

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Date: 1/30/20
)	Hearing Officer: Michael S. Lazan
)	Case No. 2019-0283
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with a Specific Learning Disability (the “Student”). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on November 15, 2019. The Complaint was filed by the Student’s parent (“Petitioner”). On November 25, 2019, Respondent filed a response. A resolution meeting was held on November 26, 2019. The resolution period expired on December 15, 2019.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

¹Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

III. Procedural History

A prehearing conference was held on December 19, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on December 27, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The Hearing Officer Determination (“HOD”) due date was February 10, 2020.

On January 24, 2020, Respondent filed a consent motion for a continuance to extend the timelines for the decision. As a result, a continuance order was issued on January 29, 2020, extending the timelines for the decision to February 10, 2020. The hearing proceeded on January 30, 2020. Petitioner was again represented by Attorney A, Esq. Respondent was again represented by Attorney B, Esq. After testimony, closing arguments were presented. This was a closed proceeding. During the proceeding, Petitioner moved into evidence exhibits 1-34. Respondent objected to exhibits 8, 10-17, 19, and 30-34. Objections were sustained (or the documents were withdrawn) in regard to exhibits 10-14 and 30-33. All other objections were overruled. Exhibits 1-9, 15-29, and 34 were admitted. Respondent moved into evidence exhibits 1-7. There were no objections. Exhibits 1-7 were admitted. Petitioner presented as witnesses: herself and Witness A, an advocate (expert: special education programming). Respondent presented as witnesses: Witness B, a teacher and Local Educational Agency (“LEA”) representative; and Witness C, a compliance case manager.

IV. Issues

As identified in the Prehearing Conference Summary and Order and in the Complaint, the issues to be determined in this case are as follows:

1. Did DCPS fail to implement the Student’s previous Individualized Education Program (“IEP”) or create its own IEP upon the Student’s entry into DCPS in or about August, 2019? If so, did DCPS violate 34 C.F.R. Sect. 300.323(a), 34 C.F.R. Sect.300.323(e), and related provisions? If so, did DCPS deny the Student a Free Appropriate Public Education (“FAPE”)?

2. Did DCPS violate “Child Find” when it failed to identify, locate, and evaluate the Student upon his/her entry into DCPS in or about August, 2019? If so, did DCPS violate 20 U.S.C. Sect. 1412(a)(3)(A), 34 C.F.R. Sect. 300.111(a), and related provisions? If so, did DCPS deny the Student a FAPE?

V. Findings of Fact

1. The Student is eligible for services as a student with a Specific Learning Disability and attends School B, a DCPS public school. The Student is currently in Z grade. The Student is below average cognitively. Cognitive testing of the Student in September, 2019, revealed that the Student has a Full Scale IQ of 78. This score represents a decrease from cognitive testing in April, 2017, which found the Student to have a Full Scale IQ of 84. The Student’s reading and writing skills are reliably estimated to be at the kindergarten-first grade level, and the Student’s mathematics skills have recently been determined to be at the first grade level. In the last two school years, the Student has experienced behavioral issues in school. To gain consistent benefit from academic instruction, the Student requires intensive academic support, provided by teachers who are specially trained to instruct disabled children. P-20; Testimony of Witness A; Testimony of Witness B.

2. The Student can solve basic addition and subtraction problems but struggles with any task involving reading. The Student can read “some” kindergarten level words. The Student can be resistant to writing, and when the Student does write, s/he frequently writes letters incorrectly or backwards. P-5.

3. For the 2018-2019 school year, the Student attended School A PCS. An amended IEP was created for the Student by School A PCS on December 14, 2018. This IEP indicated that the Student was required to receive twenty-seven hours of specialized instruction per week outside general education with no related services. Goals were written for the Student in mathematics, reading, and written expression. P-9.

