

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

OSSE
Student Hearing Office
September 11, 2013

[Parents], on behalf of
[Student],¹

Date Issued: September 11, 2013

Petitioners,

Hearing Officer: Jim Mortenson

Case No:

v

[Local Education Agency],

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was originally filed by the Petitioners on June 28, 2013. (Case No.). It was withdrawn, with permission, on July 25, 2013, and re-filed on July 26, 2013, due to scheduling issues. The Petitioners and Respondent are both represented by counsel.

A response to the original complaint was filed by the Respondent on July 8, 2013. A new response was not required following the re-filing of the complaint. A prehearing conference was convened on July 16, 2013, and a prehearing order was issued on that date. No new prehearing was required following the re-filing of the complaint. A resolution meeting was held on July 17, 2013, and resulted in an agreement that no agreement was possible, starting the 45-day hearing timeline. The due process hearing was rescheduled as a result of the new timelines, which prompted the Petitioners to seek to withdraw the complaint and re-file. The hearing dates

¹ All proper names have been removed in accordance with Student Hearing Office policy and are referenced in Appendix C which is to be removed prior to public dissemination.

remained as originally scheduled in the July 16, 2013, prehearing order. The parties agreed to waive the resolution process on July 26, 2013, for the re-filed complaint.

Both parties filed their trial briefs and exchanged their disclosures on August 22, 2013. The hearing was convened at 9:05 a.m. on Thursday, August 29, 2013, in room 2006 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The hearing recessed at 6:05 p.m., and resumed the next day, Friday, August 30, 2013, at 9:05 a.m. The hearing concluded at 2:20 p.m. on August 30, 2013. The due date for this Hearing Officer's Determination (HOD) is September 12, 2013. This HOD is issued on September 11, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

1. Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to offer or provide with an individualized education program (IEP) reasonably calculated to enable to be involved in and make progress in the general education curriculum because the Student's current IEP lacks sufficient specialized instruction, based on peer-reviewed research to the extent practicable, in the areas of reading and writing in a small, self-contained, learning environment?
2. Whether the Respondent denied the Student a FAPE because it significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the Student when the Special Education Coordinator at the Student's prior school attempted to create false documentation for the Student's education records?

The Petitioner is seeking placement of the Student in a specific non-public special education day school for the 2013-2014 school year.

The Respondent denied the Student a FAPE when it failed to offer or provide with an IEP reasonably calculated to enable to be involved in and make progress in the general education curriculum because it lacks sufficient specialized instruction, based on peer-reviewed research to the extent practicable, in the areas of reading and writing in a small, self-contained, learning environment.

The Respondent did not significantly impede the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the Student when the Special Education Coordinator at the Student's prior school sent a message to staff seeking a letter to help the Respondent defend itself against a prior due process complaint.

IV. EVIDENCE

Eight witnesses testified at the hearing, three for the Petitioners and five for the Respondent. The Petitioner's witnesses were the Student's Mother (P), an administrator from the Non-public special education day School (M.G.), and the Petitioners' Education Consultant (A.M.).² A.M. provided an expert opinion on the Student's educational progress, strengths, and needs. The Respondent's witnesses were: the Special Education Teacher (B.B.); the School Psychologist (D.S.); the Science Teacher (S.M.); the Math Teacher (K.T.); and a Program Manager

² Petitioner moved for M.G.'s opinions about the Non-public School, the Student's disability, and the least restrictive environment for the Student to be treated as expert opinions. The motion was denied because the witness is an employee of the Non-public School, so it is presumed she would have a favorable opinion about the school, and she had limited first-hand knowledge about the Student.

(M.G.M.).³ D.S. provided an expert opinion about the Student's needs, abilities, progress, and instructional needs.

