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

[STUDENT],[1]
through the Parent/Guardian,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 5/10/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 5/4/11 Room: 2004

2011 MAY 10 PM 4:46
OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

The student is a -year-old female who is currently attending the grade at School. The student has been found eligible for special education and related services with the disability classification of multiple disabilities. On March 29, 2011 counsel for petitioner filed a due process complaint alleging the following issues: 1. Failure to properly implement the student's IEP of June 21, 2010 calling for five hours of specialized instruction per week in the general education setting; 2. Failure to develop an appropriate IEP because it did not provide for sufficient hours of specialized instruction outside of general education to meet the student's needs: 3. Failure to provide an appropriate placement for the student. On April 6, 2011 counsel for respondent DCPS filed a Response denying the allegations. On April 8, 2011 the parties concluded a Resolution Meeting and failed to reach an agreement. The forty-five day

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

time line began to run on April 9, 2011 and the HOD is due May 23, 2011. On April 13, 2011 a pre-hearing conference was held by telephone with counsel for petitioner Miguel Hull and counsel for respondent Daniel McCall. A pre-hearing Order was issued on April 14, 2011. The Order stated that the issues to be addressed at the hearing are 1. Did DCPS deny a FAPE by failing to implement the student's IEP of June 21, 2011 when it called for five hours of specialized instruction in the general education classroom? 2. Did DCPS deny a FAPE in not developing an appropriate IEP on March 10, 2011 because it does not provide for more than 15 hours per week of specialized instruction outside of general education? Did DCPS deny a FAPE in not providing an appropriate placement at School? Counsel for petitioner is requesting for relief placement of the student in a non-public special education program and compensatory education.

The due process hearing convened at 9:30 a.m. on May 4, 2011 in Room 2004 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Miguel Hull represented the petitioner and Daniel McCall represented the respondent DCPS at the hearing. The hearing was closed. At the outset of the hearing, both the petitioner's documents P-1-P-20 and respondent's documents DCPS-1-DCPS-6 were admitted into evidence without objection. All witnesses were sworn under oath prior to testifying. Two Spanish interpreters provided through the Student Hearing Office were also sworn to interpret accurately and fairly. Counsel for petitioner called as witnesses the father who testified in person through two Spanish interpreters, the educational advocate, Maria Ortega, who testified in person and from School who testified by telephone. Counsel for respondent called as witnesses: the student's general education teacher and special education teacher and the special education coordinator at School who all testified in person. At the

beginning of DCPS's calling of its witnesses, there was a problem with the recording devise in room 2004 and the hearing was moved to room 2006 for the completion of the hearing.

JURISDICTION

The hearing was convened on 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

BACKGROUND

The student is a -year-old female who is currently attending the grade at School. The student has been found eligible for special education and related services with the disability classification of multiple disabilities. The student's June 21, 2010 IEP called for fifteen hours per week of specialized instruction outside of general education and five hours per week of specialized education in the general education setting. Counsel for petitioner filed this due process complaint alleging that DCPS denied a FAPE to the student by not implementing the June 21, 2010 IEP in not providing the five hours per week of specialized instruction in the general education setting. The MDT agreed at the March 10, 2011 meeting that they did not so implement the June 21, 2010 IEP, but it did not result in a denial of a FAPE. Counsel for petitioner also alleges in his due process complaint that the March 10, 2011 IEP is inappropriate in not providing more hours of specialized instruction outside of general education and that the placement at School is inappropriate. Counsel for respondent DCPS counters that both the March 10, 2011 IEP and placement are appropriate.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Did DCPS deny a FAPE by failing to implement the student's June 21, 2010 IEP calling for five hours of specialized instruction per week in the general education setting?
2. Did DCPS deny a FAPE in not developing an appropriate IEP on March 10, 2011 because it does not provide for more than 15 hours per week of specialized instruction outside of general education?
3. Did DCPS deny a FAPE in not providing an appropriate placement at

   School?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue one- the failure to implement the June 21, 2010 IEP in not providing five hours of specialized instruction a week in the general education classroom are as follows:

I.