4. During the 2018-2019 school year at School A PCS, the Student was enrolled in self-contained special education classes for academic subjects. The Student was able to make some progress while at School A PCS during this school year. However, the Student did not make “consistent” progress, as reflected by the Student’s grades. For the first term, the Student received the lowest grade score (a grade of “1”) in both reading and mathematics, though the Student did receive a grade of “3” in writing. For the second term, the Student received a grade of “1” in reading, mathematics, and writing. During this time, the Student engaged in frequent behavioral incidents in class, including incidents concerning disrespect and confrontation with staff and peers. P-17; P-18; Testimony of Witness A.

5. The Student’s IEP was revised by School A PCS on May 20, 2019. This IEP again recommended goals in mathematics, reading, and written expression and twenty-seven hours of specialized instruction per week outside general education, without related services. This IEP indicated that the Student could count to 150 and solve simple addition and subtraction problems, but was not “fluent” in either addition or subtraction. It also mentioned that the Student struggled with any task involving reading, and that the Student’s grades had improved in mathematics, indicating some progress. P-5.

6. After the 2018-2019 school year, the Student enrolled at DCPS and was assigned to School B. During the summer of 2019, Petitioner went to School B and told the school staff that the Student required specialized instruction. Testimony of Petitioner; Testimony of Witness A.

7. The Student began attending School B in the 2019-2020 school year and was placed in general education classes, except for five hours per week of specialized instruction outside general education. Petitioner and representatives from School B met on or about September 4, 2019, and again several days later, to discuss the Student's educational program. Representatives of the school told Petitioner that School B could not implement the Student's existing IEP from School A PCS, expressed some doubt about the need for such a large mandate of services, and indicated that school staff wanted to evaluate the Student. Petitioner agreed to this evaluation. Testimony of Petitioner; Testimony of Witness A; Testimony of Witness B; P-25.

8. The Student immediately had difficulty at School B during the 2019-2020 school year. In particular, the Student was not able to benefit meaningfully from the instruction in most of his/her general classes because of his/her relative inability to read and write. As a result, the Student got frustrated with academics, which resulted in the Student "fidgeting" and/or withdrawing from peers and adults. The Student's teachers noticed his/her behavioral issues and made several phone calls to Petitioner at her home to discuss the Student's behavior in class. Testimony of Petitioner; 28-3.

9. A psychoeducational evaluation of the Student was conducted by a DCPS psychologist on September 19, 2019. The psychologist's report, dated September 30, 2019, included information about the observation, the Student interview, a parent

interview, teacher interviews, testing on the Wechsler Intelligence Scale for Children-Fifth Edition (“WISC-V”), and testing on the Woodcock-Johnson Tests of Achievement-Fourth Edition, Form A (“WJ-IV”). In the report, the psychologist stated that one of the Student’s general education teachers indicated that the Student “makes an effort” but did not understand the material, particularly in reading and writing. Another general education teacher indicated to the psychologist that the Student did little in class, was often off-task, and appeared to have “very low” skills. The Student’s special education teacher indicated to the psychologist that the Student’s academic levels were “very low” and that the Student could read only “some” words. This teacher also indicated that the Student did not participate much in reading, though the Student’s participation was better in mathematics, where the Student was able to work independently. This teacher linked the Student’s behaviors in class to the Student’s academic difficulties. Testing confirmed that the Student was functioning well below grade level. On the WJ-IV, in broad reading, the Student’s “standard score” was 40, at the K.4 level, in the very low range. In mathematics, the Student’s standard score was 70, at the 2.5 grade level, in the low range. In broad written expression, the Student’s standard score was 58, at the 1.5 grade level, in the very low range. The psychologist also compiled the answers to questionnaires that were sent to the Student’s teachers per the Behavior Assessment System for Children-3 (“BASC-3”). One of the Student’s teachers indicated that the Student had “clinically significant” issues with respect to hyperactivity, aggression, conduct problems, depression, attention problems, learning problems, atypicality, withdrawal, adaptive skills, social skills, leadership, study skills, functional communication, anger control, bullying, developmental social disorders, emotional self-control, executive functioning,

negative emotionality, and resiliency. A mathematics teacher, on the other hand, found that the Student had “clinically significant” issues in learning problems only (with “at-risk” issues with respect to attention problems). P-20; Testimony of Witness B.

