In this matter, the student is placed in a private setting and neither attends regular education classes nor has contact during the school day with non-disabled peers. Therefore, the hearing officer reworded the issue to accurately describe the Petitioner's issue.

the student's current IEP. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, four (4) hours per week of tutoring services to be included on the student's IEP.

On November 7, 2011, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that it has provided the student with an IEP that is reasonably calculated to provide educational benefit and that the student is receiving educational benefit.

On November 28, 2011, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer issued the Prehearing Order on December 1, 2011. The Prehearing Order clearly outlined the issue to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. Neither party disputed the issue as outlined in the Order.

During the November 28, 2011 Prehearing Conference, the parties agreed that: (1) the student's current placement at School A is an appropriate placement; and (2) the goals and objectives in the student's current IEP are appropriate.

On December 14, 2011, Petitioner filed Disclosures including twenty-three (23) exhibits and four (4) witnesses.³ On December 14, 2011, Respondent also filed Disclosures including six (6) exhibits and four (4) witnesses.

The due process hearing commenced at approximately 9:00 a.m. on December 22, 2011 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed. Petitioner's exhibits 1-23 were admitted without objection. Respondent's exhibits 1-6 were admitted without objection. The hearing concluded at approximately 11:00 a.m. following closing statements by both parties.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

ISSUE

The issue to be determined is as follows:

1. Whether the Respondent denied the student a free appropriate public education (FAPE) by failing to provide tutoring on the student's current individualized education program (IEP)?

³ A list of exhibits is attached as Appendix B. A list of witnesses is included in Appendix A.

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 student with disabilities as defined by 34 CFR §300.8. (Petitioner's Exhibits 6 and 10)
2. The student received twenty (20) hours of independent tutoring July-August, 2011 pursuant to a July 6, 2011 agreement between the parties. (Petitioner's Exhibit 3; Respondent's Exhibit 3; Tutor's Testimony)
3. The student made only "slight progress" in math, "minimal success" in reading and written expression and slow progression overall after seventeen (17) hours of one-on-one tutoring however benefitted from the service. (Petitioner's Exhibit 5; Tutor Testimony; Educational Advocate Testimony, Parent Testimony)
4. Pursuant to the July 6, 2011 agreement, the parties met on September 21, 2011 to review the student's Vineland Assessment, update the student's IEP and determine whether the student needed additional or different supports in the area of reading and written expression. The IEP Team consisted of the child's guardian (by phone), the parent's advocate, the student's teacher, the student's speech-language therapist, a DCPS clinical director, a DCPS psychologist, a DCPS compliance monitor (by phone) and a "DCPS representative." (Petitioner's Exhibits 3 and 11)
5. The parent and the student's teacher agreed with the advocate's recommendation that the student receive after-school tutoring as a service on the child's IEP. The DCPS compliance monitor disagreed with the recommendation. The remaining IEP Team members neither agreed nor disagreed with the recommendation. (Petitioner's Exhibit 16; Educational Advocate's Testimony)
6. The DCPS compliance monitor informed the IEP Team that she needed to contact her "boss" to determine if tutoring could be included on the student's IEP. The September 21, 2011 IEP Team did not include all required members of the IEP Team. Specifically, the IEP Team did not include an LEA representative that was knowledgeable about the availability of resources of the public agency. (Petitioner's Exhibits 12, 16-18; Educational Advocate's Testimony)
7. The student's October 7, 2011 IEP provides for him to receive twenty-nine and one quarter (29.25) hours per week of specialized instruction outside of the general education setting, sixty (60) minutes per week of behavioral support services outside of the general education setting, sixty (60) minutes per week of speech-language pathology services outside of the general education setting, sixty (60) minutes per week of occupational therapy outside of the general education setting and ESY services. (Petitioner's Exhibit 10)