1. The June 21, 2010 IEP calls for fifteen hours a week of specialized instruction per week outside of general education and five hours a week of specialized instruction in reading in general education. (DCPS-1 at p.8)
2. At the March 29, 2011 MDT meeting, the MDT agreed that the student had not been provided the five hours of specialized instruction in reading in the general education setting. (Testimony of general education teacher, special education teacher, special education coordinator and educational advocate, P-5 at p. 4)
3. The student received some specialized instruction in the general education setting when the special education teacher brought the student back from a pull-out to the general education classroom and would stay on occasion once or twice a week for 10-20 minutes for one on one with the student. Some weeks the special education teacher would not come at all. (Testimony of special education teacher, general education teacher)
4. The special education coordinator contacted the main office of DCPS about awarding compensatory education for the above missed five hours a week of specialized education instruction in the general education setting. (Testimony of special education coordinator) On April 8, 2011 DCPS sent a letter to the parent authorizing ten hours of independent tutoring services for the student as compensatory education. (DCPS-6) The student's teachers and special education coordinator were not contacted by DCPS in determining the ten hours of tutoring and the person who determined the ten hours did not visit the school. (Testimony of special education coordinator)

5. The student was administered the Brigance Assessment Test in the beginning of the 2010-2011 School Year and scored below grade level 1 on the Math Test, upper second grade level in oral reading and reading comprehension and third grade level in written expression. The test was administered again in January 2011 for the mid-year assessment and she scored on a first grade level in math, third grade level in oral reading and reading comprehension and third grade level in written expression. (DCPS-2 at p.3,4 & 5, P-4 at p.3,4 & 5)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue two- failure to develop an appropriate IEP- are as follows:

II.

1. On March 10, 2011 an MDT meeting convened to develop the student's current IEP. The parents, their educational advocate, the student's general education teacher, her special education teacher, the special education coordinator, the speech and language therapist, the occupational therapist and social worker participated in the meeting. (DCPS-2 at p.1) A Spanish interpreter participated by telephone. (Testimony of father) The educational advocate who speaks fluent Spanish explained the IEP document to the parents and spoke on behalf of the parents. (Testimony of father, educational advocate)
2. The March 10, 2011 IEP developed called for fifteen hours a week of specialized instruction outside of general education, four hours per month of OT services, two hours per month of physical therapy, 4 hours per month of speech-language pathology, and two hours per month of behavioral support services. (DCPS-2 at p.11)

The March 10, 2011 IEP did not include five hours of specialized instruction in general education as was included in the previous June 21, 2010 IEP. (DCPS-1 at p.8)

3. Based on classroom assessments, tests, classroom observations and the DC BAS, the general education teacher found the student was making progress and showing growth and receiving passing grades on her report card at the present time. (Testimony of general education teacher)

4. The student's special education teacher works on reading, written language and math with the student in the fifteen hours of pull-out services. The student's IEP Progress Reports prepared by the special education teacher and related service providers show for this school year the student is progressing on all her IEP annual goals. The last progress report for the period January 22, 2011 to March 25, 2011 states on mathematics: "When asked to respond to a math question, her response is I don't know but she ends up responding correctly. She is demonstrating an understanding of learning her multiplication facts, multiplying 2-3 digit by one digit, and multiplying 2 digit by 2 digit. Through her understanding she is exhibiting the same understanding by completing homework assignments. We are currently working with finding the area and perimeter of shapes, and [student] is demonstrating an understanding of the concept." (DCPS-4 at 45) For that period on reading, the IEP progress report states: "She enjoys reading in class and likes to be the first person to read out loud. After reading a passage, [student] can use evidence from text to describe the character's traits." (DCPS-4 at 46) On written expression the IEP progress report states for the above period: "[Student] enjoys writing about activities with her family. Most of the time she capitalized the beginning of sentences and in some instances, the subject and

verb are not in agreement, but [student] is able to write information on a given topic using details." (DCPS-4 at 46) The student is able to answer questions on reading material. The special education teacher found the student has made great progress this school year and agrees with the MDT recommendation in the March 10, 2011 IEP for fifteen hours per week of specialized instruction outside of general education. She disagrees with the parents request for more services because the student's needs are being met with the fifteen hours of specialized instruction. (Testimony of special education teacher) The educational advocate in her observation of the special education pull-out had no questions on the way the special education teacher was teaching and agreed she was doing it according to the IEP and the student's needs. She also observed the general education teacher assisting the student one on one in the reading class. (Testimony of educational advocate)

5. The parent has not visited the student's class or talked to her teachers. (Testimony of father) The general education teacher invited the parents for a parent/teacher conference and sent home a letter in Spanish. The student returned the letter saying the parents would come to a parent/teacher conference at a specific time, but the parents did not come in for the scheduled parent/teacher conference. (Testimony of general education teacher)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue three that School is an inappropriate placement are as follows:

III.

