DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

Parent, on behalf of STUDENT,[1]	)	**Case Number: 2012-0505**
Petitioner,	)	
v.	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
Respondent.	)	**Hearing Officer: Frances Raskin**

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HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals With Disabilities Education Act ("IDEA"), as amended in 2004, codified at 20 U.S.C. §§ 1400, *et seq.*; the District of Columbia Code, §§ 38-2561.01, *et seq.*; the federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

II. BACKGROUND

Petitioner is the parent of an [redacted] student ("Student") with a disability. On July 23, 2012, Petitioner filed a due process complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") alleging violations of IDEA. On July 24, 2012, this Hearing Officer was assigned to preside over this case. On July 31, 2012, Respondent filed a timely response to the Complaint.[2]

On August 10, 2012, the parties participated in a resolution meeting but did not resolve the Complaint. The parties did not agree to start the forty-five day, due process hearing period on that date. Thus, the resolution period ended on August 22, 2012.

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

[2] Respondent did not challenge the sufficiency of the Complaint.

On August 27, 2012, this Hearing Officer held a prehearing conference in which Counsel for Petitioner and Counsel for Respondent participated. During the prehearing conference, counsel for Petitioner informed this Hearing Officer that Petitioner elected for the due process hearing to be closed to the public.

This Hearing Officer informed counsel that the end of the forty-five-day timeline, i.e., the deadline for the hearing officer determination ("HOD"), is October 6, 2012. Both counsel agreed to schedule the due process hearing for September 25, 2012. This Hearing Officer issued a prehearing conference summary and order ("prehearing order") on August 29, 2012.

The due process hearing commenced at 9:30 a.m. on September 25, 2012, in room 2003. The due process hearing was closed to the public. At the outset of the hearing, this Hearing Officer entered into evidence Petitioner's proposed exhibits[3] and Respondent's proposed exhibits.[4]

At the due process hearing, Petitioner testified and presented one witness on her behalf, an expert in the provision of specialized instruction to students with disabilities ("Expert). Respondent presented the testimony of three witnesses: the special education coordinator ("SEC") at The DCPS School, the Student's general education teacher ("General Education Teacher"), and the Student's current special education teacher ("Special Education Teacher 3"). After the parties presented oral closing arguments, the due process hearing concluded on September 25, 2012.

III. ISSUES PRESENTED.

This Hearing Officer certified the following issues for adjudication at the due process hearing:

A. Whether Respondent denied the Student a free, appropriate, public education ("FAPE") on December 12, 2011, when it developed an individualized education program ("IEP") that provides twelve hours per week[5] of specialized instruction outside the general education environment and six hours per week of specialized instruction in the general education environment, which Petitioner asserts is insufficient to address the Student's academic deficits; and

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[3] This Hearing Officer admitted into evidence Petitioner's exhibits 1-4, inclusive.
[4] This Hearing Officer admitted into evidence Respondent's exhibits 1-8, inclusive.
[5] During the prehearing conference, Counsel for Petitioner informed this Hearing Officer that the Student's December 12, 2011, IEP mandated that the Student receive ten hours per week of specialized instruction. In certifying this issue for hearing, the prehearing order, reflected Counsel for Petitioner's assertion regarding the hours of specialized instruction on the Student's IEP. Prior to the commencement of the due process hearing, the parties agreed that the Student's December 12, 2011, IEP mandated that the Student receive twelve hours per week of specialized instruction.

B. Whether Respondent denied the Student a FAPE at the end of the 2011-2012 school year when it failed to identify a summer school program for the Student to attend even though his teacher recommended that he receive academic instruction in a summer program to address his academic deficits.