30 of the Petitioners' 31 disclosures were entered into evidence. The Petitioners' exhibits are listed in Appendix A. All 12 of the Respondent's disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. Any credibility issues are specifically noted in the findings of fact. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

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

1. Student is a 12 year old learner with a disability enrolled in the Attending School.⁴ has multiple disabilities, including: High Functioning Autism, Speech and Language Disorder, Language-based Reading Disorder, and Attention Deficit Hyperactivity Disorder.⁵ Student is identified as eligible to receive special education under the category of multiple disabilities.⁶

³ Respondent moved for B.B.'s opinions about the IEP she was involved in developing for the Student to be treated as expert opinions. The motion was denied because the witness lacked the academic pedigree or exceptional professional experience to be treated as an expert. Furthermore, she was largely the creator of the document, and could not provide an independent opinion about her work.

⁴ P 1, Testimony (T) of P.

⁵ P 13.

⁶ P 3, P 20, P 21.

2. Multiple evaluations have been conducted of the Student to gather data on disabilities and how they affect involvement and progress in the general education curriculum.⁷
3. Student has average-range cognitive abilities.⁸ Academically, Student is severely delayed in reading and written and language.⁹ Student's math skills, in isolation, are a relative strength.¹⁰ However, utilization of those skills when reading becomes involved, is also a weakness.¹¹ On recent academic testing, Student's academic achievement clusters between the first and third grade level.¹² The Student's reading has not progressed from the approximately first grade level.¹³ Student's language testing places the 3rd percentile (88=71) in core language, with a pragmatic language quotient in the 4th percentile (SS=73).¹⁴ Student has significant issues with inattention, anxiety, and language processing.¹⁵ In large classrooms, the pace of instruction, background noise, and complexity of the language make it impractical for Student to learn.¹⁶ The Student is not incapable of learning to read.¹⁷
4. Socially, Student is a shy student who is behaviorally compliant, but does not seek out friendships.¹⁸ The Student's behavioral functioning has improved over the years.¹⁹
5. Student's IEP was revised on September 14, 2011, for 5th grade.²⁰ The IEP included four reading goals, three writing goals, and three goals in the area of emotional, social, and

⁷ R9/P 8, P 9, P 11, P 12, P 13, P 14, P 15, P 16, P 17, P 18.

⁸ P 13.

⁹ T of B.B., T of A.M., T of D.S., P 7, P 9, P 11, P 14, P 15., P 16, P 17, P 18, P 19.

¹⁰ T of A.M., T of K.T. P 7.

¹¹ T of K.T., P 3, P 7, P 13.

¹² P 7.

¹³ P 7, P 9, P 14, P 15, P 16, P 17, P 18, P 19, P 22, T of D.S., T of A.M. (This is true, despite the Student being awarded passing grades and notations of "progressing" on IEP progress reports. R 2, R 3, R 4, R 5, R 6. Also, there is no clear evidence the Student actually achieved any of annual IEP goals. (See, e.g.: R 3, R 4, R 5, R 6.)

¹⁴ P 8.

¹⁵ P 13, T of P.

¹⁶ P 8, P 11, P 13.

¹⁷ T of A.M.

¹⁸ T of P, T of B.B., T of K.T., T of S.M., P 6, P 8.

¹⁹ T of B.B., T of S.M., T of D.S., T of K.T.

²⁰ P 24.

behavioral development.²¹ Services included: one hour per day of unspecified specialized reading instruction outside of the general education setting, 30 minutes per day of unspecified specialized writing instruction outside of the general education setting, and two hours per month behavioral support services (consisting of a “check-in” with the Student and

Parents) in the general education setting.²² Additional supplementary aids and services included: a homework checklist; an apparent attempt to incorporate the recommendations of the Student’s evaluations, without listing or requiring them; reading of test questions for math, science, and composition; provided written copy of notes as necessary to be used as a reference; stating the expectations, giving visual models when possible; reducing the amount of work to be copied from the board and ensuring work from the board is copied; small group testing; a location with minimal distractions; preferential seating; extended time on subtests; and breaks between subtests.²³

