

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

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

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[Parent], on behalf of,
[Student],¹

Petitioner,

v

District of Columbia Public Schools (DPCS),

Respondent.

Date Issued: August 8, 2010

Hearing Officer: Jim Mortenson

Case No:

Hearing Date: July 29, 2010 Room: 5a

HEARING OFFICER DETERMINATION

I. BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on July 29, 2010, in hearing room 5a, and concluded on that date. The due date for the Hearing Officer's Determination (HOD) is August 8, 2010, pursuant to Standard Operating Procedure (SOP) § 1003. This HOD is issued on August 8, 2010.

The hearing in this matter was conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30. The hearing was closed to the public.

Present at the due process hearing were:

Zachary Nahass, Esq., Petitioner's Counsel

Tanya Chor, Esq., Respondent's Counsel

¹ Personal identification information is provided in Appendix A.

Petitioner

Petitioner's daughter

Four witnesses testified at the hearing for the Petitioner:

Dr. Courtney Ferenz (C.F.), Clinical Psychologist,

Jessica Abrego (J.A.), Speech-Language Therapist,

Lynnette Yoakum (L.Y.), Occupational Therapist,

Special Education Teacher.

Two witnesses testified at the hearing for the Respondent:

Marva McIntosh (M.M.), Speech-Language Pathologist, DCPS

Pamela Dishman-Owens (P.D.), Nonpublic Manager, DCPS

The complaint in this matter was filed on May 26, 2010. A prehearing conference was held on June 10, 2010, and a prehearing order was issued on that date. A resolution meeting was held and did not result in any agreements. There have been no adjustments to the hearing timelines.

Seven documents were disclosed by the Petitioner. (P 1 – P 7). The IHO rejected P 1 and P 2 as duplicative of documents already part of the hearing record. There were no objections to any other disclosed documents and P3 through P 7 were admitted into the record.² The Petitioner's exhibits are:

P 3	-	May 5, 2005	-	Individualized Education Program (IEP) and meeting notes
P 4	-	May 5, 2005	-	Extended School Year (ESY) Justification Communication/Speech and Language
P 5	-	May 5, 2005	-	ESY Justification Occupational Therapy (OT)

² Respondent did object to the witnesses the Petitioner disclosed on the grounds the evidence they would provide was not disclosed. The objection was overruled and the IHO noted that while technically the general thrust of the testimony to be provided was not specifically stated in the disclosures, the disclosed documents consisted primarily of documents authored by the witnesses, and Petitioner stated the witnesses would be testifying related to the information in those documents. Thus, there was no prejudice to the Respondent in this case.

- P 6 - February 15, 2010 - 2010 ESY Justification for Psychosocial Services
- P 7 - March 15, 2010 - 2010 ESY Justification Academics

28 documents were disclosed by the Respondent. (R 1 – R 28) R 1 included reference to three documents: the Complaint, Response, and Prehearing Order. The IHO excluded the Complaint and Prehearing Order as duplicative as they are already part of the hearing record. A response was not filed, although it was served on the Petitioner, and so the IHO permitted R 1, consisting of the Response, to be entered. The IHO required the Respondent to send a copy of the Response to him as a copy was not included in the disclosure. The IHO, at the conclusion of the hearing, also requested a copy of the DCPS ESY Eligibility Guidelines. That document was not provided and the Respondent’s Counsel, in an email dated Thursday, July 29, 2010, stated that “the criteria document you have requested is an internal personnel guidance document[.]” This correspondence will be included in the record separate from the disclosures. R 1 through R 28 were admitted as evidence into the record. Respondent’s exhibits are:

- R 1 - June 10, 2010 - Response to Complaint
- R 2 - June 11, 2010 - Prior Written Notice
- R 3 - May 5, 2010 - IEP
- R 4 - May 5, 2010 - Student Reintegration Plan
- R 5 - May 5, 2010 - Classroom Observation
- R 6 - May 5, 2010 - IEP Meeting Notes
- R 7 - May 5, 2010 - Meeting Notes
- R 8 - March 15, 2010 - 2010 ESY Justification Academics
- R 9 - December 16, 2009 - Speech and Language Evaluation
- R 10 - Student Attendance for 2009-2010 School Year
- R 11 - Quarterly Grade Report Card School Year 2009-2010
- R 12 - 3rd Quarter Therapist Comments ('09-'10 SY)
- R 13 - April 22, 2008 - Student Report
- R 14 - April 20, 2009 - Student Report
- R 15 - May 8, 2008 - Score Report
- R 16 - March 23, 2010 - Score Report
- R 17 - June 17, 2009 - IEP
- R 18 - June 4, 2008 - 2007-2008 Individual Counseling Final Report
- R 19 - June 17, 2009 - Meeting Notes