Petitioner requests relief in the form of an order that would require Respondent to revise the Student's IEP to provide 27.5 hours of specialized instruction and related services. Petitioner also requests that this Hearing Officer order Respondent to provide the Student compensatory education in the form of tutoring.[6]

IV. FINDINGS OF FACT

1. Petitioner is the mother of the Student.[7] The Student is an [redacted] young man who is repeating the fourth grade in a public elementary school ("DCPS School").[8] He is eligible for specialized instruction and related services as a student with a specific learning disability.[9]

2. During the 2009-2010 school year, the Student repeated the second grade.[10] During the 2010-2011 school year, when the Student was in third grade, he had poor attention, had difficulty keeping his mind on his school work, was easily distracted, struggled academically, and had difficulty remembering concepts.[11] In the classroom, he often engaged in distracting behaviors, and was restless and impulsive.[12] He had difficulty maintaining necessary attention in class and was easily distracted.[13] He had a short attention span and had difficulty comprehending and completing his schoolwork.[14] He had difficulty adapting to changing situations and making decisions related to problem solving.[15]

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[6] At the outset of the due process hearing, Petitioner withdrew her request that this Hearing Officer order Respondent to place the Student in a full-time, special education, nonpublic day school at public expense.
[7] Testimony of Petitioner.
[8] *Id.*
[9] Petitioner Exhibit 1 (December 12, 2011, IEP).
[10] Testimony of Petitioner.
[11] Petitioner Exhibit 2 at 9 (August 4-5, 2011, Confidential Psychological Evaluation report).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

3. The Student's cognitive functioning, as measured by his full-scale IQ of 70, is in the borderline range.[16] His nonverbal IQ is 106, which is in the average range and exceeds sixty-eight percent of typically developing students his age.[17]

4. In August 2011, the Student's verbal comprehension was in the borderline range and exceeded only five percent of typically developing students his age.[18] As a result, in the classroom, he likely has difficulty with verbal tasks that are not accompanied by visual cues.[19] He also is likely to have difficulty using words and understanding their meanings.[20]

5. In August 2011, the Student's perceptual reasoning was in the low average range and exceeded only twelve percent of his same-age, typically developing peers.[21] In the classroom, he likely has difficulty working with visual information, such as graphs, charts, and worksheets, without accompanying verbal information and simple instruction.[22]

6. In August 2011, the Student's working memory was in the borderline range and exceeded only five percent of his same-age peers.[23] This weakness may impede his processing of complex information and slow new learning.[24] In the classroom, he likely has difficulty remembering information long enough to process it for comprehension and solving mathematical problems without pencil and paper.[25]

7. In August 2011, the Student's processing speed also was in the borderline range and exceeded only two percent of his same-age peers.[26] In the classroom, he likely has difficulty processing routine information, which may make the task of comprehending novel information more time-consuming and difficult.[27]

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[16] Petitioner Exhibit 2 at 10.
[17] *Id.* at 7.
[18] *Id.* at 5. Verbal comprehension is a measure of crystallized intelligence. *Id.* It represents the Student's ability to reason with previously learned information. *Id.*
[19] *Id.*
[20] *Id.* at 5-6.
[21] *Id.* at 5. Perceptual reasoning is a measure of the Student's ability to analyze and synthesize abstract visual stimuli. *Id.* at 6.
[22] *Id.* at 6.
[23] *Id.* at 5. Working memory represents the Student's ability to hold information in his immediate awareness and use it within a few seconds. *Id.* at 6.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 5. Processing speed is a measure of the Student's ability to scan, sequence, or discriminate visual information automatically when he is under pressure to maintain focus. *Id.* at 6.
[27] *Id.* at 7.

8. In September 2011, Respondent convened a meeting of the Student's IEP team.[28] Petitioner attended the meeting, as did the SEC, the Student's former special education teacher (Special Education Teacher 2), and the General Education Teacher.[29] The IEP team found that the Student was eligible for specialized instruction and related services as a student with a specific learning disability.[30]

9. At the September 2011, IEP meeting, the IEP team developed an IEP for the Student that included annual goals in mathematics, reading, and written expression.[31] The IEP provided that the Student was to receive ten hours per week of specialized instruction outside the general education setting because he required one-on-one support to strengthen the skills addressed in the general education setting.[32] The IEP also provided that the Student was to receive six hours per week of specialized instruction in the general education setting.[33]

10. In October 2011, when he was in the second month of fourth grade, the Student performed in broad reading at the equivalent of a typically developing student who was in the second month of second grade.[34] In broad math, the Student performed at the equivalent of a typically developing student in the fourth month of second grade.[35] In broad written language, the Student performed at the equivalent of a typically developing student who was in the second month of second grade.[36]

