

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

on behalf of,

(DOB Student,
 STARS

Petitioner,

Case No.

Bruce Ryan, Hearing Officer

v.

Hearing: April 24 & 27, 2009

Decided: May 7, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on February 26, 2009, on behalf of a -year old student (the "Student") who resides in the District of Columbia and attends Academy. The complaint was brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations. Petitioner is represented by Fatmata Barrie, Esq., and Respondent District of Columbia Public Schools ("DCPS") is represented by Tanya Chor, Esq., Assistant Attorney General for the District of Columbia.

The complaint alleges that DCPS has failed to provide certain compensatory education agreed to at an August 26, 2008 meeting of the Student's Multi-disciplinary Team ("MDT") – specifically, a laptop computer and related educational software. The compensatory education was determined to be appropriate based on a finding in a January 25, 2008 HOD that DCPS had denied the Student a free appropriate public education ("FAPE").

DCPS filed a Response on March 10, 2009, which admitted that "DCPS had agreed to provide the student with a laptop and software as compensatory education in order to comply with an earlier HOD." DCPS stated that "[a]s of March 3, 2009, the items were available for the person to obtain from 825 N. Capital Street SE Washington DC, Office of Special Education, " and it attached a signed receipt for the items dated March 4, 2009. DCPS further stated that the Student has not been denied a FAPE by any delay in obtaining these items.

A Prehearing Conference ("PHC") was held on March 26, 2009, and a Prehearing Order was issued March 31, 2009, clarifying the issues and requested relief. Five-day disclosures were filed by both parties, and the Due Process Hearing was originally scheduled for April 2, 2009. After convening the hearing on April 2, the parties agreed that Petitioner would amend her

2009 MAY -7 PM 1:53
OSSE
STUDENT HEARING OFFICE

complaint by April 3, DCPS would respond by April 13, a further PHC would be held April 14, and the Due Process Hearing would reconvene on April 24, 2009.

The Due Process Hearing was held in two sessions, on April 24 and 27, 2009. At the hearing, 20 documentary exhibits were submitted by Petitioner (identified as "1" through "20"), and eight documentary exhibits were submitted by DCPS (identified as "DCPS-1" through "DCPS-8"). Following objections by DCPS, -9 and -14 were withdrawn, and 12 and -13 were excluded (objections sustained). All other exhibits were admitted into evidence. Petitioner presented four witnesses – (Parent-Petitioner); (Speech Therapist at (Teacher at and Brandi Reynolds (Expert). DCPS presented two witnesses – Ayorkor Austin (DCPS Compliance Specialist); and Kara Mitchell (OSE Resolution Team).

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

II. ISSUE(S) AND REQUESTED RELIEF

As indicated in the Prehearing Order, and as discussed further at the outset of the Due Process Hearing, the following issue was presented for determination:

Whether DCPS denied the Student a FAPE when it failed timely to provide him the laptop computer and software agreed to by the MDT/IEP team on August 26, 2008?

As relief, Petitioner requests that DCPS be ordered to provide and/or fund (1) the software recommended by Academy as agreed at the 8/26/08 MDT/IEP meeting, (2) a laptop computer that works and that the Student can access, and (3) additional compensatory education for the failure timely to provide the Student with the required educational software and laptop.

III. FINDINGS OF FACT

1. The Student is a -year old resident of the District of Columbia whose date of birth is . The Student resides with his guardian (Petitioner) and attends Academy, where he was placed by DCPS. See -1; Parent Testimony.
2. The Student has been determined eligible for special education and related services as a child with a disability, specifically Mental Retardation ("MR"). He has an Individualized Education Program ("IEP") dated August 26, 2008, which calls for a full-time program outside the general education setting. -2.
3. On January 24, 2008, an HOD was issued finding that DCPS denied the Student a FAPE by failing to evaluate the Student in all areas of suspected disability and by failing to develop an appropriate IEP. -15. The HOD ordered, *inter alia*, that independent evaluations be conducted and that within 15 calendar days of receiving them, DCPS convene an MDT/IEP meeting to review all evaluations, review and revise the IEP as warranted, discuss and determine an appropriate placement, and consider compensatory education. -15, at 6. If the team found compensatory education to be warranted, then DCPS was ordered to "develop an appropriate

