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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

STUDENT,[1]
through the Parent,

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

Date Issued: June 30, 2010

Hearing Officer: Virginia A. Dietrich

Case No:

Hearing Date: 06/24/10 Room: 1

HEARING OFFICER DETERMINATION

BACKGROUND

Petitioner filed a due process complaint notice on 04/23/10, alleging that Student had been denied a free appropriate public education ("FAPE") when the District of Columbia Public Schools ("DCPS") failed to implement Student's Individualized Education Program ("IEP") by failing to provide him with the occupational therapy services that were prescribed by his IEP. Petitioner also claimed that Student was entitled to compensatory education as a result of those missed services. As it turns out, there was no dispute between the parties about the fact that DCPS had not provided Student with 20 hours of occupational therapy services between October 2009 and April 2010. What was in dispute was how the missed services were to be provided. As early as 01/22/10, DCPS acknowledged the missed services and proposed to make them up by adding one hour/week of occupational therapy services to Student's class schedule. However, Petitioner objected to DCPS' proposal because it would mean that Student would have to miss his academic classes in order to receive the make-up occupational therapy services, and that just didn't sit quite right with Petitioner because Student was already struggling in his academic subjects and after all, it was DCPS' fault that an occupational therapy services provider was not available to provide the required services. Instead, Petitioner wanted to rectify the situation by having DCPS fund independent occupational therapy services so that the services could be provided outside of the school day.

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[1] Personal identification information is provided in Appendix A.

Hearing Officer Determination

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEIA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

This Hearing Officer was assigned to the case on 04/26/10. A prehearing conference took place on 06/02/10, and a Prehearing Order that memorialized the content of the prehearing conference was issued on 06/02/10.

The due process hearing was a closed hearing that began and concluded on 06/24/10. Petitioner was represented by Zachary Nahass, Esq. and DCPS was represented by Blair Matsumoto, Esq.. Petitioner presented two witnesses: Petitioner; and Serene Peterson, Petitioner's educational advocate. DCPS offered no witnesses, and rested its case on the submission of its disclosure documents into evidence.

Petitioner's Exhibits P-1 through P-7 and DCPS' Exhibits DCPS-1 through DCPS-10 were admitted into evidence without objection. No written closing arguments or briefs were required.

At the time the complaint was filed, Student was a years old boy attending the grade at a public school in the District of Columbia. Student was a disabled child under the IDEIA, with his most current IEP, dated 02/26/10, ascribing him a disability classification of Other Health Impairment, and prescribing 29.5 hours/week of specialized instruction, 60 minutes/week of speech-language pathology services, 120 minutes/week of occupational therapy services, and 30 minutes/week of behavioral support services, with all services to be provided outside of general education. The 02/26/10 IEP also prescribed Extended School Year services that included occupational therapy services.

The parties met for a resolution meeting on 06/11/10, but settlement could not be reached due to an impasse on the nature and extent of compensatory education services to be provided for the missed occupational therapy services. As early as 01/22/10, DCPS had proposed that one additional hour/week be added to Student's already full class schedule to make up for the missed services. Petitioner immediately rejected this proposal and on 01/29/10, Petitioner proposed a compensatory education plan that included a summer camp, a reading program, and other academic enrichment programs and activities, but somehow the plan failed to include occupational therapy services. In the complaint and at the prehearing conference, Petitioner's request for relief was simply that DCPS fund independent compensatory education services to compensate Student for missed occupational therapy services. At the due process hearing, Petitioner's request for relief remained the same, except that the number of service hours requested increased from 16 to 20, an increase that DCPS did not object to. After the issues and relief requested were stated for the record, parties were offered the opportunity to engage in a settlement discussion, but DCPS declined.

The sole issue to be determined is as follows:

Hearing Officer Determination

Whether DCPS denied Student a FAPE when it failed to implement the portion of Student's IEP that required DCPS to provide Student with 60 minutes/week of occupational therapy services between October 2009 and April 2009?

The parties agreed to the following stipulated facts:

#1. DCPS owes Student 20 hours of compensatory education for missed occupational therapy services that occurred between October 2009 and April 2010.

#2. At the Multidisciplinary Team ("MDT") meeting that took place on 01/22/10, DCPS offered to make up the missed occupational therapy services with a proposal of adding 1 hour/week to Student's IEP, and Petitioner rejected DCPS' proposal.

#3. Laura Fogliano is the compensatory education coordinator for DCPS.

