DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parents], on behalf of,
[Student], [1]

Petitioners,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: July 27, 2011

Hearing Officer: Jim Mortenson

Case No: 2009-1434

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION on REMAND

I. BACKGROUND

The complaint in this matter was filed by the Petitioners on October 14, 2009 and resulted in a Hearing Officer Determination (HOD), following a due process hearing, on December 24, 2009. The case was appealed to the Federal District Court for the District of Columbia and on May 20, 2011, the Court remanded the matter back to the administrative forum, presided over by this Independent Hearing Officer (IHO) "to conduct a fact-specific inquiry and make a determination on the issue of compensatory education." [Parent], et al., v. District of Columbia, Civ. Act. No. 10-506, at 11 (D.D.C. May 20, 2011). Specifically, this inquiry is based on whether the Student requires compensatory education for physical therapy services missed from February 2009 until April 2009, and if so, how much?

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[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

On May 26, 2011, this IHO sent the Parties, through their Counsel, Roberta Gambale, Esq. for the Petitioners, and Laura George, Esq. for the Respondent, a Notice of Hearing Procedures to be used on Remand. These procedures were required because no regulations exist on how to procedurally handle a remand from the Court, and the Court provided no specificity on the procedures to use. Thus, to ensure the requirement of the Court was met, as well as the intent of the law to have a speedy determination in special education disputes this IHO set forth the requirements to be followed by the parties including the opportunity to file a motion for an evidentiary hearing.

In order to conduct a fact-specific inquiry and make a reasoned determination, the Notice of May 26, 2011, required the parties to specifically answer, including providing or pointing to evidence to support those answers, the following six questions:

1) What was the Student's level of functional performance regarding his motor skills in February 2009 when his individualized education program (IEP) was to be implemented at Tacoma Education Center?

2) What was the Student's level of functional performance regarding his motor skills on October 20, 2009, when the Due Process Complaint was filed concerning the implementation of the IEP?

3) What should the Student's level of functional performance regarding his motor skills reasonably have been on October 20, 2009, had the physical therapy services been provided from February 2009 until April 2009?

4) What is the Student's present level of functional performance regarding his motor skills today?

5) Where should the Student's present level of functional performance regarding his motor skills be had physical therapy been provided from February 2009 until April 2009?

6) What physical therapy services must be provided, if any, and for how long, to bring the Student to the level of functional performance he would have been at presently but for the failure to provide physical therapy services from February 2009 until April 2009?

The parties did, pursuant to the Notice, provide written evidence and arguments for this IHO to consider, in addition to the administrative record developed under the original hearing timelines in 2009. Both parties attempted to answer the first four questions with evidence to support their positions. The Petitioner attempted to answer questions six and seven but without supporting evidence. The Respondent did not answer questions five and six. The Respondent filed its brief and 13 documents on June 13, 2011. The Petitioners filed their brief, an affidavit of one of the Petitioners, and eight documents on June 16, 2011.

Respondent's documents are:[2]

Ex. No.	Date	Document
RR - 1)	December 12, 2008	Physical Therapy Evaluation Repot (See PR 5)
RR - 2)	June 4, 2009	Service Tracker
	July 23, 2009	Service Tracker
RR - 3)	September 28, 2010	Review of Independent Assessment
RR - 4)	2009-2010 School Year	National Child Research Center Progress Summary (See PR 2)
RR - 5)	October 22, 2010	Observations
RR - 6)	October 25, 2010	Physical Therapy Observation
RR - 7)	April 24, 2011	Physical Therapy Assessment Report (See PR 5)
RR - 8)	May 5, 2011	IEP Meeting Notes
RR - 9)	June 1, 2011	IEP Meeting Notes
RR - 10)	(Undated)	Meeting Notes
RR - 11)	April 15, 2009	IEP (See PR 2)
RR - 12)	June 1, 2011	IEP
RR - 13)	October 26, 2010	IEP

Petitioner's documents are:

Ex. No.	Date	Document
PR - 1)	January 13, 2009	IEP
PR - 2)	April 15, 2009	IEP (See RR 11)
	2009-2010 School Year	National Child Research Center Progress Summary (See RR 4)
	January 10, 2009	Full Assessment Report for Education: Comprehensive Developmental Evaluation

[2] "RR" and "PR" represent documents provided by the Respondent and Petitioner, respectively, on remand. "R" and "P" refer to exhibits of the Respondent and Petitioner, respectively, in the original hearing and recorded in the HOD of December 24, 2009.

PR - 3)	June 4, 2009	Student Report of Progress (See R 3 & P 45 in HOD of December 24, 2009)
PR - 4)	July 2010	IEP Report Card
PR - 5)	April 24, 2011	Physical Therapy Assessment Report (See RR 7)
PR - 6)	December 12, 2008	Physical Therapy Evaluation Repot (See RR 1)
PR - 7)	June 1, 2011	Review Audiology Eval
PR - 8)	(Undated)	Lab School of Washington [Brochure]
PR - 9)	June 13, 2011	Affidavit of [Petitioner, Student's Mother]

The parties were advised to file a motion for an evidentiary hearing if either believed one was necessary to supplement the record further. Neither party filed a motion for an evidentiary hearing so no evidentiary hearing was held.

The Petitioners believe the Student requires an additional 30 minutes per week of physical therapy services for three months at a particular private school but provided no evidence to support this assertion. The Respondent does not believe the Student requires compensatory education services.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Order of United States District Judge James E. Boasberg, the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

III. FINDINGS OF FACT[3]

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

[3] The entire background of the Student is not repeated here. It is adequately recorded in the HOD of December 24, 2009 and the Court's Memorandum Opinion of May 20, 2011. Thus, only findings of fact material to the narrow issue at hand are made here.