Compensatory Education Plan including the appropriate amount of hours, form and format consistent with *Reid*. “ *Id.*”

4. Following receipt of all independent evaluations, an MDT/IEP meeting was convened August 26, 2008. At that meeting, a Compensatory Education Plan was adopted to cover the time period September 2006-February 2008. DCPS-5. The plan awarded the following products and services: “One laptop computer with 2 pieces of instructional software to be identified by within one (1) day. Also One-on-One tutoring 5 hours/week for the School Year 08/09.” *Id.*¹ The meeting notes indicated that the laptop and two software programs should be provided within 60 days. DCPS-7, at p. 4.

5. On August 29, 2008, the Student’s educational advocate (“EA”) submitted to DCPS the documentation from identifying the specific software needed for the Student’s laptop computer, as had been recommended and agreed at the 8/26/08 MDT/IEP meeting. 11.) The software consisted of “Sounds Abound Interactive Software” (Grades PreK-4th) for Reading and “Bradford Arithmetic Software-Grades K-6” for Math. 10.)

6. The Student’s speech pathologist at (Ms. Abrego) testified that she selected these specific programs because they instruct at the Student’s functioning level and that for as long as she has worked with him, he responds when the work is at his functioning level. *See* Abrego Testimony. Ms. Abrego testified that if the Student is forced to work with a program that is above his functioning level (*e.g.*, at his chronological age level), he would “shut down” and would not be able to do the work and, as a result, it would not benefit him. *Id.* *See also* Moore Testimony; Parent Testimony.

7. On September 2, 2008, DCPS Compliance Specialist Ayorkor Austin replied to the EA’s letter, confirming that she was “in receipt of a copy of the software selections made by Academy per the Compensatory Education plan negotiated in the MDT meeting on August 26, 2008.” 20. However, Ms. Austin stated that she “must now challenge and reject the selections as inappropriate” and offered alternatives for consideration. *Id.*; 19 (attached software descriptions, including “Language Arts Review – Advanced Level”). The Student’s EA protested this rejection by letter dated September 9, 2008. 17.

8. Ms. Austin testified at hearing that she rejected the software selected by because (a) the software only went up to the 3^d or 4th grade level, so “wouldn’t serve [the Student] very long,” and (b) she felt the Student would suffer “low self-esteem” by getting software meant for young children. Austin Testimony. Ms. Austin conceded that the concern regarding low self-esteem was “not specific to [the Student],” but was just regarding a “child in general.” *Id.* She has never met the Student, never taught the Student, and never performed any assessments with regard to the type of instructional software needed by the Student. *Id.* (cross examination).²

¹ There is no issue in this case regarding DCPS’ provision of the tutoring services agreed to at the 8/26/08 MDT meeting.

² Ms. Austin testified that she thought there was other software that “catered to a broader range of students and grade/age ranges,” including the software DCPS ultimately selected. Austin Testimony. The software preferred by DCPS “catered to K-12” so that “as he improved the software would serve him up to the 12th grade level.” *Id.* Ms. Austin testified that she relied upon this “potential for greater longevity” even though the Student was years old and was admittedly reading at no higher than the 1st or 2^d grade level. *Id.*

9. At the time the original complaint in this case was filed, on February 26, 2009, DCPS had not provided the Student with a laptop computer and two pieces of educational software, as agreed at the 8/26/08 MDT/IEP meeting. *See* [redacted] 1; Parent Testimony. The parent and/or the educational advocate attempted to follow up with DCPS several times following the 8/26/08 MDT meeting, without success. *See* Parent Testimony.

