

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

OSSE
Student Hearing Office
October 25, 2013

PARENT on behalf of
STUDENT,

Petitioner,

v

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent

HEARING OFFICER DETERMINATION
and Decision on Motion for Directed Verdict

STATEMENT OF THE CASE

On July 24, 2013 parent, Petitioner herein, on behalf of the student (“Student”) filed an Administrative Due Process Complaint Notice (“Complaint”), HO 1,¹ requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education (“FAPE”) to Student by District of Columbia Public Schools (“DCPS”) under the Individuals with Disabilities Education Act, as amended (“IDEA”). 20 U.S.C.A. §1415(f)(1)(A). Respondent DCPS filed a Response to Petitioner’s Administrative Due Process Complaint Notice (HO 5) on August 6, 2013. This was two days beyond the 10 day timeline for filing a response established in 34 C.F.R. § 300.508(e)(1). A resolution meeting was held August 7, 2013. The parties were not able to reach an agreement and executed a Resolution Period

¹ Hearing Officer Exhibits will be referred to as “HO” followed by the exhibit number; Petitioner’s Exhibits will be referred to as “P” followed by the exhibit number; and Respondent’s Exhibits will be referred to as “R” followed by the exhibit number.

Disposition Form on the same date so indicating. HO 6. The 45 day timeline began to run on August 24, 2013, the day after the 30 day resolution period ended. Following the Prehearing Conference held on August 29, 2013, I issued a Prehearing Conference Order on the same date. HO 8. Also on August 29, 2013 Petitioner filed a Consent Motion for a Continuance. I granted the 10 day continuance on August 30, 2013. During the prehearing conference the parties and I discussed two legal issues to be resolved prior to the due process hearing. The parties filed briefs (HO 10, HO 11, HO 12) on these issues in compliance with the briefing schedule set during the prehearing conference. In my Order (HO 13) of September 24, 2013 I found that the Office of the State Superintendent of Education (“OSSE”) Letter of Decision involving DCPS’ requirement that an assessment of visual acuity be provided before visual service would be provided to Student did not bar proceeding on the issues regarding the assessment of Student’s need for vision services and the inclusion of vision services on Student’s IEP of April 11, 2013. I also determined the issues in this matter would be limited to the IDEA two year statute of limitations. All claims were to be limited to the two years immediately preceding the filing of the complaint on July 24, 2013.² My Hearing Officer Determination is due on October 27, 2013.

At all times relevant to these proceedings Petitioner was represented by Kimberly Glassman, Esq. DCPS was represented by Tanya Chor, Assistant Attorney General, until October 1, 2013 when Linda Smalls, Assistant Attorney General, began representing DCPS. By

² Respondent raised an issue of subject matter jurisdiction as a preliminary matter on October 15, 2013. Respondent argued that the fact that the April 11, 2011 IEP was developed and existed prior to the beginning of the two year statute of limitations period, on July 24, 2011, meant that the statute of limitations precluded hearing any issue in relation to this IEP. I denied Respondent’s motion, agreeing with Petitioner, that while the development of the IEP was outside the two year statute of limitations period. The April 11, 2011 IEP was in effect at the beginning of the statute of limitations period on July 24, 2011. Respondent also argued that the April 11, 2011 IEP was in effect only until February 16, 2012 and therefore the timeframe in which the issues raised are in contention can at most address events that occurred between July 24, 2011 and February 16, 2012. I stated I would determine the end date for the issues presented here based on the evidence presented at hearing. That determination is discussed **Infra at pp. 16 & 17.**

agreement of the parties, the hearing was scheduled for October 15 and 17, 2013. The hearing was held as scheduled in Room 2004 of the Student Hearing Office.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C. §§ 1400, *et seq.*; District of Columbia Code, §§ 38-2561.01, *et seq.*; federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

ISSUES³

The issues are:

- 1) Whether DCPS denied Student a FAPE by failing to properly determine the student's eligibility for vision services from July 24, 2011 through October 2012. This issue involves the IEP dated April 11, 2011; and
- 2) Whether DCPS denied Student a FAPE by failing to develop appropriate IEPs. This issue involves the IEP dated April 11, 2011. It is intended to address only the failure to include vision services in this IEP and to provide such services under this IEP while it was in effect.