6. During the 2011-12 school year (5th grade), Student attended one of Respondent’s elementary schools.²⁴ Student's parents filed a due process complaint and in organizing a defense the Special Education Coordinator requested a letter from the Student’s Specials Teacher that was to “state that [Student] fully participates in [all classes] and does not require additional/special assistance.”²⁵ No such letter was offered into evidence and the case, apparently, was resolved without a hearing.
7. Student’s IEP was revised on April 23, 2012, for 6th grade.²⁶ Ten goals for mathematics were added to the IEP.²⁷ The reading goals were not revised and a fifth was added concerning the

²¹ P 24.

²² P 24.

²³ P 24.

²⁴ T of P.

²⁵ P 26.

²⁶ P 5.

²⁷ P 5.

use of a checklist to monitor the completion of classwork and homework (this is not a reading skill but a functional skill.)²⁸ Writing goals were revised and totaled six goals in the revision, including the same functional goal for using a checklist that was included under the area of reading.²⁹ The goals in the area of emotional, social, and behavioral development were revised, but for the maintenance of one goal concerning the use of checklists for monitoring turning in of work (essentially the same goal specified under reading and writing).³⁰ Services included: 95 minutes per day of unspecified specialized reading instruction outside of the general education setting, 60 minutes per day of unspecified specialized writing instruction outside of the general education setting, 30 minutes per day of unspecified specialized math instruction outside of the general education setting, and three hours per month of behavioral support services outside of the general education setting.³¹ Additional supplementary aids and services included: extended time on classroom assignments and tests; reduced homework; reduced work after demonstration of a skill; precise, brief directions and presentations; wait time; verbal and visual presentations; chunking of information; visual supports for strategies; and possible use of a homework checklist.³²

8. For the 2012-13 school year, Student attended the Attending School (middle school), where was part of an autism program.³³ Student made no measurable academic gains during the 2012-13 school year, despite being awarded passing grades.³⁴ On one standardized reading

²⁸ P 5.

²⁹ P 5.

³⁰ P 5.

³¹ P 5.

³² P 5.

³³ P 4, P 20, P 21, T of D.S.

³⁴ P 9, P 19, R 2, T of D.S.

test, Student did not answer any of the questions correctly across multiple administrations of the same test.³⁵

9. Student's IEP was revised on April 9, 2013, for 7th grade.³⁶ The math goals were revised to four goals reflecting fifth and sixth grade skills the Student needed to learn.³⁷ The reading goals were revised to three goals reflecting sixth grade standards and one goal reflecting a second grade standard the Student needed to learn.³⁸ The writing goals were revised to a single writing goal to reflect both second and third grade writing standards.³⁹ Three goals were added in the area of communication/speech and language, reflecting sixth and seventh grade standards.⁴⁰ The five functional goals in the area of emotional, social, and behavioral development were not revised.⁴¹ Services included: unspecified specialized instruction for 10 hours per week in the general education setting; unspecified specialized reading instruction in the general education setting for 45 minutes per day; and unspecified behavioral support services outside of the general education setting for three hours per month.⁴² Three hours per month of speech-language pathology on a consultative basis was also added.⁴³ Additional supplementary aids and services included: home-school communication notebook; extended time on classroom assignments and tests; reduced homework; precise, brief directions; wait time; verbal and visual presentations; chunking of information; possible use of a homework checklist; reading of test questions in math, science, and composition; written copy of notes as necessary to be used as a reference; stating expectations and giving visual models when

³⁵ P 9, P 19.

³⁶ P 3.

³⁷ P 3.

³⁸ P 3.

³⁹ P 3.

⁴⁰ P 3.

⁴¹ P 3.

⁴² P 3.