10. Subsequent to the filing of the complaint, on or about March 4, 2009, DCPS issued a laptop computer to Petitioner. DCPS-I, p. 6. The laptop computer contained two pieces of software, called "Words and Concepts I" and "Math Blaster." *Id.* This software was provided without the benefit of any input from [redacted] or Petitioner. According to DCPS' own testimony, it was selected by Mr. Ron Jenkins (a DCPS official responsible for providing assistive technology to DCPS students) and discussed with Ms. Kara Mitchell (OSE Resolution Team) on or about March 3, 2009. *See* Mitchell Testimony. Ms. Mitchell was not even aware that [redacted] had recommended or selected different software until April 23, 2009. *Id.*

11. The laptop computer issued to Petitioner on March 4, 2009, did not operate properly, and the software provided with it was not the software that had been recommended and identified by [redacted]. *See* Parent Testimony; Mitchell Testimony.

12. The different software provided by DCPS is not appropriate to address the Student's specific needs because it is too advanced for his present level of academic functioning in reading and math. *See* Arego Testimony; Moore Testimony; Reynolds Testimony.

13. In reading, the Student is currently performing at the Kindergarten to 1st Grade level; he does not yet have the "phonemic awareness skills" that are the basis of successful reading; and is in need of a program that teaches "very basic pre-reading skills" in order for him to make progress. Arego Testimony. The reading software provided by DCPS is "way beyond where [the Student] was in August 2008 and where he is now," according to Ms. Arego, who has worked with him since early 2008 when he arrived at [redacted]. *Id.*

14. In math, the Student is also functioning at a "very low level" (Moore Testimony), not much higher than his reading level (*i.e.*, appx. 1st 2^d Grade). *See* [redacted]-3, p. 3 (math scores in 5/26/08 IEP). The Student recognizes numbers, but he cannot perform basic addition and subtraction calculations. *See, e.g.*, Moore Testimony. The more "age-appropriate" software provided by DCPS does not address the Student's current level of functioning, according to his teacher and math tutor. *See* Moore Testimony; Parent Testimony.

15. The laptop computer and software provided by DCPS are currently of no benefit to the Student as he is not able to access them. *Id.*

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see also* *Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to evaluate and failures to develop an appropriate IEP.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.3. The standard generally is preponderance of the evidence. See, e.g., *N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

B. Issue(s)/Alleged Violations by DCPS

Whether DCPS denied the Student a FAPE when it failed timely to provide him the laptop computer and software agreed to by the MDT/IEP team on August 26, 2008?

3. Petitioner claims that DCPS has failed to provide the Student with the appropriate computer laptop and software agreed to at the 8/26/08 MDT meeting in a timely manner, and that such failure constitutes a denial of FAPE. For the reasons discussed below, the Hearing Officer concludes that Petitioner has carried her burden of proving this claim by a preponderance of the evidence.

4. The testimony and other evidence demonstrated that DCPS agreed on 8/26/08 to provide a laptop computer with two pieces of instructional software to be identified by Academy; that the assistive technology was to be provided within 60 days; that identified the needed software by 8/29/08; that DCPS rejected the software selected by without valid reason or justification; that DCPS failed to provide any laptop computer or software for over six months, until after Petitioner filed this complaint; and that when DCPS finally did provide assistive technology in early March 2009, it failed to include the agreed, appropriate software, and the computer did not operate properly. See *Findings of Fact*.

5. Since the MDT developed the compensatory education plan in response to the prior HOD, it became part of the Student's IEP. Moreover, the record shows that DCPS' rejection of the instructional software selected by Academy was not based on the unique needs of the Student, but rather primarily on his chronological age as well as concerns regarding low self-esteem that were admittedly not specific to the Student.

6. Accordingly, DCPS' failure to provide the Student with an operating laptop computer containing the instructional software selected by , as agreed to at the 8/26/08 MDT/IEP meeting, constitutes a substantive denial of FAPE. See, e.g., *D.W. v. District of Columbia*, 561 F. Supp. 2d 56 (D.D.C. 2008) ("failure to respond effectively to an order of compensatory education is not subject to analysis under the substantive-procedural dichotomy"; and "current failure to provide [him] with compensatory education threatens his prospects of success under IDEA and therefore constitutes a substantive violation.").