8. The student is functioning at a 1st grade level in mathematics, reading and written expression. (Tutor's Testimony, Teacher's Testimony)
9. The student requires full-time special education services in a highly structured, small student-to-teacher ratio academic setting with a range of accommodations. The student needs a curriculum that focuses on cognitive/academic skills development as well as language, social/emotional and adaptive skills development. The student also needs individualized attention and instruction and a classroom environment that is structured to minimize stimulus overload while maximizing his ability to sustain his attention. (Petitioner's Exhibit 20)
10. The student's classroom has seven (7) students, one lead teacher and one teacher's aide. The classroom will be receiving a second teacher's aide because of the recent addition of another student. The students in the classroom are functioning at similar academic levels. The student is taught in a small group of four (4) students for reading. The four (4) students in the student's reading group are functioning at the same academic level in reading as the student. (Teacher's Testimony)
11. The student's placement and IEP goals and objectives are appropriate. (Petitioner's Exhibit 2)
12. The student made slow progress on his IEP goals during the first quarter and received letter grade B or C in all core subjects. The student's slow progress is due to his academic functioning level. (Petitioner's Exhibits 13 and 14; Teacher's Testimony)

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:

Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably

calculated to enable a child to receive some educational benefit. *Board of Education v. Rowley*, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

Procedural Safeguards

The IDEA imposes strict procedural requirements on educators to ensure that a student's substantive right to a "free appropriate public education" is met. 20 U.S.C. § 1415. The IDEA regulations at 34 CFR §300.513(a)(2) state that 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.

While the Petitioner did not argue that the Respondent did not comply with all procedural requirements of the IDEA, evidence presented in the case reveals a procedural violation. Specifically, IDEA regulations at 34 CFR 300.321(a)(4) require that the IEP Team include a representative of the public agency who (i) is qualified to provide, or supervise the provision of, specifically designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general education curriculum; and (iii) is knowledgeable about the availability of resources of the public agency.

At the September 21, 2011 IEP Team meeting, the IEP Team consisted of the child's guardian (by phone), the parent's advocate, the student's teacher, the student's speech-language therapist, a DCPS clinical director, a DCPS psychologist, a DCPS compliance monitor (by phone) and a "DCPS representative." The purpose of the IEP Team meeting was to review the student's Vineland Assessment, update the student's IEP and determine whether the student needed additional or different supports in the area of reading and written expression. The student's advocate requested additional tutoring for the student and the student's teacher agreed with the recommendation. With the exception of the DCPS compliance monitor who stated that she did not believe that additional tutoring was warranted, the remaining IEP Team members neither agreed nor disagreed with the recommendation. The DCPS compliance monitor informed the parent and the parent's advocate that she would have to contact her superiors to determine if the LEA would be able to provide tutoring to the student. Neither the DCPS compliance monitor nor the "DCPS representative" was able to offer information as to the availability of tutoring for the student. Therefore, a decision regarding tutoring services for the child hinged on the opinion of a person who may not have been knowledgeable about the unique needs of the student and who was not available for the parent to discuss his concerns regarding the student's progress.

The failure of the Respondent to have an LEA representative who is able to commit agency resources that are necessary to implement the child's IEP that would be developed or revised at the IEP Team meeting deprived the IEP Team of its ability to make decisions for the student and impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to his child.

While the hearing officer finds that the Respondent committed a procedural violation by failing to have an LEA representative who was knowledgeable about the availability of resources at the student's September 21, 2011 IEP Team meeting, as discussed below, two of Petitioner's four witnesses clearly stated that the student is being provided a FAPE. The hearing officer concludes that the student's current IEP, as developed by the September 21, 2011 IEP Team is appropriate. Therefore, while the procedural violation impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to his child, it did not *significantly* impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to his child.