RELIEF REQUESTED⁴

Petitioner is seeking compensatory education for the failure to provide vision services from July 24, 2011 through October 2012.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:

- | | |
|----|---|
| P1 | OSSE Letter of Decision to Complaint 011-023 (June 26, 2012); |
| P2 | Withdrawn |

³ The issues have been edited to reflect my determination that the two year statute of limitations applies to this matter. References to a May 6, 2010 IEP which was not in effect during the two year period have been removed. I have also amended the time period in which I review the possibility of a denial of FAPE to begin July 24, 2011 (the first day of the two year statute of limitation period) rather than May 2010, which is outside the statute of limitations period. The statute of limitations began July 24, 2011. I do not address the issues prior to that date.

⁴ As with the issues, the request for relief has been edited to reflect only the time within the two year statute of limitations applicable to this matter, that is from July 24, 2011 through July 24, 2013.

- P3 Individualized Education Plan (April 11, 2011);
- P4 Individualized Education Plan (October 10, 2012);
- P5 Individualized Education Plan (April 11, 2013);
- P6 District of Columbia Public Schools Functional Vision Assessment (November 5, 2012);
- P7 District of Columbia Public Schools Observation of Visual Behaviors (April 10, 2008);
- P8 District of Columbia Public Schools Eye Exam Report (February 3, 2010);
- P9 Letter from Ophthalmologist 1 Concerning Vision (December 12, 2007);
- P10 Letter from OSSE re: FOIA Request Records (September 27, 2013);⁵
- P10-A Psychological Evaluation (February 9, 2010);
- P10-B Comprehensive Speech and Language Assessment (February 18, 2010);
- P10-C Final Eligibility Determination (May 6, 2010);
- P10-D Letter of Visual Evaluation (August 17, 2011);
- P11 Developmental Vision Evaluation and Compensatory Education Recommendation (October 2013);
- P12 Optometrist Curriculum Vitae;
- P13 Support Organization for Trisomy 18, Trisomy 13, Trisomy 13 Facts available at www.trisomy.org/trisomy-13-facts (last visited October 5, 2013);
- P14 Letter from Geneticist (May 12, 2011)
- P15 Letter from Parents to DCPS Program Director (April 4, 2011)

Exhibits admitted on behalf of Respondent are:

- | | | |
|------|-----------------------------------|-------------------|
| R-01 | Prior Written Notice | Date: 04/11/2013 |
| R-02 | IEP Meeting Notes | Date: 04/11/2013 |
| R-03 | IEP Meeting Notes | Date: 10/10/2012 |
| R-04 | IEP Progress Reports | Date: SY2012-2013 |
| R-05 | IEP Progress Reports | Date: SY2011-2012 |
| R-06 | VIS Grade Report Summary | Date: SY2011-2012 |
| R-07 | DCPS Functional Vision Assessment | Date: 11/05/2012 |
| R-08 | IEE Authorization | Date: 05/09/2013 |
| R-09 | Emails from Parents | Date: Various |
| R-10 | Letter of Decision | Date: 03/21/2013 |

Exhibits admitted by the Hearing Officer are:⁶

- HO 1 Administrative Due Process Complaint Notice filed July 24, 2013
- HO 2 Notice of Hearing Officer Appointment of July 24, 2013
- HO 3 Prehearing Conference Scheduling Letter and Order re Timelines of July 25, 2013

⁵ The records provided to Petitioner by the OSSE, which are Petitioner exhibits 10 through 10D, were issued in redacted form. The student's name and gender references do not appear in some of the documents. There are some additional redactions as to Student's age. The Letter from OSSE with the Table of Contents from the FOIA Request, Exhibit 10, serves to authenticate the documents in Exhibit 10A – 10D.