10. In or about November, 2019, DCPS representatives attempted to conduct meetings with Petitioner and her lawyer to review the Student’s evaluations and draft IEP goals, among other things. Petitioner cancelled at least one of the scheduled dates to meet with Respondent. Testimony of Witness B; R-6.

11. On or about November 26, 2019, the parties met in a resolution meeting with respect to the instant litigation. At this meeting, the Student’s mathematics teacher indicated that the Student was at a first grade level in mathematics, which represented a decline from the Student’s level at School A PCS. After the resolution meeting ended, an IEP meeting commenced at the request of Respondent. At this IEP meeting, Respondent offered the Student twenty hours of specialized instruction per week. Testimony of Witness A; Testimony of Witness B; Testimony of Witness C; P-22; P-23.

12. A draft IEP was written for the Student on November 26, 2019. This IEP contained much of the same information that was written by School A PCS in the IEP of May 20, 2019, except that it recommended that the Student receive twenty hours of specialized instruction instead of twenty-seven hours. The IEP also recommended “Other Classroom Aids and Services” including modified promotional criteria, use of a computer, breaks, graphic organizers, and the use of teacher-created notes. This IEP was finalized on December 4, 2019. P-5; Testimony of Witness B.

13. On or about January 14, 2020, Respondent proposed to place the Student at School C, which can implement the Student’s DCPS IEP. Respondent also sought to

schedule a meeting with Petitioner to provide Petitioner with additional information about the school. However, Petitioner told the school staff that she was not interested in School C. Later in January, 2020, Respondent offered to place the Student at another school, School D. Testimony of Witness B; Testimony of Witness C.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the District of Columbia Special Education Student Rights Act of 2014, which states that “(w)here there is a dispute about the appropriateness of the child’s individual educational program or placement, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement” provided that the party requesting the due process hearing establishes “a prima facie case.” D.C. Code Sect. 38-2571.03(6)(A)(i).

As explained by United States District Court Chief Judge Beryl Howell in the comprehensive decision Eley v. District of Columbia, 47 F. Supp. 3d 1 (D.D.C. 2014), citing to Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cty., Ill. v. Illinois State Bd. of Educ., 103 F.3d 545, 548 (7th Cir. 1996), an “educational placement” falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP. Judge Howell also explained that “the location where educational services are to be implemented is a vital portion of a student's educational placement.” Id. at 16. Accordingly, where a parent contends that a student’s current (or, “existing”) school is not appropriately implementing the student’s IEP, the parent is also contending that the student’s “existing” placement is inappropriate. The burden for Issue #1, therefore, must be on Respondent, provided that Petitioner presents a prima facie case.

Issue #2 does not directly relate to the appropriateness of the Student's program or placement. As a result, on Issue #2, the burden of persuasion must be on Petitioner.

Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS fail to implement the Student's previous IEP or create its own IEP upon the Student's entry into DCPS in or about August, 2019? If so, did DCPS violate 34 CFR 300.323(a), 34 C.F.R. Sect. 300.323(e), and related provisions? If so, did DCPS deny the Student a FAPE?

Petitioner contended that School B improperly failed to implement the Student's IEP of May 20, 2019, which was created at School A PCS during the 2018-2019 school year. DCPS contended that the IDEA gives it a choice on how to address the issue of students who transfer into an LEA during the summer. DCPS argued that the IDEA allows an LEA either to adopt a student's prior IEP or develop its own IEP for that student. DCPS's contention is accurate; an LEA has discretion to decide whether it is necessary to convene an IEP team *before the first day of school* for a student who has moved to a new LEA over the summer break. Letter to Siegel, 74 IDELR 23 (OSEP 2019). If an LEA convenes an IEP team over the summer and develops an appropriate IEP for a student, it may disregard the requirements of the IEP that was created by the student's former LEA.