For relief, Petitioner requested that the Hearing Officer find that DCPS denied Student a FAPE with respect to DCPS' failure to provide occupational therapy services and that DCPS fund 20 hours of independent compensatory occupational therapy services to be provided outside of the school day.

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 has been receiving special education services and occupational therapy as a related service, since the age of three. (Testimony of Petitioner).

#2. From March – September 2009, teachers complained to Petitioner that Student was not completing his homework and that he needed to practice his handwriting. Petitioner helps Student with his homework every night for approximately two hours, which generally consists of math, reading, and writing complete sentences. Writing is very fatiguing for Student and during homework sessions, Student expresses a great deal of frustration with doing the work and puts his head down on the table and resists. Sometimes, Student is so fatigued that he cannot complete the homework, and then Petitioner lets him finish it in the morning before going to school. When doing homework, Student's writing is not good; the spacing and letters are incorrect. (Testimony of Petitioner).

#3. The IEP that was developed for Student on 03/31/09 when Student was years old and in the grade at ascribed Student a disability classification of Other Health Impaired and prescribed 25 hours/week of specialized instruction, 60 minutes/week of speech-language pathology services, 60 minutes/week of occupational therapy services, and 30 minutes/week of behavioral support services, with all services to be provided outside of general education. The goals in the IEP to which occupational therapy services were targeted consisted of: Student holding a writing utensil, a tripod or quadrupod grip; Student independently positioning scissors on his fingers; Student cutting an 8-inch straight line, curved line and zig zag

line independently; Student writing the numbers 1-10 on the lines of his paper with correct letter formation, letter direction and letter spacing; Student writing his name on the lines of his paper with correct letter formation, letter direction and letter; Student cutting out squares and circles within ¼ of lines; Student tying a string into knots; and Student independently fastening buttons, snaps and zippers on his clothing; with an achievement date of 03/30/10 for all goals. Classroom accommodations included, but were not limited to: extra time for completion of tasks and pencil grip. Student's IEP also provided for Extended School Year services that addressed motor skills/physical development in the areas of correct letter formation, letter direction and letter spacing by providing 30 minutes/week of occupational therapy. (P-2).

#4. At the Multidisciplinary Team ("MDT") meeting that took place on 01/22/10, Petitioner learned for the first time that Student had not been receiving occupational therapy services since mid October 2009 due to the unavailability of an occupational therapy services provider. (Testimony of Petitioner; DCPS-8). At the MDT meeting, DCPS proposed to make up the missed occupational therapy services by adding 1 hour/week of compensatory time to Student's IEP, with .5 hours/week in general education and .5 hours/week outside of general education. (Stipulation #2; P-3; DCPS-8). In order to make up the missed occupational therapy services as proposed by DCPS, Student would have to be pulled out of his art and/or science classes and miss academic instruction in those areas. (Testimony of Petitioner). Petitioner rejected DCPS' proposal on how to make up the missed occupational therapy services (Stipulation #2; DCPS-5; Testimony of Petitioner; Testimony of because Petitioner did not want Student pulled out of his academic classes because Student was already struggling academically. (Testimony of Petitioner; Testimony of

#5. On 01/29/10, Petitioner proposed to DCPS her own compensatory education plan that consisted of 1 hour/week of instructional/educational services and 1 hour/week of therapeutic services for a period of 3 months in order to aid in Student's educational progress; funding from DCPS for a reading assessment from to address Student's delays in reading; funding for the number of hours of reading and math services recommended by the assessment; funding from DCPS for 20 hours of independent individual reading tutorial services; and funding from DCPS for 1 hour/week for a period of 3 months for Student's involvement in a swimming, soccer or reading camp to help build Student's development of social skills, peer relations, and encourage positive team building and self-esteem. In the written compensatory education proposal, Petitioner requested that DCPS either accept or reject her proposed plan by 02/12/10. (P-5). Subsequently, Petitioner's advocate spoke with the special education specialist at about the proposed plan and she was informed that the compensatory education coordinator for DCPS would handle the matter. (Testimony of Serene Peterson). On 03/09/10, Petitioner's advocate sent an email to the special education specialist at requesting a response to Petitioner's compensatory education proposal, but she never received a written or verbal response to the email. (P-6; Testimony of