⁶ Emails forwarding the documents of record to opposing counsel and the hearing officer are filed with the documents of record unless otherwise noted.

HO 4	Prehearing Notice of July 26, 2013, incorrectly dated June 26, 2013
HO 5	District of Columbia Public Schools' Response and Motion to Dismiss the Administrative Due Process Complaint Notice of August 6, 2013
HO 6	Resolution Period Disposition Form of August 7, 2013
HO 7	Prehearing Conference Order of August 29, 2013
HO 8	Consent Motion for a Continuance of August 29, 2013
HO 9	Interim Order on Continuance Motion of August 30, 2013
HO 10	Petitioner's Brief on the Impact of the State Complaint and Statute of Limitations of September 9, 2013
HO 11	Respondent Brief on Res Judicata of State Complaint and Statute of Limitations Under IDEA of September 16, 2013
HO 12	Petitioner's Reply to Respondent's Brief on Res Judicata and Statute of Limitations of September 20, 2013
HO 13	Order on the Impact of the Letter of Decision Issued by the Office of the State Superintendent of Education and on the IDEA Statute of Limitations issued September 24, 2013
HO 14	Miscellaneous emails <ul style="list-style-type: none"> ● Three chains of 7/25/13 re scheduling ● 8/2/13 re resolution session ● Chain 8/7 – 8/8/13 re rescheduling the PHN ● Two chains, combined, of 9/26/13 re changing time for status conference ● 10/1/13 re newly assigned DCPS counsel ● Chain of 10/7/13 re completeness of disclosures ● 10/7/13 re link to disclosures ● 10/8/13 from Petitioner's counsel to Respondent's counsel re access to disclosures
HO 15	List of Proposed Hearing Officer Exhibits filed October 3, 2013

B. Testimony

Petitioner testified and presented the following witnesses:

- Father
- Optometrist testified as an expert in the field of developmental optometry
- Tutor

DCPS presented no witnesses.

ORDER RE MOTION FOR A DIRECTED VERDICT

On October 17, 2013, after Petitioner's counsel rested following presentation of her witnesses, Respondent's counsel moved for a directed verdict. In making this Motion Respondent's counsel argued there had been no evidence presented in support of Petitioner's claims. Petitioner responded indicating that she had presented evidence in support of her claims and that the totality of the evidence establishes Student's vision needs impacted her education.

After hearing counsels' arguments I held the Motion for a Directed Verdict in abeyance and stated I would issue my decision on the Motion when I issued the Hearing Officer Determination.

A motion for a directed verdict must be resolved in the light most favorable to the party opposing the Motion. Under Federal Rule of Civil Procedure 50(a), a motion for directed verdict must be granted if "under the governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern R. Co., 320 U. S. 476, 479-480 (1943). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. Wilkerson v. McCarthy, 336 U. S. 53, 62 (1949)." Anderson v. Liberty Lobby, Inc., 477 US 242, 251 (Sup.Ct. 1986). The inquiry is whether there is a sufficient disagreement to require submission to a trier of fact or whether the evidence is so one-sided that one party must prevail as a matter of law. *Id.* at 252 -253. The determination then is made in a fashion similar to that used when deciding a motion for summary judgment. If there is a basis by which the non-moving party could prevail, the motion should not be granted.