11. In October 2011, the Student's overall academic skills were equivalent to a typically developing student in the second month of second grade.[37] His academic fluency was equivalent to a typically developing student in the second month of second grade.[38] His total achievement was equivalent to a typically developing student in the third month of second grade.[39] Thus, by October 2011, the Student was performing four years below his same-age peers in all academic areas.[40]

12. By October 28, 2012, which was the end of the first quarter of the 2011-2012 school year, the Student had made progress on all four of the annual mathematics goals on

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[28] Respondent Exhibit 2 at 12 (September 6, 2011, IEP).
[29] *Id.*
[30] Respondent Exhibit 2 at 12 (September 6, 2011, IEP).
[31] *Id.* at 14-16.
[32] *Id.* at 17-18.
[33] *Id.* at 17.
[34] Petitioner Exhibit 3 at 3 (October 21, 2011, Educational Achievement Report).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] Testimony of Expert.

his September 6, 2011, IEP.[41] The Student had made progress in all five of the annual reading goals on his September 6, 2011, IEP.[42] He also had made progress in all three of the annual goals in written expression on his September 6, 2011, IEP.[43]

13. On December 12, 2011, Respondent convened a meeting of the Student's IEP team.[44] The IEP team reviewed the Student's assessment reports and IEP progress report.[45] Petitioner and her educational advocate attended the meeting.[46]

14. On December 12, 2011, the Student's IEP team developed an IEP for him.[47] The IEP team developed annual goals in mathematics, reading, and written expression.[48] The team decided that the Student would receive twelve hours per week of specialized instruction outside the general education setting because he required one-on-one support to build upon the skills addressed in the general education setting.[49] They also decided that he should receive six hours per week of specialized instruction in the general education setting.[50]

15. By April 2012, which was the end of the third quarter of the 2011-2012 school year, the Student had made progress on five of the six annual mathematics goals on his December 12, 2011, IEP.[51] He had mastered the sixth goal.[52]

16. By April 2012, the Student had made progress in all six of the annual reading goals on his December 12, 2011, IEP.[53] He also had made progress in all three of the annual goals in written expression on his December 12, 2011, IEP.[54]

17. Special Education Teacher 1 missed all of the fourth quarter of the 2011-2012 school year due to illness.[55] From April 2012 until the end of the 2011-2012 school year, another special education teacher ("Special Education Teacher 2") taught the Student's special education class.[56]

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[41] Respondent Exhibit 3 at 22-23 (November 9, 2011, IEP Progress Report).
[42] *Id.* at 23-24.
[43] *Id.* at 24-25.
[44] Testimony of Petitioner.
[45] *Id.*
[46] Petitioner Exhibit 1 at 1.
[47] *Id.*
[48] *Id.* at 2-5.
[49] *Id.* at 6-7.
[50] *Id.* at 6.
[51] Respondent Exhibit 5 at 32 (April 13, 2012, IEP Progress Report).
[52] *Id.*
[53] *Id.* at 33-34.
[54] *Id.*
[55] Testimony of Petitioner, SEC.
[56] *Id.*

18. During the 2011-2012 school year, the Student's behavior hindered his progress in the general education setting.[57] He would bother other students, respond negatively to redirection, and talk back to his teachers.[58] He would not heed classroom rules, would not perform class assignments, and would be playful during class.[59] He also did not turn in his homework.[60] If he did not understand the material, he would shut down and refuse to work.[61]

19. In May 2012, Respondent convened an informal meeting.[62] Petitioner, the Advocate, the SEC, the General Education Teacher, and Special Education Teacher 2 attended the meeting.[63] The meeting participants discussed the Student's eligibility for extended school year ("ESY") or whether he should attend summer school during the 2012 summer.[64]

20. ESY is provided to special education students to prevent academic regression.[65] ESY programs are generally four hours per day for four weeks during the summer months.[66]