7. The time period in which DCPS' denial of FAPE has occurred in this regard runs from approximately October 25, 2009 (*i.e.*, 60 days following the 8/26/08 MDT meeting) to the present.

C. Relief

8. The IDEA authorizes district courts and hearing officers to fashion "appropriate" relief, e.g., 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d at 521-23 (D.C. Cir. 2005).

9. Appropriate equitable relief may include 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.'" *Reid*, 401 F. 3d at 521 (quotations omitted). "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." 401 F.3d at 524. *See also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

10. With respect to compensatory education, Petitioner presented expert testimony to support a request of an additional 160 hours of one-to-one tutoring in the areas of reading and math. The expert (Ms. Reynolds)³ testified that she developed the proposed compensatory education plan for the Student based on the "amount of time he lost" from not having the benefit of the laptop and instructional software, which she estimated to be "about four months" at the time she developed the plan. (Reynolds Testimony.) She stated that he should receive approximately 10 hours per week for 16 weeks (*i.e.*, a total of 160 hours) to make up for this lost benefit. *Id.*

11. As DCPS counsel correctly points out in her written closing statement, this evidence appears to fall short of the "fact-specific exercise" demanded by *Reid* in that it does not appear to demonstrate with particularity either (a) the educational benefits that likely would have accrued from the appropriate assistive technology having been provided to the Student back in October 2008, or (b) how the additional tutoring is reasonably calculated to provide these missing benefits. Accordingly, the Hearing Officer concludes that the present record is inadequate to support a fact-specific award of additional compensatory education for the period in which DCPS has unfortunately delayed providing the required assistive technology to the Student.

12. The Hearing Officer has exercised his discretion to fashion otherwise appropriate equitable relief, based on the record developed in this proceeding and the violation adjudicated herein. It appears from the record that Petitioner's filing of the complaint in this matter is what finally led to DCPS' acting on the long-outstanding and unfulfilled 8/26/08 compensatory education plan. The Order set forth below directs DCPS **within 10 school days** to provide a new computer laptop in good working order and containing the two specific software programs originally selected by _____ on August 29, 2008.

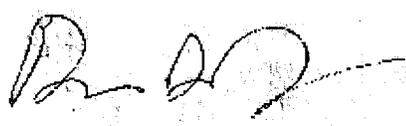
³ Ms. Reynolds hold a Master of Arts degree in Counseling Psychology from Bowie State University, served as a special education teacher for several years, has utilized various educational software with special education students, has developed over a dozen compensatory education plans, and currently provides psycho-educational assessments. *See* 16; Reynolds Testimony.

V. ORDER

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

1. Within **10 school days** of this Order (*i.e.*, by approximately **May 21, 2009**), DCPS shall provide to Petitioner for the benefit of the Student a new computer laptop, in good working order, which contains the following two pieces of instructional software previously selected by Academy on or about August 29, 2008: (a) "Sounds Abound Interactive Software" (Grades PreK-4th) for reading instruction; and (b) "Bradford Arithmetic Software-Grades K-6" for math instruction. At the same time, DCPS may obtain the return of the laptop computer and software issued to Petitioner on or about March 4, 2009.
2. To the extent either of the instructional software programs identified above is no longer immediately available, any reasonably comparable current software may be substituted, but only to the extent specifically agreed to in writing by Petitioner and Academy.
3. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Fatmata Barrie, Esq., via facsimile (202-626-0048), or via email (fbarrie@verizon.net).
4. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's representatives shall extend the deadlines by the number of days attributable to such delay.
5. This case shall be, and hereby is, **CLOSED**.

Dated: May 7, 2009


/s/

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to 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 U.S.C. §1415(i)(2).