1. The student has been attending this school year School. She is in the grade. (Testimony of general education teacher, special education teacher)
2. The student's current IEP of March 10, 2011 is being implemented at School. The student is receiving the fifteen hours per week of specialized instruction outside of general education and all her related services as required in her current IEP. (Testimony of special education teacher)
3. The student is making progress and showing growth toward meeting her IEP annual goals in mathematics, reading and written expression. (IEP Progress Reports-DCPS-4, testimony of special education teacher)
4. The student is making progress in the regular education class for reading and social studies as shown by her passing grades on her report card and progress noted by her general education teacher through daily classroom observations, classroom tests and informal assessments. (Testimony of general education teacher)

CREDIBILITY FINDING

A hearing officer is responsible for assessing the credibility of witnesses. *See Shore Regional High School Bd. of Educ. v. P.S.*, 381 F.3d 194 (3rd Cir. 2004) This hearing officer finds the testimony in person of the student's general education teacher and special education teacher very credible. This hearing officer observed their demeanor and found their answers to questions to be straightforward, thoughtful and precise. They both showed in depth knowledge of the student and her needs. This hearing officer finds that their daily teaching with the student gives great weight to their testimony on how the student is progressing in school.

DISCUSSION/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 on issue one- failure to fully implement the June 21, 2010 IEP:

The legal standard that applies to whether an implementation failure amounts to a denial of a FAPE, as recently stated in *Wilson v. D.C.* (Civil Action 09-02424 March 18, 2011) by Judge Henry Kennedy, is whether the aspects of the IEP not followed were "substantial or significant" or whether the deviations from the IEP's stated requirements were "material". Judge Kennedy relied on the above quoted language in the Fifth Circuit decision of *Houston Independent School District v. Bobby R.*, 200 F. 3d 341 at 349 (5th Cir. 2007). The Ninth Circuit Court of Appeals in *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5 J*, 502 F. 3d 811 at 822 ((9th Cir. 2007) stated: "[A] material failure to implement an IEP violates IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."; *accord S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008), *Catalan v. D.C.,* 478 F. Supp. 2d 73 (D.D.C. 2007). The student's educational progress, or lack of it, may be probative of whether there has been a significant shortfall. In *Catalan*, the district court found that missing a few speech and language sessions was not enough to constitute a substantial deviation from the IEP and a denial of a FAPE. In *Wilson*, the same federal judge who decided *Catalan*, held that the District's delay in arranging transportation services caused a nine-year-old boy to miss three weeks of his four week ESY program amounted to a material implementation failure resulting in a denial of a FAPE.

In this case, the MDT agreed that the student did not receive the five hours per week of specialized instruction in the general education setting. (See Findings of Fact #I.-2.) The student did receive some specialized instruction for 10-20 minutes on an occasional basis when the special education teacher brought the student back from the pull-out session. (See Findings of Fact #I.-3.) The special education coordinator made a request to DCPS for an award of compensatory education for the missed specialized instruction services and DCPS offered ten hours of independent tutoring. (See Findings of Fact #I.-4) The person who determined the ten hours of tutoring services did not talk to the student's teachers or visit the school. (See Findings of Fact #I.-4) The student is making academic progress at School. (See Findings of Fact # II.-3 & 4) The current IEP shows in present levels of performance that the student is four years below grade level in math and two years below grade level in reading and written expression. The student made gains between the initial Brigance Test assessment at the beginning of this school year and the January 2011 assessment in math and reading. (See Findings of Fact #I.-5) During the most recent IEP Progress Report from January 22, 2011 to March 25, 2011, the student was progressing to meet her IEP annual goals in math, reading and written expression. (See Findings of Fact #II.-4) The student is also passing in her most recent report card period. (See Findings of Fact #II.-3) While the student is making progress at Takoma Elementary School, she still is several years below grade level according to one assessment tool- the Brigance Test. This hearing officer concludes based on the above Findings of Fact that the failure to fully implement the student's June 21, 2010 IEP in not providing the five hours of specialized instruction per week in the general education setting is not a minor discrepancy, but is material in light of the student's severe deficits.