21. At the May 2012 meeting, the participants discussed the criteria for ESY eligibility.[67] In order to qualify for ESY, a student must exhibit academic regression following a break in the school year and an inability to recoup the skills after returning to school.[68] The General Education Teacher reported that the Student was able to retain information, recoup any skills he had lost during breaks in the school year, and move forward.[69] All of the participants in the meeting, including the Advocate, agreed that the Student did not qualify for ESY.[70]

22. At the May 2012 meeting, Petitioner requested that the Student repeat the fourth grade the following school year.[71] She also requested that the Student be allowed to attend summer school.[72] The General Education Teacher agreed that the Student should

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[57] Testimony of General Education Teacher.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Testimony of Petitioner.
[62] Testimony of SEC.
[63] *Id.*
[64] *Id.*
[65] Testimony of Expert.
[66] *Id.*
[67] Testimony of SEC.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] Testimony of General Education Teacher.
[72] *Id.*

attend summer school during the 2012 summer to reinforce the skills he had learned during the 2011-2012 school year.[73]

23. The meeting participants then discussed the summer school application process.[74] The General Education Teacher informed Petitioner that he already had given the Student an application for summer school to take home to Petitioner.[75] The SEC then provided Petitioner another copy of the summer school application.[76] The SEC also informed Petitioner that she could obtain additional copies of the summer school application in the front office of the DCPS School and online.[77]

24. During the May 2012 meeting, the General Education Teacher suggested that the Student would benefit from tutoring outside school.[78] He said tutoring would reinforce the Student's skills.[79] He said that summer school and a tutor would provide the Student the academic support he required in light of the fact that he would be repeating the fourth grade the following school year.[80]

25. At the end of the 2011-2012 school year, the Student received a report card that that showed he was functioning below grade level in some subjects and developing the required skills required in other subjects.[81] The report card included recommendations from his teachers that the Student should receive academic intervention during the 2012 summer.[82]

26. During the 2012 summer, Petitioner obtained a tutor for the Student.[83] The Student continues to receive ninety minutes of tutoring once or twice a week.[84] The Student had retained the information he has learned while working with his tutor.[85] The tutoring has helped the Student a lot.[86]

27. Petitioner never submitted an application for the Student to attend summer school during the 2012 summer.[87] She also did not register him for summer school.[88]

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[73] *Id.*
[74] Testimony of SEC.
[75] *Id.*; testimony of General Education Teacher.
[76] Testimony of SEC, General Education Teacher.
[77] Testimony of SEC.
[78] Testimony of SEC.
[79] Testimony of General Education Teacher.
[80] *Id.*
[81] Testimony of Petitioner, Expert.
[82] Testimony of Expert.
[83] Testimony of Petitioner.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] Testimony of SEC.

28. During the 2012-2013 year, the Student is repeating the fourth grade at The DCPS School.[89] He is making progress in reading and performing at a higher level than the previous year.[90] He also is making progress in math.[91] He is more focused and working a lot harder than he had the previous year.[92] He dedicates at least fifty percent more effort to his schoolwork this year.[93]

29. In September 2012, the Student's general education classroom had twenty-six students and one general education teacher.[94] His special education classroom had six students and one special education teacher.[95] Thus, the Student would receive more support in his special education classroom than in the general education classroom.[96]

30. In order to make progress, the Student requires three hours per week of specialized instruction in mathematics, three hours per week of specialized instruction in reading, and three hours per week of specialized instruction in written expression.[97] The Student also requires an additional three hours per week of specialized instruction in reading, as this is the area in which he struggles the most.[98]

31. Petitioner's testimony was only partially credible. On cross-examination, she became hostile and refused to answer questions.[99] This Hearing Officer did not find credible her claims that she was not instructed to enroll the Student in summer school and did not receive a summer school application. This testimony was contrary to that of the SEC and the General Education Teacher. This Hearing Officer also does not find credible Petitioner's testimony that she, did not request that the Student be retained in fourth grade in part because Petitioner also testified that she felt that he should have been retained because he was not prepared to advance to fifth grade. However, this Hearing Officer credits Petitioner's testimony about the Student's academic deficits, as this testimony was corroborated by the testimony of the other witnesses, the Student's August 2011 psychological assessment, and his October 2011 educational assessment. This Hearing