1. The Student had an initial individualized education program (IEP) formulated on January 13, 2009.[4] The Student's then present level of functional performance concerning gross motor skills was:[5]

> [Student] walks safely and independently on level surfaces within his school, moving slowly and with caution. He also runs slowly. He is not able to walk up or down seven-inch stairs using an alternating pattern without support. He wears a protective helmet.
> [Student] needs to be able to: Keep pace with his peers in most school situations[.] Walk up stair using alternating pattern without support[.] Walk down stairs using alternating pattern.
>
> [Student's] functional mobility skills will impact his ability to keep pace with his peers in all school situations, including moving all distances required, evacuating the building as necessary, and playing games that involve physical activity.
>
> [Student] typically trails his peers by five feet or more.
>
> [Student] runs 30 feet in nine seconds.
>
> [Student] is able to walk up seven-inch stairs using an alternating pattern while holding onto rail or when one of his hands is held.
>
> [Student] walks down stairs using a step-to pattern (placing both feet on each step) with or without support from rail.

2. The initial IEP included the following four goals, to be achieved within one year, concerning the Student's gross motor skills for which physical therapy was required:[6]

   1) "[Student] will keep pace with his peers for distances up to 30 feet when traveling on level surfaces."
   2) "[Student] will run 45 feet in six seconds or less without falling, 2 of 3 trials."
   3) "[Student] will walk up five stairs of standard height (7.5-8 inches) using an alternating pattern (placing one foot on each step) without holding onto rail, 4 of 5 trials."
   4) "[Student] will walk down five stairs of standard height using an alternating pattern while holding onto rail, 4 of 5 trials."

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[4] PR 1/P 15.
[5] PR 1/P 15.
[6] PR 1/P 15.

3. The January 13, 2009, IEP required physical therapy services, outside of the general education setting, for 30 minutes per week.[7]
4. The Student received no physical therapy services until April, 2009.[8] Some of the missed services were made up with double the time provided in late April and early May, 2009.[9]
5. By October 2009, over three months before the four PT goals were expected to be met, the first two PT goals were mastered.[10] The two PT goals concerning walking the stairs were still "progressing" and the Student was able to walk up stairs using an alternating pattern but while holding the rail with one hand.[11] The Student was able to walk down stairs in a step-to patterns while holding the rail with one hand.[12]
6. By October 2010, the next period any data appears in the record, the Student was still using the rail when walking up the stairs, although he was using an alternating pattern.[13] By early 2011, he could walk down the stairs with an alternating pattern.[14]
7. The most recent data about the Student, from April 2011, shows the Student can walk the stairs with an alternating pattern without rail support and walks down the stairs with inconsistent alternating pattern with one rail support.[15]

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[7] PR 1/P 15.
[8] Testimony (T) of P1, T of M.S., T of B.V. (As found in HOD of December 24, 2009), P 43/R 2.
[9] P 20, P 28, P 43/R 2.
[10] P 45/R 3.
[11] P 45/R 3.
[12] P 45/R 3.
[13] RR 13.
[14] PR 5.
[15] PR 5.

IV. CONCLUSIONS OF LAW

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

1. When a denial a free appropriate public education (FAPE) has occurred that has resulted in educational harm, compensatory education may be an appropriate remedy. "[T]he inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 524 (D.C. Cir 2005).
2. When an IEP is developed or revised and annual academic and functional goals put in place it is expected, although not guaranteed, the Student will reach those goals within a year. *See,* 34 C.F.R. § 300.320 (An IEP must include: "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[.]"), and 34 C.F.R. § 300.324(b) (An IEP must be reviewed and revised periodically, but not less than annually, to address "[a]ny lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum[.]")
3. The Student met two of the original four physical therapy goals within a year. Another was met within the next year. The Student continues to struggle with a functional goal to walk down stairs in an alternating pattern. However, that struggle is very minimal at this point.

Nevertheless, because he was expected to be able to do that by January 2010, and the failure to reach that goal is attributed by the Court to the failure to provide the physical therapy services that were to help him get there, some compensatory services are in order.

4. A set time of services in a private placement is not warranted to put the Student in the place he would have been but for the failure to provide physical therapy for several weeks and the Petitioners have provided no supporting evidence for their request. Rather, the order below is a reasonable attempt, based on the evidence, to put the Student in the place he would have been but for the failure to provide the physical therapy services in 2009.

V. DECISON & ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the Student will be provided 30 minutes per week of physical therapy services designed to aid the Student in walking down stairs in a consistently alternating pattern. The services will be provided twice per week to help ensure the Student has adequate repetition of instruction and therapy so as to reasonably be expected to master the skill in a relatively short period of time. These compensatory services will be provided, in addition to the physical therapy services already part of the Student's IEP, until this specified skill is mastered as measured by data collected over a period of two weeks in which the Student performs the skill in 4 out of 5 trials consistently during that period. (Since the Student will have at least two sessions per week, this means he will be assessed at least four times to see if he can perform consistently in 4 out of 5 trials per assessment.) The IEP team must meet no later than August 17, 2011, to determine a plan for providing these services. The services must begin no later than the start of the 2011-2012 school year or sooner if the team agrees it is appropriate.

IT IS SO ORDERED.

Date: July 27, 2011

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).