This hearing officer finds that DCPS's failure to implement the student's June 21, 2010 IEP resulted in a denial of a FAPE. Compensatory education is an equitable remedy for the denial of a FAPE. In *Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005), this Circuit set out the standards for an award of compensatory education. "Under the theory of 'compensatory education,' courts and hearing officers may award educational services...to be provided prospectively to compensate for a past deficient program. *Id.* at 522 Designing a compensatory education remedy requires " a fact-specific exercise of discretion by either the district court or a hearing officer." *Id.* at 524 To assist the court or hearing officer's fact specific inquiry, " the parties must have some opportunity to present evidence regarding [the student's]specific education deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526 DCPS may be required to "offer proof that the placement compensated for prior FAPE denials in addition to providing some benefit going forward." *Id.* at 525

In this case, counsel for petitioner did not present a plan for compensatory education on the failure to implement the student's IEP. The parent has the burden of "propos[ing] a well-articulated plan that reflects [the student's] current education abilities and needs and is supported by the record." *Phillips v. District of Columbia,* 2010 WL 3563068, at *6, 55 IDELR 101 (D.D.C. Sept. 13, 2010) Neither party has requested an extension of time beyond the 45-day timeline to supplement the record. The hearing officer cannot unilaterally extend the 45-day timeline. *34 C.F.R. Section 300.515 (c).* "Choosing instead to award [the parent] nothing does not represent the 'qualitative focus' on [the child's] 'individual needs' that Reid requires." *Phillips* at *6 *quoting Nesbitt I*, 532 F. Supp. 2d at 125. The hearing officer can determine the amount of compensatory education that a student requires if the record provides him with

sufficient "insight about the precise types of education services [the student] needs to progress." *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 130 (D.D.C. 2008) Findings to assist the hearing officer to tailor the compensatory education award to the student's unique needs should include the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services requested and the student's current educational abilities. *Branham v. District of Columbia*, 427 F. 3d 7 (D.C. Cir. 2005)

The March 10, 2011 IEP includes the January 2011 Brigance assessment for the student's current level of performance that shows the student is four years below grade level in mathematics and two years below grade level in reading and written expression. The special education teacher's more recent IEP Progress Report covering the period of January 22, 2011 to March 25, 2011 shows more progress in the student reaching her IEP annual goals in reading, writing and mathematics. (See Findings of Fact #II.-4) The current instruction by the general education teacher and special education teacher is addressing the student's deficits and as Findings of Fact #II. 3 & 4 show the student is making academic progress, though more needs to be done especially in mathematics. As noted above, the failure of counsel for petitioner to present any compensatory education plan or testimony related to the amount of compensatory education makes it more difficult to be precise in calculating the compensatory education award. This hearing officer, however, concludes based on the current assessments of her teachers that an award that is tailored to the student's unique needs would be forty hours of one on one tutoring. This award should enable the student to continue to make progress "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*, 401 F. 3d at 524.

The second issue to address is whether the IEP developed on March 10, 2011 is appropriate on the number of hours it provides for specialized instruction. Counsel for petitioner argues that the fifteen hours per week of specialized instruction outside of general education is insufficient to meet the student's needs. In determining if the IEP is appropriate this hearing officer must answer the question "is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, at 206-07 (1982). In *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *cert denied*, 488 U.S. 1030 (1989), The Third Circuit held that appropriateness under *Rowley* as applied to a student with severe disabilities means more than trivial educational benefit. The Court held in *Polk* that "...using *Rowley*'s own terminology, we hold that Congress intended to afford children with special needs an education that would confer meaningful benefit." *Polk* at p.184 Other Circuits have endorsed the *Polk* court's interpretation of educational benefit in *Doe v. Smith*, 441 IDELR 544 (6th Cir. 1989); *Fort Zumwalt School District v. Clynes,* 26 IDELR 172 (8th Cir. 1991); *Roland M. v. Concord School Comm'n,* 16 IDELR 1129 (1st Cir. 1991) and *Hall v. Vance County Board of Education*, 557 IDELR 155 (4th Cir. 1985) In *Ridgewood Bd. of Educ. v. N.E.*, 30 IDELR 41,44 (3d Cir. 1999) and *T.R. v. Kingwood Township Board of Education*, 32 IDELR 30 (3d Cir. 2000) the Third Circuit held that an IEP must provide "meaningful benefit." *See also A.I.ex rel. Iapalucci v. D.C.*, 402 F. Supp. 2d 152 (D.D.C. 2005) ("...the appropriate focus of the court's review should be on whether DCPS is providing A.I. with an IEP that is reasonably calculated to provide meaningful educational benefit." *Id.* at p.167)