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[88] Testimony of Petitioner.
[89] Testimony of Expert, Petitioner. Had he not repeated the second and fourth grades, he would be in the sixth grade.
[90] Testimony of Petitioner, General Education Teacher.
[91] Testimony of General Education Teacher.
[92] *Id.*
[93] *Id.*
[94] Testimony of Expert.
[95] *Id.*
[96] *Id.*
[97] Testimony of Expert.
[98] *Id.*
[99] This Hearing Officer recessed the hearing so that Petitioner had a chance to calm down. This Hearing Officer requested that counsel for Petitioner explain to Petitioner the nature of cross examination and that she was required to answer counsel for Respondent's questions.

Officer also finds credible Petitioner's testimony that the Student is making significant progress academically during the 2012-2012 school year because this testimony is consistent with the testimony of the General Education Teacher and the Expert.

32. The Expert generally provided credible testimony, although many of her opinions were unsupported by the evidence. She is familiar with the Student's disability, cognitive deficits, and academic difficulties. She observed the Student on two different days in September 2012, interviewed the General Education Teacher and Special Education Teacher 3, as well as the principal of the DCPS School. She reviewed his IEP, report card, the August 2011 psychological assessment and the October 2011 educational assessment. Although this Hearing Officer finds credible the Expert's testimony that the Student should not have been retained, Petitioner requested that he repeat the fourth grade and did not raise this as an issue in the Complaint. This Hearing Officer also finds credible the Expert's testimony that the Student should receive six hours per week of specialized instruction in reading, three hours per week of specialized instruction in mathematics, and three hours per week of specialized instruction in written expression, as this testimony was supported by the Student's August 2011 psychological evaluation.

33. This Hearing Officer does not credit the Expert's testimony that the Student did not make academic progress during the 2011-2012 school year because he spent too much time in the general education setting. Instead, this Hearing Officer credits the testimony of the General Education Teacher, who has had more interactions with the Student and observed the factors that inhibited his progress, namely his immature and playful behavior during the 2011-2012, school year. This Hearing Officer does not credit the Expert's opinion that the Student should have received ESY during the 2012 summer as Petitioner failed to show that the Student experienced regression during breaks in the school year and failed to recoup those skills when school resumed. This Hearing Officer also does not credit the Expert's testimony that the Student's lack of progress during the 2011-2012 school year was due to the failure of the IEP team to provide him fifteen hours of specialized instruction on his IEP. The Expert's knowledge of the size of the Student's classrooms and the manner in which he receives specialized instruction is based upon her observations during the 2012-2013 school year, not the 2011-2012 school year, which is the school year at issue in this case. Finally, as explained herein, this Hearing Officer does not credit the Expert's testimony that the IEP provided the Student insufficient specialized instruction because he required fifteen hours of specialized instruction.

34. This Hearing Officer finds the testimony of the SEC credible. Her testimony about the May 2012 meeting was corroborated in part by Petitioner. The General Education Teacher also corroborated her testimony.

35. This Hearing Officer finds the testimony of the General Education Teacher credible. He has known the Student since he was in first grade and has worked with him during school hours and during after care. He was the only witness who had firsthand knowledge of the Student's performance, and academic difficulties, during the 2011-2012 school year. Additionally, the SEC corroborated the General Education Teacher's testimony about the provision of the summer school application to Petitioner during the May 2012

meeting. Petitioner also corroborated the General Education Teacher's testimony that the Student has made significantly more progress during the 2012-2013 school year than during the previous school year.

36. This Hearing Officer finds credible the testimony of the Special Education Teacher. However, as her testimony and knowledge was confined to the Student's performance in her special education class during the 2012-2013 school year, this Hearing Officer finds that it was not relevant to the issues in this case.