#6. On 02/26/10, when Student was in the grade at Student's IEP was revised. The revised IEP ascribed Student a disability classification of Other Health Impaired and prescribed 29.5 hours/week of specialized instruction, 60 minutes/week of speech-language pathology services, 120 minutes/week of occupational therapy services, and 30

minutes/week of behavioral support services, with all services to be provided outside of general education. The revised IEP included six of the eight previous motor skills/physical development goals; apparently Student had made progress and had mastered the goals of holding a writing utensil, a tripod or quadrupod grip and independently fastening buttons, snaps and zippers on his clothing. Student's IEP included a classroom accommodation for pencil grip. Student's 02/26/10 IEP also provided for Extended School Year services that addressed motor skills/physical development in the areas of correct letter formation, letter direction and letter spacing by providing 60 minutes/week of occupational therapy services. Extended School Year services were necessary for Student because Student needed continued exposure and the provision of special education and related services in order to prevent regression in his current skills and facilitate his recoupment of skills upon return to the regular school year. (DCPS-5).

#7. Petitioner and Petitioner's advocate were aware at the MDT meeting on 02/26/10 that occupational therapy services on the IEP had been increased to 120 minutes/week to make up for missed services; however, Petitioner did not sign the IEP indicating agreement with the IEP services. (DCPS-5; P-4). At that meeting, Petitioner was again advised by DCPS that her proposed compensatory education plan would be handled by the DCPS compensatory education coordinator, Ms. Fogliano, who was not at the meeting and could not be reached by telephone during the meeting. (P-4; Testimony of DCPS never officially responded to Petitioner's compensatory education proposal that was submitted to DCPS on 01/29/10, either verbally or in writing. (Testimony of

#8. DCPS owes Student 20 hours of compensatory education for missed occupational therapy services that occurred between October 2009 and April 2010. (Stipulation #1).

#9. Student transferred from to on or about 04/06/10, and since attending Student has received only 1 hour/week of occupational therapy services. (Testimony of Petitioner).

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:

"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. 3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast,* 44 IDELR 150 (2005).

In this case, Petitioner's proof was adequate to demonstrate by a preponderance of the evidence that DCPS' failure to implement the portion of Student's IEP that required DCPS to provide Student with 60 minutes/week of occupational therapy services between October 2009 and April 2010 resulted in the denial of a FAPE.

Hearing Officer Determination

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).

As a matter of federal law, school districts must provide the services specified in a student's IEP. Specifically, the IDEIA mandates that as soon as possible following development of the IEP, each public agency must ensure that special education and related services are made available to the child in accordance with the child's IEP. 34 C.F.R. 300.323(c)(2). District of Columbia law carries a corresponding provision that requires DCPS to implement a child's IEP as soon as possible after the meeting where the IEP is developed or revised. 5 D.C.M.R. 3010.2.

The facts in this case show that between October 2009 and April 2010, Student had an IEP that required DCPS to provide him with 60 minutes/week of occupational therapy services and DCPS failed to provide the service due to the unavailability of an occupational therapy services provider. (Findings #3, #4, #8). Thus, Petitioner met her burden to show that DCPS committed a procedural violation of the IDEIA. Did this violation result in the denial of a FAPE?

The IDEIA defines a FAPE as special education and related services that are provided at public expense, meet the standards of the state education agency, include an appropriate school and are provided in conformity with an IEP that meets the requirements of the IDEIA. 34 C.F.R. 300.17. Related services include occupational therapy. 34 C.F.R. 300.34.

In this case, the Hearing Officer concludes that Student's failure to receive much needed occupational therapy services over a six months period of time caused a deprivation of educational benefit for Student. Student, now nine years old, has been receiving occupational therapy services since the age of three, and from March through September 2009, just prior to DCPS' failure to provide the occupational therapy services, teachers had been complaining to Petitioner that Student needed to practice his handwriting and that he was not completing his homework. (Findings #1, #2). According to Petitioner, who helped Student with his homework for two hours every night, Student had great difficulty with writing. The physical act of writing fatigued Student tremendously, Student's spacing and letters were incorrect, and Student had great difficulty completing his homework on a daily basis. (Finding #2). Clearly, occupational therapy was a necessary service for Student because it targeted letter formation and spacing; skills that would help Student write better and easier.