Findings of Fact #II.-3 & 4 show that both the general education teacher and the special education teacher see the student making academic progress. The special education teacher

through her testimony and IEP progress reports has shown specific examples of the student's progress toward meeting her IEP goals in reading, writing and mathematics. This hearing officer has found the testimony of both the general education teacher and the special education teacher very credible. Both the general education teacher and special education teacher work with the student on a daily basis and agree that the IEP's provision of 15 hours per week of specialized instruction outside of general education in the March 10, 2011 IEP is appropriate to meet the student's needs. The parent has not gone to the student's classes or talked to her teachers. The parents also did not go to a scheduled parent/teacher conference to discuss the student's progress. (See Findings of Fact #II-5) This hearing officer therefore gives little weight to the parent's opinion that the student needs more hours of specialized instruction outside of general education. The educational advocate made an observation in the special education pull-out session and found the teacher's instruction appropriate to meet the student's IEP and needs. She also observed the general education teacher working one on one with the student to assist her on instruction. (See Findings of Fact #II.-4) This hearing officer concludes that the March 10, 2011 IEP is "reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07

The third issue to address is whether the placement at School is appropriate. The Supreme Court held in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 201 (1982) that IDEA was intended to provide a "basic floor of opportunity" and an individualized plan "designed to provide educational benefit to the handicapped child." *See Schoenbach v.District of Columbia*, 309 F. Supp. 2d 71, at 80 (D.D.C. 2004) This Circuit has held that a school has met its obligation to provide a FAPE if the school's program "confers some educational benefit." *Kerkam v. Superintendent, District of Columbia*

Public Schools, 931 F 2d 84 (D.C. Cir. 1991) The analysis of the appropriateness of a public school placement "is not comparative." *Jenkins. v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir. 1991) Although IDEA guarantees a FAPE, it "does not necessarily guarantee the child [with the disability] the best available education." *Holland v. District of Columbia*, 71 F.3d 417,419 (D.C.Cir. 1995). Nor does IDEA ensure that a FAPE will consist of the precise plan that the parent desires. *See Shaw v. District of Columbia*, 238 F.Supp. 2d 127,139 (D.D.C. 2002). An IEP must be 'reasonably calculated' to confer educational benefits on the child, ...but it need not "maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Rowley* at 200, 207. , quoted in *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009) Academic success is an important factor "in determining whether an IEP is reasonably calculated to provide education benefits." *Roark ex rel. Roark v. D.C.*, 460 F. Supp. 2d 32, at 45 (D.D.C. 2006)

In this case, this hearing officer finds at Findings of Fact #III.-2 that School is implementing the student's current IEP. This hearing officer also finds at Findings of Fact #III.-3 &4 that both the general education teacher and the special education teacher who work with the student on a daily basis see the student making academic progress. This hearing officer concludes that the student's current placement is conferring educational benefits to the student and is therefore appropriate.

ORDER

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

On issue one the failure to fully implement the June 21, 2010 IEP, this hearing officer finds a denial of a FAPE and awards forty (40) hours of compensatory education to be provided in the form of individual tutoring by an independent provider of the parent's choice at a maximum of sixty-five dollars ($65) an hour. The compensatory education award is to be fully provided by September 1, 2011.

Issue two on the IEP being inappropriate is DISMISSED.

Issue three on the placement being inappropriate is DISMISSED.

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: 5/10/11 Seymour DuBow /s/

Hearing Officer