V. CONCLUSIONS OF LAW

The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."[100] Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.[101]

FAPE is defined as:

> Special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the State Education Agency . . . include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program.[102]

A school district need not maximize the potential of children with disabilities, but the door of public education must be opened in a meaningful way, and the IEP must provide the opportunity for more than only "trivial advancement."[103]

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational

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[100] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. § 1400(d)(1)(A)).
[101] *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).
[102] 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.
[103] *P. v. Newington Bd. of Educ.*, 546 F.3d. 111 (2nd Cir. 2008) (citations omitted).

benefits.[104] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[105]

The burden of proof is properly placed upon the party seeking relief.[106] Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[107] The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence.[108] In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.[109] Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,[110] except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.[111]

VI. DISCUSSION

A. Petitioner Failed to Prove that Respondent Denied the Student a FAPE on December 12, 2011, by Developing an IEP that Provided that the Student Would Receive Twelve Hours Per Week of Specialized Instruction in a Special Education Classroom and Six Hours Per Week of Specialized Instruction in the General Education Classroom.

School districts must ensure that "all children with disabilities residing in the State . . . who are in need of special education and related services" are identified.[112] Once such children are identified, a team, including the child's parents and select teachers, as well as a representative of the local educational agency with knowledge about the school's resources and curriculum, develops an individualized education program for the child.[113] The IEP

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[104] 34 C.F.R. § 300.513 (a)(2).
[105] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).
[106] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[107] 20 U.S.C. § 1415 (i)(2)(c). *See also Reid*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).
[108] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).
[109] *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff'd*, 512 U.S. 246 (1994).
[110] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).
[111] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).
[112] *Branham v. District of Columbia, 368 U.S. App. D.C. 151, 427 F.3d 7, 8 (D.C. Cir. 2005)* (citing *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005)).
[113] *Branham, 427 F.3d at 8.*

must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.[114]

In other words, an appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs,[115] establishes annual goals related to those needs,[116] and provides appropriate specialized instruction and related services.[117]

The IEP team must review a student's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved.[118] The IEP team must revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals and, if appropriate; the results of any re-evaluation, or information about the child provided to, or by, the parents.[119]

In developing an IEP, the IEP team must consider the strengths of the child; concerns of the parents for enhancing the education of the child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child.[120] An IEP must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.[121]

An IEP must include a statement of measurable annual goals.[122] For children with disabilities who take alternate assessments aligned to alternate academic achievement standards, the IEP must contain a description of benchmarks or short-term objectives.[123] If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or district-wide assessment of student achievement, the IEP must include a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child.[124]

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[114] *Id.* (citing *Rowley*, 458 U.S. at 203).
[115] 34 C.F.R. § 300.320 (a) (1).
[116] *Id.* at (a) (2).
[117] *Id.* at (a) (4).
[118] 34 C.F.R. § 300.324 (b)(1).
[119] *Id.*
[120] 34 C.F.R. § 300.324 (a).
[121] 34 C.F.R. § 300.320 (a)(1); D.C. Mun. Reg. tit. 5-E § 3009.1 (a); *A.I. ex rel. lapalucci v. District of Columbia*, 402 F. Supp. 2d 152, 159 (2005) (finding that an IEP must include measurable goals and benchmarks to measure the child's progress toward the annual goals).
[122] 34 C.F.R. § 300.320 (a) (2) (i); D.C. Mun. Reg. tit. 5-E § 3007.2 (b) (annual goals must include short-term instructional objectives).
[123] 34 C.F.R. § 300.320 (2)(ii).
[124] 34 C.F.R. § 300.320 (a) (6).

The adequacy of the student's IEP is determined by whether the student has "access to specialized instruction and related services which are individually designed to provide educational benefit."[125] For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression."[126] IDEA does not require that the services provided maximize each child's potential.[127]

An IEP is a snapshot in time and should not be viewed in retrospective.[128] In striving for appropriateness, an IEP must take into account what was, and was not, objectively reasonable at the time the IEP was promulgated.[129]

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.[130] The court should not "disturb an IEP simply because [it] disagree[s] with its content."[131] The court is obliged to "defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides."[132]

On December 12, 2011, the Student's IEP team, which included Petitioner and her Advocate, developed an IEP for the Student. The IEP team reviewed the Student's present levels of performance, as determined by his August 2011 psychological assessment and October 2011 education assessment. Based on these present levels of performance, and his academic needs, the IEP team developed annual goals in the areas of reading, mathematics, and written expression. The IEP team also determined that the Student required specialized instruction for most of his school day, including twelve hours per week of pullout services in a special education classroom and six hours of inclusion support in his general education classroom.