R 20	-	June 12, 2008	-	IEP
R 21	-	May 23, 2007	-	Speech and Language Evaluation
R 22	-	May 29, 2007	-	(OT Assessment Report)
R 23	-	November 26, 2007	-	Confidential Psychological Evaluation
R 24	-	May 22, 2007	-	Confidential Report of Psychoeducational Evaluation
R 25	-	May 24, 2007	-	Social Work Evaluation Report
R 26	-	May 31, 2007	-	Educational Report
R 27	-	undated	-	Curricula Vitae of
R 28	-	undated	-	Curricula Vitae of]

II. ISSUE

Whether the Respondent failed to provide the Student with an IEP reasonably calculated to provide educational benefit when it excluded ESY services?

III. 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 year old learner with disabilities who completed the grade at (a non-public special education school in which he was placed by the Respondent two years ago) at the end of the 2009-2010 school year.³
2. The Student is eligible for special education and related services as a result of meeting the definition for emotional disturbance.⁴ The Student has exhibited behavioral problems, learning difficulties, and visual perceptual difficulties, which have impeded his academic progress.⁵

³ R 3/P 3, Testimony (T) of

⁴ R 3/P 3.

⁵ R 22, R 23, R 24, R 25, R 26.

3. An IEP team meeting was held on May 5, 2010, and there was not agreement that the Student required ESY services.⁶ The Respondent's representative at the meeting, Eric Abraham, used six questions to determine whether the Student was entitled to ESY services.⁷ The questions/criteria to be used were based on "critical skills" consisting of: mobility; physical control; impulse control; self-care and self-help; social interaction; and basic cognition and basic communication.⁸ The Student met three of the six questions/criteria, and this was determined by Eric Abraham to mean the Student was not "eligible for ESY."⁹ All of the Student's teachers and service providers on the IEP team believed the Student should have ESY services and articulated their rationale at the meeting and in writing.¹⁰ The Student was recommended for ESY services for academics, speech and language services, psychosocial services, and occupational therapy.¹¹
4. The Student's current educational performance is not entirely clear, because State-wide assessment results (DC-CAS) shows basic to proficient performance in math and reading, respectively, classroom observations of teachers and reports reflect mixed results, and a standardized assessment of academic achievement (the Woodcock Johnson III) shows the Student remains about two years behind his same grade peers academically.¹² The IEP team, in stating the Student's present levels of academic performance, relied on the Woodcock Johnson III (WJ III) scores, so those are given greater weight here when

⁶ Stipulated fact.

⁷ T of T of R 6.

⁸ T of P.D. A written policy on these "criteria" exists as a "internal personnel guidance document" and was not shared with the IHO (or the Petitioner) despite my request. Also, since this evidence came from someone not at the meeting, and no one at the meeting who testified knew all the questions asked or the criteria used, it is only assumed that the questions asked at the meeting were based on these skill areas.

⁹ R 2, R 6.

¹⁰ P 4/R 8, P 5/R 8, P 6/R 8, P 7/R 8, R 6, R 7.

¹¹ P 4/R 8, P 5/R 8, P 6/R 8, P 7/R 8.

¹² P 4/R 8, P 5/R 8, P 6/R 8, P 7/R 8, R 5, R 6, R 7, R 11, R 12, R 14, R 16.

examining the ESY determination.¹³ The Student's Broad Math score on the WJ III was a 5.1 grade equivalency (GE), the Broad Reading score was a 3.2 GE, and the Broad Written Language score was a 3.1 GE.¹⁴

5. The Student's academic progress, utilizing the WJ III as an assessment tool, is on track to close the achievement gap between himself and his same grade peers because he progressed at greater than one year's progress from the prior year to last year.¹⁵
6. The Student must have constant review, repetition, and prompting in order to decode and encode unfamiliar words and improve his receptive language skills to participate fully in the general education environment.¹⁶ His problems with auditory processing cause him to take longer than peers to understand orally presented information, which has a significant impact in the classroom.¹⁷
7. The Student relies heavily on the therapeutic structure and services, supervision, and constant rewards and consequences at school to contain maladaptive behavior and encourage social, emotional, behavioral, and academic growth.¹⁸ Without the therapeutic structure and services during periods of ESY academic or other functional services the Student cannot benefit from those services just as he cannot benefit during the regular school year without them.¹⁹ Additionally, time at home during the summer without the

¹³ R 3/P 3.