⁴³ P 3.

possible; calculator; preferential seating; reduction of amount of work to be copied from the board and ensuring it is copied; small group testing; location with minimal distractions; extended time on subtests; and breaks between subtests.⁴⁴

10. The Student requires placement in a small, self-contained learning environment that utilizes research-based reading and writing interventions, with frequent assessment to monitor progress, in order to remediate severe learning disabilities.⁴⁵

11. While a part of the Wilson Reading Program was used with the Student, it was not specified in the IEP for the Student and did not help the Student make the progress needed to.⁴⁶

12. Respondent's staff believe the Student should remain in a mainstream setting, including for specialized instruction, because expectations for would be lower if were pulled out of class or in a segregated classroom.⁴⁷

13. The Student has been accepted to the Non-public School.⁴⁸ The Non-public School is a SEA approved special education day school, located in the District of Columbia, for students with various disabilities including: Learning Disabilities; Attention Deficit Hyperactivity Disorder; Autism Spectrum Disorders; Traumatic Brain Injuries; and multiple disabilities.⁴⁹ The Non-public School is capable of providing the Student with small classes of eight to nine students, individualized attention, and the research-based interventions that requires to make meaningful educational progress.⁵⁰ The School provides remedial instruction to bring students' academic achievement up, and exposure to grade appropriate curriculum is also

⁴⁴ P 3.

⁴⁵ P 8, P 11, P 13.

⁴⁶ T of B.B., T of A.M.

⁴⁷ T of D.S., T of B.B. (B.B. testified that she thought the Student was making progress, that missing out on interactions with non-disabled peers would hinder growth, and so did not require more pull-out time. Yet, both of these witnesses agreed that the Student was not close to grade-level in reading or making hoped-for progress in that skill.)

⁴⁸ P 28, T of M.G.

⁴⁹ T of M.G., P 29.

⁵⁰ T of M.G., P 29. (There are various reading programs the School uses, based on students' needs.)

provided.⁵¹ The School monitors progress including annual assessments to measure educational progress prior to revising IEPs.⁵² A range of related services are available and all services are provided based on the specific needs of the student.⁵³ The annual tuition of approximately \$39, 950.00 and related service costs are all set by the SEA.⁵⁴

VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is a preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

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

⁵¹ T of M.G.

⁵² T of M.G.

⁵³ T of M.G.

⁵⁴ T of M.G.

34 C.F.R. § 300.17. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1). In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide education benefits. Suggs v. District of Columbia, 679 F. Supp. 2d 43, 51 (D.D.C.2010). “An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under current educational program, *see Reid v. District of Columbia*, 401 F.3d [516,] 519-20 [(D.C.Cir. 2005)]; the nature and effects of the child's disability have not been adequately monitored, *see Harris v. District of Columbia*, 561 F. Supp. 2d [63,] 68 [(D.D.C. 2008)]; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” Suggs, 679 F. Supp. 2d at 51-52. This line of reasoning is supported by the statute and regulations themselves. The IEP is a living document that, once initially created and consented to, it reviewed “periodically, but not less than annually, to determine whether the annual goals for the child are being achieved[.]” 34 C.F.R. § 300.324(b). The IEP must then be revised to address:

- (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
- (B) The results of any reevaluation conducted under § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
- (D) The child’s anticipated needs; or
- (E) Other matters.

34 C.F.R. § 300.324(b)(2)(ii).

3. In this case, year after year, the Student’s academic achievement in the area of reading failed to progress in any meaningful way. Despite this, the IEP proposed included less interventions rather than more or substantially different interventions or services designed to resolve or

ameliorate the Student's reading difficulties. Simply relying on the Student's functional performance in terms of measuring progress is not sufficient to provide a FAPE to this Student. The Student is not incapable of learning to read, so the Respondent has an obligation to provide services to teach the Student to read, and the IEP in question was not reasonably calculated to do that because it included fewer hours of reading instruction and lacked a specific researched-based reading program of sufficient intensity to help the Student learn to read. Of course, reading is an essential skill for academic achievement and success in life. Sufficient information was available to the Respondent to understand the Student's reading needs. achievement in writing is also an issue and not adequately addressed by any specific services. Because the IEP revised in April 2013 failed to adequately address these academic needs, it was not reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum and denied the Student a FAPE.⁵⁵