Educational Benefit

A FAPE need not provide the "absolutely best" or "potential-maximizing" education. *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010) (citation and internal quotation marks omitted). The FAPE need only be "appropriately designed and implemented so as to convey [the] [s]tudent with a meaningful benefit." *Id.* at 433 (citations and quotation marks omitted). "Meaningful educational benefit" means that an eligible child's program affords him or her the opportunity for "significant learning." *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). An eligible student is denied a FAPE if the IEP is not likely to produce progress, or if the program affords the child only a "trivial" or "de minimis" educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3rd Cir. 1996); *Polk v. Cent. Susquehanna Intermed. Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988); see also *Bd. of Educ. of Frederick County v. I.S. ex rel. Summers*, 325 F. Supp.2d 565, 576-77 (D. Md. 2004).

The parties agree that the student's placement and IEP goals and objectives are appropriate. The only question is whether the student also requires tutoring as a support after school hours to be provided a FAPE. Tutoring was provided to the student by Respondent in July and August, 2011 as compensatory education for a past denial of FAPE. At that time, tutoring was not included on the student's IEP as a necessary support for a FAPE.

The student is functioning significantly below grade level, has difficulty focusing and requires considerable repetition of academic skills. The student's July 25, 2011 Adaptive Functioning Assessment recommends that the student:

receive a full-time special education services in a highly structured, small-student-to-teacher ratio academic setting geared towards children with intellectual disability and with a range of accommodations and a diverse instructional learning style (i.e., audiovisual, tactile, kinesthetic). The curriculum should focus on cognitive/academic skills development as well as language, social/emotional and adaptive skills development. Also, given his attentional [sic] problems, it is strongly recommended that he receive increased individualized attention and instruction; a classroom environment that is physically structured to minimize stimulus overload while maximizing his ability to sustain his attention.

The student's October 7, 2011 IEP prescribes 29.25 hours per week of specialized instruction outside of the general education environment, 60 minutes per week of behavioral support services, 60 minutes per week of speech-language therapy, 60 minutes per week of occupational therapy, ESY and multiple classroom accommodations. He is placed in a private special education school and is taught in a classroom with seven students, one lead teacher and two teacher aides. The students enrolled in the class have similar ability levels. The student's reading program is taught in a group of four students. While the student's first quarter progress report noted minimal progress, the student earned letter grade B or C in all core subjects.

Each of Petitioner's witnesses testified that the student "needs" tutoring services. However, the educational advocate and the student's teacher, as witnesses for the Petitioner, admitted that the student is currently receiving a FAPE. It is clear from an analysis of the testimony that Petitioner's witnesses were employing a potential maximizing standard rather than the FAPE standard when stating that the student "needs" tutoring. In fact, Petitioner's witnesses all stated that the student would "benefit" from tutoring rather than contending that the student is not receiving a FAPE without tutoring services. It is likely that the student would benefit from additional after-school tutoring. That is not, however, the standard for whether there has been a denial of FAPE.

Petitioner argued that the student's first quarter progress report is evidence of needing tutoring because the student made minimal progress on IEP goals. However, in the student's August, 2011 Compensatory Education Monthly Report, the tutor noted only "slight progress" in math, "minimal success" in reading and written expression and slow progression overall after seventeen (17) hours of one-on-one tutoring. The Petitioner presented considerable evidence that the student is struggling retaining concepts for extended periods of time, is functioning significantly below grade level and is progressing very slowly however did not present any evidence that the student's IEP is not reasonably calculated to confer educational benefit. In fact, evidence presented supports the supposition that the student's slow progress is due to his level of academic functioning rather than a deficient educational program.

A local education agency is not required to maximize the potential of a student with a disability. Instead, all that is required is that the Respondent provide the basic floor of educational opportunity by providing an IEP that is reasonably calculated to confer educational benefit. *Board of Education, etc. v. Rowley*, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991). The hearing officer concludes that the student's current IEP is reasonable calculated to confer educational benefit. The Petitioner failed to meet its burden with regard to the issue presented.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

The due process complaint in this matter is **dismissed** with prejudice. All relief sought by Petitioner herein is **denied**.

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 6, 2012

Melanie B. Chisholm
Hearing Officer