¹⁴ R 3/P 3, R 16.

¹⁵ R 15, R 16.

¹⁶ P 4/R 8.

¹⁷ T of J.A., T of M.M. (M.M. originally denied the Student required ESY, but confirmed that she agreed with the J.A. at the IEP meeting that the Student should have ESY services for speech and language as a result of his auditory processing difficulties.)

¹⁸ P 6/R 8.

¹⁹ P 6/R 8,

structure his current school environment provides results in deterioration of psychosocial skills and will result in a difficult transition back to school in the fall.²⁰

8. The Student demonstrates regression of handwriting skills, both legibility and speed, as a result of scheduled breaks from school.²¹ The occupational therapist “worries” about the Student getting back up to speed in the fall, but there is no clear evidence or argument that the recoupment period for the Student would be unusually excessive or that any regression would prevent him from receiving FAPE.²²
9. The Student’s special education teacher recommended the following services to make up for missed academic services during the summer: six weeks of reading tutoring for one hour per week and six weeks of math tutoring for one hour per week.²³
10. The Student’s speech and language pathologist recommended the following services to make up for missed speech and language services during the summer: Work on the Earobics computer program to attempt to get to level 6 by the end of the summer, with one hour to ninety minutes per week of support and monitoring by a tutor, for six weeks.²⁴

IV. 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:

²⁰ T of C.F., P 6, R 8.

²¹ P 5/R 8.

²² T of L.Y., P 5/R 8.

²³ T of T.S. (The Respondent argued that the Student could have taken advantage of ESY services this summer as a matter of stay-put. However, no evidence was presented to support or refute this argument, and it is not considered in this HOD.

²⁴ T of J.A.

1. A free appropriate public education (FAPE) for a child with a disability under the IDEA

is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17. The Supreme Court has described the purpose of the IDEA quite

clearly:

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Board of Educ. v. Rowley, 458 U.S. 176, 203-204 (1982). It is within this legal context

we must examine the case at hand.

2. “Special education means specially designed instruction, at no cost to the parents, to meet

the unique needs of a child with a disability[.]” 34 C.F.R. § 300.39(a)(1). Federal

Regulations at 34 C.F.R. § 300.39(b)(3) defines “specially designed instruction” as:

adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

3. An IEP must include:

(1) A statement of the child's present levels of academic achievement and functional performance, including —

(i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); . . .

(2)(i) A statement of measurable annual goals, including academic and functional goals designed to —

- (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
- (B) Meet each of the child's other educational needs that result from the child's disability; . . .
- (3) A description of —
 - (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
 - (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
- (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child —
 - (i) To advance appropriately toward attaining the annual goals;
 - (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
 - (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
- (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
- (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why —
 - (A) The child cannot participate in the regular assessment; and
 - (B) The particular alternate assessment selected is appropriate for the child; and
- (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.

34 C.F.R. § 300.320(a), *see also*, D.C. Mun. Regs. tit. 5, § 3009.1.

4. Federal regulations at § 300.106, Extended school year services, provides:

- (a) General. (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
- (2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§ 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.
- (3) In implementing the requirements of this section, a public agency may not —
 - (i) Limit extended school year services to particular categories of disability; or
 - (ii) Unilaterally limit the type, amount, or duration of those services.
- (b) Definition. As used in this section, the term extended school year services means special education and related services that —
 - (1) Are provided to a child with a disability —
 - (i) Beyond the normal school year of the public agency;
 - (ii) In accordance with the child's IEP; and
 - (iii) At no cost to the parents of the child; and
 - (2) Meet the standards of the SEA.

See also, D.C. Mun. Regs. tit. 5, § 3017. The United States Department of Education, Office for Special Education Programs (OSEP) explains that the term “only” is used in paragraph (a)(2) of the regulation to provide “appropriate parameters to the responsibility of the IEP Team.” 71 Fed. Reg. No. 156, 46582 (2006). States may develop their own standards for making ESY determinations and the District of Columbia standard is nearly identical to the language in the Federal Regulations. *See*, D.C. Mun. Regs. tit. 5, § 3017.