At the time the IEP was developed, the Student was making progress on all of the annual goals in his September 6, 2011, IEP.

Petitioner presented no evidence to show that she or the Advocate disagreed with the content of the IEP at the time it was developed. Petitioner also presented no testimony to show that the goals in the December 12, 2011, IEP were not likely to produce academic progress.

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[125] *Rowley,* 458 U.S. at 201 (1982).
[126] *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).
[127] *Id.* at 198.
[128] *Mandy S. v. Fulton County Sch. Dist.*, 205 F. Supp. 2d 1358, 1367 (N.D. Ga. 2000) (citations omitted).
[129] *Id.*
[130] *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).
[131] *Id.*
[132] *Id.*

Rather, by the end of the 2011-2012 school year, the Student had mastered one of the annual mathematics goals on his December 12, 2011, IEP, and made progress on all the remaining IEP goals. During the first two months of the 2012-2013 school year, he has made exceptional progress in reading, which is his greatest area of difficulty. Thus, his December 12, 2011, IEP produced progress, not regression.

Although the Expert testified that the Student should receive three hours of specialized instruction in mathematics, three hours of specialized instruction in written expression, and twelve hours of specialized instruction in reading, Petitioner failed to show that the Student did not receive this level of support pursuant to the December 12, 2011, IEP. In fact, the Student's December 12, 2011, IEP provides that the Student would receive a total of eighteen hours of specialized instruction, which is three hours more than the Expert recommends.

As Petitioner admitted, the Student's behavior, not the content of his IEP, hindered his academic progress during the 2011-2012 school year. He would bother other students, respond negatively to redirection, and talk back to his teachers. He would not heed classroom rules, would not perform class assignments, and would be playful during class. He also did not turn in his homework. If he did not understand the material, he would shut down and refuse to work. For this reason, Petitioner requested that he repeat the fourth grade.

For these reasons, this Hearing Officer finds that the Student's December 12, 2011, IEP was reasonably calculated to provide the Student educational benefits. Moreover, this Hearing Officer finds that this IEP provided the Student the basic floor of opportunity required by the IDEA.

Finally, the Student has made significant academic progress during the 2012-2013 school year, even though Respondent has not revised his IEP. The Student's progress is in part due to the tutoring Petitioner obtained for him, in part because he is repeating the fourth grade and is familiar with the material, and in part because he is more serious about his schoolwork.

Thus, Petitioner failed to prove that Respondent denied the Student a FAPE by developing an IEP that provides insufficient specialized instruction.

B. Petitioner Failed to Prove that Respondent Denied the Student a FAPE Failing to Provide the Student ESY for the 2012 Summer.

ESY services are organized, educational programs designed for disabled children that occur outside the regular school year, e.g., summer programs.[133] Each public agency must ensure that extended school year services are available as necessary to provide

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[133] *M.M. v. School District of Greenville County*, 303 F.3d 523, 528 n. 9 (4th Cir. 2002).

FAPE.[134] Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child.[135] A public agency may not limit extended school year services to particular categories of disability; or unilaterally limit the type, amount, or duration of those services.[136]

IDEA, the District of Columbia Code, and the District of Columbia Municipal Regulations do not include specific criteria for determining whether a child qualifies for ESY services,[137] other than the requirement that ESY be provided if it is necessary to provide FAPE to a child.[138] Many states design ESY services to address a child's problems with regression and recoupment.[139] These states focus on a child's "likelihood of regression or retention" and difficulties recouping previously learned concepts in making ESY eligibility determinations.[140]

Thus, in many states, ESY Services are only necessary when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.[141] Other states determine that that ESY Services are warranted only when they prevent significant regression of skills or knowledge that would seriously affect a disabled child's progress toward self-sufficiency.[142]

Additionally, states may use recoupment and retention as their sole criteria, but they are not limited to these standards and have considerable flexibility in determining eligibility for ESY services.[143] While children with disabilities need not actually experience regression in their skills before an IEP team may find them eligible for ESY, the IEP team