In the instant matter, Respondent's Motion for a Directed Verdict, as to the first issue, is based on the position that Petitioner has failed to provide evidence supporting her claim that DCPS should have found student eligible for vision services in the time period between July 24, 2011 and October 10, 2012. Respondent asserts there is no evidence addressing Student's needs for vision services in this time period. In making this argument DCPS appears to have focused on the OSSE LOD of June 6, 2012 and on the multidisciplinary team's determination, under 34 C.F.R. § 300.306, that Student was not eligible for vision services. In response, Petitioner identifies a range of documentary evidence indicating Student required vision services including the OSSE LOD, DCPS' Observation of Visual Behaviors of April 10, 2008, DCPS' Eye Exam

Report of February 3, 2010 and a letter of visual evaluation from August 17, 2012. Many other exhibits also identify Student's visual impairment and recognize her need for services.⁷ If Respondent's intent with this argument is to suggest there is neither testimony nor documentary evidence addressing the specific time period expressly, I find this argument misconstrues the nature of Student's vision impairment. The consistency of the evaluations and assessments across time as well as the statement by DCPS' own eye exam report of February 2010 show Student's impairment has been and continues to be stable across time.

Respondent's argument as to Issue 2 is based on the position that Petitioner has provided no evidence as to educational harm resulting from the failure to include vision services on Student's April 11, 2011 IEP and the related failure to provide vision services while this IEP was in effect. Respondent argues there was no showing of a lack of educational progress and no evidence regarding the impact of the failure to provide vision services on Student. Respondent further adds that Petitioner's expert in developmental optometry indicated Student required vision therapy which is not provided in an educational setting. Respondent focuses on the optometrist's proposal that an occupational therapist could provide the vision services Student requires. Petitioner's response is that the expert testified as to the benefit of a teacher for the visually impaired working with the occupational therapist and that this same collaboration could establish accommodations, modifications and processes for addressing Student's needs for training in convergence and tracking.

Not only did Petitioners' witness provide support for Petitioners' contentions that Student required vision services, but Petitioners' documentary evidence also provides evidence in support of this claim as well as the claim that Student should have been found eligible for

⁷ See Findings of Fact 3.a. – j., *Infra*.

vision services. Thus Respondent's Motion for a Directed Verdict must fail as there is sufficient evidence in the record by which the Petitioner, the non-moving party, could prevail.

I, therefore, find Respondent's Motion for a Directed Verdict must be denied. The facts before me are not so one sided as to require a decision in Respondent's favor as a matter of law. It is necessary that I review the facts and determine whether Petitioner has presented a case that will allow her to prevail.

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:⁸

1. Student is 9 years old. She is eligible for special education as a student with multiple disabilities. She has a rare genetic disorder, Trisomy 13. Student's syndrome significantly interferes with her physiological and neurological development. Most children with this disorder do not live past infancy. Student has a weak immune system, respiratory dysfunction as well as visual and hearing difficulties. She does not communicate using language and shows developmental delays. Student also has mobility difficulties and has limited use of her hands. Student receives special education and related services at home, per her Geneticist's recommendation. P 1; P 6; P 7; P 8; P 9; P 10A; P 10B; P 10/d; P 11; P 12; P 13; P 14; R 10; Testimony of Petitioner; Testimony of Father; Testimony of Optometrist.
2. Concerns with Student's vision arose soon after she started school. These concerns were raised at Student IEP meetings as far back as 2008. P 1; P 7; P 8; P 9; Testimony of Petitioner.
3. The reports regarding Student's visual disability and related needs for intervention have been consistent. For years prior to the development of the 2011 IEP and for some time after its

⁸ In the findings that follow I cite exhibit numbers and/or testimony as bases for the findings. Some exhibits were introduced by both Petitioner and Respondent. The citations to exhibits reference only one party's exhibits in those instances where both parties have introduced the same exhibit.

development and implementation, DCPS had knowledge the Student had a visual impairment that affected her education.⁹