5. In reviewing this determination, a court’s inquiry will be “twofold. First, has the State complied with the procedures set for in the Act? And second, is the [IEP] developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” Board of Educ. v. Rowley, 458 U.S. 176, 206-207 (1982). Thus, the IHO should also utilize this two part test in analyzing the facts.
6. In this case, the requirements of 34 C.F.R. § 300.106 (thus § 300.320(a)(4)) were not complied with in terms of substance or procedure. The evidence shows the Student requires ESY services to provide him with a FAPE. The Respondent’s evidence is based on the Student’s progress, which while excellent, has not yet closed the achievement gap between where he performs academically and where he is expected to perform for his grade level. Simply making great academic progress is not the only basis for determining whether ESY is necessary for FAPE in this case. The District’s reason for no ESY services is also based on criteria which were not State or Federal standards and were not offered into evidence or provided, despite being requested by the IHO. These criteria are not regulations governing the determination process as they were not promulgated in accordance with IDEA (*see*, 34 C.F.R. § 300.199), and were nevertheless used to deny the

Student services he is otherwise entitled to receive. The Petitioner's evidence includes the Student's overall deficiency in academic performance, including the IEP team's determination to use the WCJ III academic results over the DC-CAS data to determine the Student's present levels of academic achievement and the agreement of two speech and language pathologists (a DCPS person and the non-public school's person) that his problems with auditory processing so impact him in the classroom that services over the summer to address this deficit would be necessary. The Student's overall rate of progress without ESY services would be insufficient to progress appropriately. The Student's good academic progress toward closing his achievement gap, combined with the unknown "criteria" was not a valid basis to remove ESY services from the IEP, when some of the staff working with the Student had valid justifications for maintaining services outside of the regular school year so that the Student would continue to make that academic, as well as functional, progress necessary for FAPE. (Specifically, being involved in a progressing in the general education curriculum.) Thus, the Student was denied a FAPE and is entitled to compensatory education for academics and speech and language.²⁵

7. The Student is not entitled to compensatory services for occupational therapy because the Petitioner failed to show that it is more likely than not that the Student required those ESY services only to receive a FAPE. Based on the evidence presented, any regression of the Student's handwriting skills would not impede his access to the general education curriculum or progress toward annual goals.

²⁵ The Respondent objected to compensatory education as a possible remedy because the relief requested was ESY services at [redacted]. The Complaint was filed in June, and by the time the hearing was held in late July, this remedy was no longer viable. The IHO agreed with the Petitioner, at hearing, that if the Petitioner were entitled to a remedy, compensatory education would be considered.

8. The Student is not entitled to compensatory services for psychosocial services because even though those services were a necessary component of his educational programming over ESY periods, the services will be necessary in the fall, regardless of whether he regressed in the summer for lack of them alone, and the loss of those services for that purpose is without effect.

V. ORDER

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

1. The Petitioner prevails because the Student's IEP was not reasonably calculated to provide educational benefit when it excluded ESY services. The Respondent failed to follow 34 C.F.R. § 300.106 and D.C. Mun. Regs. tit. 5, § 3017 and did not determine whether the Student required ESY services only for the provision of FAPE.
2. The Student will be provided the following services to compensate for the denial of FAPE:
 - a. Six hours of reading tutoring for six weeks, addressing his IEP goals, to be provided between August 9, 2010, and October 1, 2010.
 - b. Six hours of math tutoring for six weeks, addressing his IEP goals, to be provided between August 9, 2010, and October 1, 2010.
 - c. Six hours of speech and language services for six weeks, using a computer program called Earobics, including instruction from a tutor or aide on using the program and monitoring the Student's progress using the program. (This may be done at school or at home with the provision of a computer and the software, and

a tutor or aide knowledgeable about the program.) This will be provided between August 9, 2010, and October 1, 2010.

3. Any services awarded herein not taken advantage of by the Student within the timelines stated shall be forfeit.
4. Any delay in arranging, offering, or providing the services awarded herein and within the timelines stated shall, if the Petitioner decides not to take advantage of the compensatory education mechanisms under the Blackman/Jones Consent Decree for failure to timely implement a HOD, result in a day for day extension of any delay. This order may also be enforced through the State Complaint Process, pursuant to 34 C.F.R. §§ 300.151-300.153, or other options available under law.

IT IS SO ORDERED.

Date: August 8, 2010



Independent 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).