Although, as DCPS argued, Student was making progress on his occupational therapy goals as evidenced by the elimination of two motor skills/physical development goals on Student's 02/26/10 IEP, the fact remains that Student was subject to regression without services, as was evidenced by DCPS determining in Student's 03/31/09 IEP and 02/26/10 IEP that Student needed Extended School Year services during the summer of 2009 and 2010, respectively, to address motor skills/physical development goals relating to correct letter formation, letter direction and letter spacing. The rationale and necessity for Extended School Year services is

that without constant instruction and remediation, regression in skills is likely. (Findings #3, #6). In all likelihood, the reason Student achieved the two occupational therapy goals that he achieved despite the absence of occupational therapy services at school, was because these were skills that he either worked on or most likely worked on at home, i.e., pencil grip while doing his homework and fastening his clothing, all under the constant, dutiful tutelage of Petitioner. Moreover, DCPS doubled the number of occupational therapy service hours in Student's 02/26/10 IEP, presumably because Student needed it. (Finding #3, #6). Thus, the Hearing Officer concludes that occupational therapy was an extremely important related service that Student needed in order to help him successfully complete his class work and homework on a daily basis in the area of writing, so that he could do what his IEP was designed to do, i.e., help him advance appropriately toward attaining annual goals. 34 C.F.R. 300.320(a)(4)(i). Six of eight occupational therapy goals remained constant from the 03/31/09 IEP to the 02/26/10 IEP. This meant that Student had not met the requirements of graduating from those goals. If Student had received the occupational services that he was supposed to, he might have achieved more of the goals on his IEP.

Note: The dates of ESY services on the 02/26/10 IEP (DCPS-5) with respect to the provision of occupational therapy services for the summer of 2010 is clearly erroneous. It is evident that the MDT intended to change the dates from the summer of 2009 to the summer of 2010 because the amount of occupational services was increased from 30 minutes/week to 60 minutes/week. The "begin" date for specialized services for ESY accurately reflects a start date of 06/29/10, but the remainder of the "begin" and "end" dates reflect 2009 dates that have passed and are clearly erroneous.

What type of compensatory education is Student entitled to for the missed services?

"When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place." The qualitative standard for determining compensatory education is that "compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid v. District of Columbia,* 43 IDELR 32 (2005).

There is no dispute between the parties that DCPS owes Student 20 hours of compensatory, occupational therapy services. (Finding #8). The entire dispute in this case is over how the missed services should be provided. From the very beginning, Petitioner disagreed with DCPS that the missed services should be provided to Student in school in lieu of instruction in one of his academic classes and Petitioner rejected their proposal. (Findings #4). However, Petitioner's compensatory education counterproposal to DCPS to make up for the missed occupational therapy services failed to include any occupational therapy services, and for all intents and purposes, Petitioner's counterproposal missed the mark for providing the type of services that Student had missed. (Finding #5). Interestingly, neither Petitioner nor DCPS offered each other an appropriate proposal for the provision of missed occupational therapy services, and perhaps that why their minds could never meet. Petitioner's shoot for the sky compensatory education counterproposal that included everything except occupational therapy

services (Finding #5) was passed along the DCPS chain for approval or disapproval, and DCPS never officially responded to it. (Finding #7). Meanwhile, it is Student who has suffered because he still hasn't received the missed occupational therapy services and he is the one who is struggling with his writing homework every night.

Petitioner's objection to DCPS providing the missed services during the school day because Student would have to forfeit instruction in academic classes while Student is already struggling in academics is well taken. In view of Student's full academic schedule and Student's continuous struggle with academics, the missed services might meaningfully be provided in the home environment since Student struggles with writing while doing his homework. Petitioner's request for funding for an independent provider to provide the occupational therapy services outside of the school day is not an unreasonable one in view of the circumstances. The Hearing Officer concludes that it is appropriate for Student to receive the instruction outside of the school day.

Petitioner met her burden of proof that (1) Student was denied a FAPE when DCPS failed to provide Student with required occupational therapy services from October 2009 through April 2010, and (2) Student is entitled to compensatory education for those missed services.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, this Hearing Officer orders:

(1) DCPS shall fund 20 hours of independent occupational therapy services at the prevailing market rate and provide a letter of funding for the services to Petitioner's Attorney with a copy to Petitioner via U.S. mail, no later than five (5) business days from the date of this Order; and
(2) DCPS shall amend the Extended School Year section of Student's 02/26/10 IEP, pursuant to 34 C.F.R. 300.324(a)(4), to reflect accurate "begin" and "end" dates, no later than 30 calendar days from the date of this Order.

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: June 30, 2010

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner (via U.S. mail)
Petitioner's Attorney: Zachary Nahass, Esq. (electronically)
DCPS' Attorney: Blair Matsumoto, Esq. (electronically)
DCPS (electronically)
SHO (electronically)