- a. A letter of December 12, 2007 from Ophthalmologist 1 indicates Student has high myopia and poor compliance wearing glasses. Her vision is stated to be fix and follow in each eye. P 9.
- b. A report of Observation of Visual Behavior completed by DCPS in April 2008 indicates, in summary, that Student needs to be close to see details. She does not demonstrate seeing objects and details farther than 3 feet away. It recommends an ophthalmology consult and alternative methods of large to small to be used to facilitate learning. It concludes Student qualifies for educational needs in the area of vision. P 7.
- c. An eye exam report from the Program for Students with Visual Impairment/ Blindness for DCPS completed October 6, 2009 and signed February 3, 2010 indicates Student has high myopia, a cataract of the right eye, exotropia and mild optic atrophy. It states her prognosis is stable. P 8.
- d. The Psychological Evaluation report of February 9, 2010, completed by Early Stages, identifies Student's tendency to examine objects by bringing them up to her eyes and using peripheral vision. P 10-A.
- e. The February 18, 2010 Comprehensive Speech and Language Assessment completed by DCPS reviews prior reports in various disciplines and recognizes Student's vision weaknesses as a possible factor impacting her performance on the speech and language evaluation. The report also recommends an ophthalmology consult due to

⁹ Reports dated before July 24, 2011 are included here for context only due to the applicability of the two year statute of limitations. Those reports dated subsequent to October 2012 are provided for similar contextual purposes.

continued concerns regarding vision behavior of closely examining objects out of her periphery. P 10-B.

f. DCPS' Final Eligibility Determination Report, in the attached Evaluation Summary Report of May 6, 2010, recognizes Student's vision needs and refers to progress reports in reference to the goals on her IEP. It also states a strategy used with Student is to have her focus on different objects to strengthen her vision. P 10-C.

g. A May 12, 2011 letter from Student's Geneticist refers to Student's visual dysfunction. P 14.

h. An August 17, 2011 letter from the Innovative Vision Center in Pendleton, South Carolina states Student could benefit from vision therapy oriented exercises. It states Student's peripheral retina shows some mild ROP and mild pallor. It recommends concentrating on saccadic and pursuit function to improve visual function. P 10-D.

i. A Functional Vision Assessment completed on November 5, 2012 by DCPS concludes Student has good functional vision but is not using her residual vision to her maximum potential and that she could benefit from visual Efficiency Skills to learn how to use her remaining vision better and more efficiently. P 6.

j. The Developmental Vision Evaluation performed on September 19, 2013 determined Student has myopia, oculomotor dysfunction, convergence insufficiency and possible refractive amblyopia. Recommendations are to assist Student in becoming accustomed to her glasses and to provide vision therapy, consultation for adaption and training on Student's iPad and a yearly dilated eye examination yearly.¹⁰ It concludes that Student's vision impairment negatively affects her ability to learn. P 11.

¹⁰ This latter process is likely to require sedation to which parents are opposed. *See* FOF 4, *Infra* at p. 11.

4. DCPS requested a test of visual acuity as a mandatory prerequisite to determining Student's eligibility for vision services. Student is unable to respond to the standard test for visual acuity in an office due to her other disabilities. The only way her visual acuity can be assessed is through a procedure under sedation. Again due to her other disabilities sedation is extremely dangerous for Student, and her parents are, therefore, opposed to the sedation process. P 1; Testimony of Petitioner.

5. Student's April 11, 2011 IEP does not address her vision impairment as an area of need. However, in the Present Level of Educational Performance section of Motor Skills/ Physical Development Area, specific reference is made to Student's vision related strengths and weaknesses. For example, it states, Student is able to direct her visual gaze to the speaker when she is in conversation with prompting. In contrast, it states Student does not sustain her visual focus and does not direct her gaze in the neutral or lower visual fields. It also states Student needs to incorporate visual scanning for efficient movement. In addition, in the reading section the IEP states Student demonstrates the greatest achievement when activities use a functional sensory motor interactive approach, and two reading and one ESY goal reference the use of large face picture cards. P 3.

6. Student's April 11, 2011 IEP was amended in February 2012. Student's case manager sent Student's parents an amendment that allowed audiology to be included on Student's IEP under special education. No meeting was held. No other changes were made to the April 11, 2011 IEP at that time. Testimony of Father.