4. The Petitioners are seeking, as a remedy to the denial of FAPE, placement of the Student in a Non-public Special Education Day School. When considering prospective nonpublic placement as a remedy, the following factors must be considered: a) the nature and severity of the Student's disability; b) the Student's specialized educational needs; c) the link between those needs and the services offered by the private school; d) the reasonableness of the

⁵⁵ School staff testified that expectations for the Student would be lower in any sort of pull-out or other segregated setting, indicating a fundamental flaw in the Respondent's delivery of special education, an equitable consideration in this case. While education in the regular education setting is preferred, if possible, a segregated setting should not be hindered by lower expectations. *See, e.g.*: 20 U.S.C. § 1400(c) "(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this title has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities. (4) However, the implementation of this title has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities. (5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;"

placement's cost; and e) the extent to which the placement represents the least restrictive environment. Branham v. District of Columbia, 427 F. 3d 7, 12, (D.C. Cir. 2005).

5. In this case, the Student is starting the seventh grade and has made no significant progress in reading skills. This is a severe problem, but one than can be rectified. The Student's needs in reading and writing can be addressed by the programs provided by the Non-public School. The curriculum is geared toward remediation and also exposes students to grade appropriate content. The cost of the Non-public School is set by the SEA, and is therefore not unreasonable. Due to the Student's significant deficiencies in reading and writing cannot be educated in the mainstream setting with peers currently on grade level, and requires much more intense remediation which can reasonably be provided in the special education day school, and is therefore the LRE for the Student. Even if the Student could be educated in a less restrictive setting, this one factor would not tip the scales against this requested remedy, given the importance of the other factors on ensuring FAPE is provided to the Student over the course of the next year.
6. Procedural errors on behalf of a LEA may lead to a denial of FAPE if, for example, the procedural problem significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child. 34 C.F.R. § 300.513(a)(2)(ii). In this case, the Petitioners argue that the efforts of a Special Education Coordinator (SEC) at their child's school to prepare a defense for a pending due process hearing significantly impeded their opportunity to participate in the decision-making process regarding the provision of a FAPE to their child because those efforts included a request, in their words, to falsify documents. The evidence for this is an email the SEC sent to staff, stating: "As part of our defense, I would like to present a letter from [Student's] specials

teacher in which we would state that [Student] fully participates in all these activities and does not require additional/special assistance.” There is no evidence such a letter was generated. Even if it had, the Petitioners would have to show that the letter was false. Even if the letter were false, it may be difficult to prove that such a letter, prepared for purposes of litigation, significantly impeded their opportunity to participate in the decision-making process regarding the provision of FAPE to their child. Indeed, had a hearing occurred and such a letter been presented, the purpose of that hearing would be, in part, fact-finding with regards to both parties’ positions and evidence. The Petitioners have not shown that the effort on behalf of the SEC, two years ago to prepare a defense to a prior complaint, has significantly impeded their opportunity to participate in the decision-making process regarding the provision of FAPE to their child.

VII. DECISION

1. The Respondent denied the Student a FAPE when it failed to offer or provide with an IEP reasonably calculated to enable to be involved in and make progress in the general education curriculum because it lacks sufficient specialized instruction, based on peer-reviewed research to the extent practicable, in the areas of reading and writing in a small, self-contained, learning environment.
2. The Respondent did not significantly impede the Parents’ opportunity to participate in the decision-making process regarding the provision of FAPE to the Student when the Special Education Coordinator at the Student’s prior school sent a message to staff seeking letters to help the Respondent defend itself against a prior due process complaint.

VIII. ORDER

The Student will be placed and transported to and from the Non-public School, at public expense, for the 2013-2014 school year, starting no later than Monday, September 23, 2013.

IT IS SO ORDERED.



Date: September 11, 2013

Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).