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[134] 34 C.F.R. § 300.106 (a).
[135] 34 C.F.R. § 300.106 (a)(2). *See also* D.C. Mun. Reg. tit. 5-E § 3017.1.
[136] 34 C.F.R. § 300.106 (a)(3); D.C. Mun. Reg. tit. 5-E § 3017.3.
[137] *See*, e.g., *Letter to Myers*, 213 IDELR 255 (OSEP 1989) (stating that IDEA regulations neither establishes standards for ESY programs nor specifies the circumstances in which ESY is needed).
[138] Comments to IDEA regulations, 71 Fed. Reg. 46582 (2006).
[139] *Letter to Myers*, 213 IDELR 255; Comments to IDEA regulations, 71 Fed. Reg. 46582 stating that these concepts are derived from well-established judicial precedents). *See*, e.g., *Johnson* v. *Bixby Independent School District 4*, 921 F.2d 1022 (10th Cir. 1990); *Crawford* v. *Pittman*, 708 F.2d 1028 (5th Cir. 1983); *GARC* v. *McDaniel*, 716 F.2d 1565 (11th Cir. 1983).
[140] *Letter to Myers*, 213 IDELR 255.
[141] *M.M. v. School District of Greenville County*, 303 F.3d. 523, 537-38. See also *Alamo Heights Indep. Sch. Dist. v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Johnson v. Independent School District No. 4,* 921 F.2d 1022, 1028 (10th Cir. 1990).
[142] *Cordrey v. Euckert*, 917 F.2d 1460, 1474 (6th Cir. 1990).
[143] 71 Fed. Reg. 46582; Letter to Myers,

must have a reasonable basis for concluding that regression would occur without the provision of summer programs or services.[144]

Nonetheless, the determination whether services beyond the regular school day are essential for the child to receive educational benefit is necessarily fact and case specific.[145] Because a showing of actual regression is not required, a disabled child's need for ESY Services may be established by expert testimony, based on a professional individual evaluation.[146] However, the mere fact of likely regression is not a sufficient basis, because all students, disabled or not, may regress to some extent during lengthy breaks from school.[147] ESY Services are required under the IDEA only when such regression will substantially thwart the goal of "meaningful progress."[148]

Here, Petitioner presented no evidence that the Student would not retain all that he had learned in the 2011-2012 school year or otherwise prove that the Student required ESY during the 2012 summer. Petitioner provided no evidence, either documentary or testimonial, to show that the Student's regression over the summer would substantially thwart his academic progress or that it would affect his progress toward self-sufficiency. Nor did Petitioner provide any proof that the Student would experience regression over the summer or have difficulties recouping previously learned concepts.

Rather, Petitioner failed to heed the recommendation of the General Education Teacher that she enroll the Student in summer school during the 2012 summer to ensure he receives academic instruction to support the skills he developed during the 2011-2012 school year. Even though Respondent provided Petitioner a copy of the summer school application at the May 2012 meeting, Petitioner failed to submit the application or enroll the Student in summer school.

Finally, Petitioner admitted that the Student has made significant academic progress during the first two months of the 2012-2013 school year. In fact, in this short time, he has surpassed his level of performance in reading at the end of the 2011-2012 school year. This alone shows that the Student did not suffer regression during the 2012 summer that he was unable to recoup upon returning to school this fall.

Thus, Petitioner failed to prove that Respondent denied the Student a FAPE by failing to provide ESY.

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[144] *See Letter to Anonymous*, 22 IDELR 908 (OSEP 1995).
[145] *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990).
[146] *M.M.*, 303 F.3d at 538.
[147] *Id.*
[148] *Id.* (citing *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3rd Cir. 1988)).

ORDER

Based upon the findings of fact and conclusions of law herein, it is, this fifth day of October 2012, hereby ordered that the Complaint is dismissed with prejudice.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is a final determination on the merits. Any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action, with respect to the issues presented at the due process hearing, in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).

Distributed to:

Counsel for Petitioner
Counsel for Respondent
Student Hearing Office