7. An IEP meeting was held in March 2012.¹¹ While Student's parents had originally agreed to the date, they were unable to attend due to a death in the family. They notified DCPS two days

¹¹ In addition to this IEP meeting held without the parents, an IEP meeting was held on April 17, 2012 with the parent. Testimony at hearing confounded these two separate meetings.

in advance of their unavailability and suggested alternative dates. DCPS held the March 2012 meeting without the parents in attendance. This IEP was invalidated by OSSE due to the lack of parent involvement. P 1; Testimony of Father.

8. A draft IEP was developed at an IEP meeting held on April 17, 2012. Student's parents attended this meeting. The Special Education Coordinator referred to this IEP as a draft IEP in an email to the parents dated April 23, 2012. P 1.

9. An OSSE Letter of Determination issued June 26, 2012 found DCPS out of compliance with 34 C.F.R. § 300.304(b)(2) for requiring a measure of visual acuity before providing Student vision services. The LOD indicated DCPS had been on notice since 2008 that Student had needs in the area of vision, and DCPS must not continue to delay providing appropriate services to Student. P 1.

10. To comply with the OSSE Letter of Determination issued June 26, 2012, Student's October 10, 2012 IEP added vision as a new area of need and includes goals in vision. The team, including Student's parents, agreed the IEP goals in vision would be related to a functional vision assessment that would be done to establish Student's baseline. Student was to receive 2 hours per week of vision services until the functional vision assessment was completed. The vision hours and goals would then be reviewed. The present levels of performance, on this IEP, under vision state Student can demonstrate eye contact for 30 seconds to one minute. She can look directly toward an object of her choice or walk independently to obtain an object of choice. She is able to scan the room to look for an object of choice. In the section describing how the disability affects her access to the general curriculum, the IEP indicates Student needs to be close to see details and cannot see objects or details more than 3 feet away. The IEP states Student qualifies for educational needs in the area of vision to develop academics. Goals are to track a

slow moving object at 16 inch targets and to visually fixate on a target at three foot distances. P 4; R 3.

11. Student is able to fixate on objects but has trouble following a moving object. This is associated with difficulties accessing printed material. Student does not use her visual system in a normal manner. She is not visually guided. Instead she uses her tactile sense. She also appears to use her peripheral vision and, at least some of the time, uses one eye at a time. Student does not use her hands and eyes together. P 6; P 7; P 8; P 11: Testimony of Optometrist.

12. The Student would benefit from the use of large print and picture, a distraction free visual environment, the use of manipulatives, high contrast materials, good lighting in her educational program as well as training in tracking, convergence and scanning. Testimony of Optometrist.

13. Some occupational therapists have training to address visual skills but their training is not the same as optometrists. They do not provide vision therapy which, typically, is not provided in classrooms. Rather, like occupational therapy or speech, vision therapy is provided in a separate environment. An occupational therapist is not able to teach Student to attend to visual stimuli. This requires a vision professional. Testimony of Optometrist.

14. Student would have benefitted from the services of a teacher of the visually impaired who would be able to do more than helping her develop the skills an occupational therapist does. Testimony of Optometrist.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find all witness testimony presented in this matter to be credible, some witnesses were more persuasive than others. Where these differences in persuasiveness are relevant to my determination, I so indicate.

Whether DCPS denied Student a FAPE by failing to properly determine the student's eligibility for vision services from July 24, 2011 through October 2012. This issue involves the IEP dated April 11, 2011.

Whether DCPS denied Student a FAPE by failing to develop appropriate IEPs. This issue involves the IEP dated April 11, 2011. It is intended to address only the failure to include vision services in this IEP and to provide such services under this IEP while it was in effect.

Under the IDEA a student is to be assessed in all areas related to the suspected disability including vision. 34 C.F.R. § 300.304(c)(4). In conducting an evaluation no single measure or criterion is to be used for determining whether a child is a student with a disability and for determining the appropriate educational program for the student. 34 C.F.R. § 300.304(b)(2). After the assessments are completed a group of qualified professionals and the parent determine whether the child is a child with a disability and the educational needs of the child. Visual impairment, under IDEA, means “an impairment that, even with correction, adversely affects a child’s educational performance.” 34 C.F.R. § 300.8(c)(13). The instant student is classified as having multiple disabilities. Multiple disabilities, under IDEA, means “concomitant impairments . . . the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments.” 34 C.F.R. § 300.300.8(c)(7). Visual impairment can be one of the impairments included in a classification of multiple disabilities.

Student has an exceptionally rare genetic condition which significantly interferes with her physiological and neurological development. Of particular relevance here is Student’s associated visual dysfunction. This dysfunction is manifested by myopia, oculomotor dysfunction, convergence insufficiency and possible refractive amblyopia. She also has a cataract in her right eye. In order to see details Student must have an object within a few inches of her eyes. She is

unable to see things beyond three feet. She has difficulty tracking moving objects and her two eyes do not work together. She also is not visually guided. Instead Student uses her tactile sense. She also appears to use her peripheral vision and, at least some of the time, uses one eye at a time. Student does not use her hands and eyes together.

Throughout her schooling history assessments have indicated these visual limitations, and others. Recommendations for vision services have been made by individual assessors, but the multidisciplinary team (“MDT”) has denied these services for a variety of reasons. Most recently, the MDT denied Student vision services because they insisted a test of visual acuity was required before the need for such services could be determined. This requirement was imposed despite the history of recommendations for such services including a DCPS April 2008 Observation of Visual Behavior which concluded Student qualified for educational needs in the area of vision, a February 2010 Psychological Evaluation report that identified Student’s tendency to examine objects by bringing them up to her eyes and using peripheral vision, a February 2010 Speech and Language assessment that recognized Student’s vision weaknesses and recommended an ophthalmology consult, and an Evaluation Summary Report of May 2010 included in a DCPS’ Final Eligibility Determination Report that recognized Student’s vision needs and referred to progress reports in reference to the goals on her then current IEP and a strategy used to strengthen Student’s vision. A similar report indicating Student’s visual disability and need for intervention was made between July 24, 2011 and October 10, 2012, the time frame relevant to the instant complaint. An August 17, 2011 letter from the Innovative Vision Center in Pendleton, South Carolina states Student could benefit from vision therapy oriented exercises. It states Student’s peripheral retina shows some mild ROP and mild pallor. It recommends concentrating on saccadic and pursuit function to improve visual function. It is also

noteworthy that reports reflecting similar visual dysfunction and need for intervention continued after the time frame at issue here. In sum, as noted in the eye exam report from the Program for Students with Visual Impairment/Blindness for DCPS completed October 6, 2009 and signed February 3, 2010 Student's prognosis regarding her vision is and has been stable. Student's April 2011 IEP does document some impact from Student's visual impairment including not sustaining her visual focus and not directing her visual gaze in the neutral or lower visual fields when navigating positional or location changes, but there are no goals to address these needs. Moreover, the IEP was not amended at any time it was in effect to address these needs.

DCPS contends the April 11, 2011 IEP was only in effect until February 2012. I disagree. While it is true the April 2011 IEP was amended in February 2012, this amendment occurred without benefit of an IEP meeting. Instead Student's case manager sent Student's parents an amendment that allowed audiology, a service Student was receiving, to be included in the IEP under special instruction. No other changes were made to the IEP. This amendment is not the review and revision process contemplated by IDEA for updating an IEP to reflect changes in a student's needs and develop a program for the upcoming year. That review and revision process requires a meeting where the team, including the parents, discusses a student's progress, needs and any relevant changes to assure the IEP addresses the student's then current educational needs. 34 C.F.R. § 300.324(b). Rather, the amendment process occurring in February 2012 is the process described under 34 C.F.R. § 300.324(a)(4) which does not require a meeting. *See also*, Fed. Reg. Vol 71, No. 156, p 46685. A change to an IEP made without benefit of an IEP meeting does not constitute a new IEP with a prospective year long duration. It is an amendment to an existent IEP. Therefore, the April 2011 IEP, including the February 2012 amendment, remained in effect in February 2012. DCPS also contended, in the alternative, that the IEP developed in

April 2012 replaced the April 2011 IEP. Again I disagree. The IEP developed in April 2012 was described as a draft IEP by the Special Education Coordinator in an email to the parents. It goes without saying that a draft IEP cannot be a final IEP. A draft IEP does not reset the requirements for a student's program for the year to come. A new final IEP, therefore, was not developed for Student until October 10, 2012.¹²

In establishing the dates the April 11, 2011 IEP was in effect, it is important to recognize that DCPS could have held an IEP meeting to review and revise the IEP to include vision services on Student's IEP at any time between April 11, 2011 and October 10, 2012. This time frame includes the July 24, 2011 through October 10, 2012 dates at issue here. While an IEP must be reviewed and revised at least annually, a meeting to review and revise an IEP can be held more frequently. 34 C.F.R. § 300.324(b). DCPS chose not to convene such a meeting despite parents repeated requests for vision services and, as already discussed Student's consistent and apparently obvious need for such services.

For the foregoing reasons, I conclude, by a preponderance of the evidence that DCPS denied Student a FAPE by failing to determine the student's eligibility for vision services from July 24, 2011 through October 10, 2012 and further that DCPS denied Student a FAPE by failing to include vision services and provide vision services under the April 2011 IEP from July 24, 2011 through October 10, 2012.¹³

¹² There was some discussion regarding whether the parents agreed with this IEP. The October 10, 2012 IEP entered into evidence, by Petitioner, is not designated a draft. I note a parent's disagreement with the content of an IEP does not, in itself, establish that the IEP is not a final IEP. Moreover, no issue was raised as to this IEP's status in the current Complaint.

¹³ I recognize that had DCPS reviewed and revised the April 11, 2011 IEP to include vision services it would have had a different date designating the annual review meeting date. As this did not occur it is referenced here as the April 11, 2011 IEP.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. Respondent's Motion for a Directed Verdict is Denied.
2. DCPS denied Student a FAPE by failing to determine the student's eligibility for vision services from July 24, 2011 through October 10, 2012.
3. DCPS denied Student a FAPE by failing to include vision services and provide vision services under the April 2011 IEP from July 24, 2011 through October 10, 2012.¹⁴

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered Student is to receive compensatory vision services for 12 months beginning after the plan, as discussed below, is developed. The compensatory services shall be designed to address Student's identified vision needs and place her in the position she would have been had she received vision services from July 24, 2011 through October 10, 2012. A team, ("the vision services team") composed of Student's occupational therapist, her special education teacher, her vision teacher, Student's mother and/or father and Petitioner's expert optometrist shall meet within 15 school days of DCPS' receipt of this Hearing Officer Determination to develop a plan for the specific services to be provided to Student. The services may include both assessment and direct vision services. The vision services are to be provided at Student's home in coordination with her on-going IEP services. If Student returns to a school based program at any time during the 12 months this compensatory education plan is in effect, the vision services shall be provided in

¹⁴ See FN 13.

school. The vision services are to address Student's vision needs as discussed herein, including, but not limited to:

- training in tracking, convergence and scanning;
- use of appropriate materials, including large print and pictures, manipulatives and high contrast materials;
- consultation for adaption and training on Student's iPad; and
- development of a program to help Student accept wearing eyeglasses.

The vision services team shall meet bi-monthly to review Student's progress and revise, as appropriate, the services provided through the compensatory education plan.

DCPS shall compensate Petitioner's expert optometrist for her participation in this process. If assessments are required, the vision services team shall determine who will provide the assessments. If an independent provider is required for an assessment DCPS shall compensate the provider.

IT IS SO ORDERED:

October 25, 2013

Date


Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).