Respondent, however, did not decide to develop a new IEP for the Student during the summer of 2019, even though there is undisputed testimony from Petitioner that she notified DCPS about the Student's extensive specialized instruction needs over the summer. Respondent was therefore obliged to implement the Student's previous IEP, even though it was created at a different LEA and even if DCPS might have disagreed with it. 34 C.F.R. Sect. 300.323(a) (at the beginning of each school year, each public agency must have an IEP in effect for each child with a disability within its jurisdiction);

Ute Pass Bd. of Coop. Educ. Servs., 114 LRP 31981 (SEA CO 06/11/14) (new LEA should have implemented the IEP from the prior LEA as written until it could convene an IEP meeting with the parents to determine whether the student remained eligible for special education and related services); cf. Eagle Mountain-Saginaw Independent School District, 60 IDELR 178 (SEA TX 2012) (because the IEP of a student with autism and an intellectual disability who had moved to the LEA over the summer was not set to expire for several months, the district did not err in implementing it over parent's objections).

Accordingly, DCPS had an obligation to provide the Student with twenty-seven hours of specialized instruction per week outside general education at the start of the 2019-2020 school year. Instead, the Student received five hours of specialized instruction outside general education per week at School B. This reduction amounts to a decrease of more than 81% of the Student's specialized instruction hours, which must be considered a "substantial," "significant," and "material" cut in hours. Compare Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was in the IEP); see also Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007); Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007).²

²Courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. Garmany v. Dist. of Columbia, 935 F. Supp. 2d 177, 181 (D.D.C. 2013). Courts have held that the standard for determining whether there has been a denial of FAPE is not whether a student has suffered educational harm. Wilson v. District of Columbia, 770 F. Supp. 2d 270 (D.D.C. 2011) (FAPE denial even where a student made academic progress despite the LEA's material failure to implement part of the student's IEP).

Parenthetically, the record strongly suggests that the absence of appropriate services had an adverse impact on the Student. In mathematics, recent testing indicated that the Student was functioning at the first grade level, a decline from the Student's mathematics level as determined by School A PCS. Moreover, the Student's teachers indicated that the Student was not benefitting at all from reading or writing lessons. One teacher stated that the Student did not understand the material in class, particularly in reading and writing. Another general education teacher indicated that the Student did little in class, was often off-task, and appeared to have "very low" skills. Likewise, the Student's special education teacher indicated that the Student's academic levels were very low.

DCPS contended that Petitioner did not cooperate with DCPS's efforts to schedule meetings in November, 2019, suggesting that the gap in services was Petitioner's fault. While Petitioner could have been more cooperative in scheduling meetings in November, 2019, there was no showing that the brief delay in scheduling the Student's IEP meeting in November, 2019, was the cause of the delay in Respondent's placement offer to the Student. In fact, even after the creation of the Student's IEP in November, 2019, DCPS took until January 14, 2020, well over a month later, to offer the Student a placement at School C. The Student was denied a FAPE by DCPS's failure to implement the Student's IEPs from the start of the 2019-2020 school year through to January 14, 2020.

2. Did DCPS violate "Child Find" when it failed to identify, locate, and evaluate the Student upon his/her entry into DCPS in or about August, 2019? If so, did DCPS violate 20 U.S.C. 1412(a)(3)(A), 34 C.F.R. 300.111(a), and related provisions? If so, did DCPS deny the Student a FAPE?

The Child Find provisions of the IDEA require each state to have policies and procedures in effect to ensure that “[a]ll children with disabilities residing in the State... who are in need of special education and related services, are identified, located, and evaluated.” 20 U.S.C. Sect. 1412(a)(3)(A); 34 C.F.R. Sect. 300.111(a). Child Find must include any child suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. Sect. 300.111(c)(1); Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008).

Petitioner did not clearly mention this issue during closing argument, very likely because she realized that the Student had already been identified, located, and evaluated by School A PCS prior to the Student’s transfer to DCPS. Indeed, the record indicates that the Student was determined to be eligible for services as a student with a Specific Learning Disability per the identification, location, and evaluation of the Student by School A PCS going back to at least the 2017-2018 school year. There has been no subsequent determination by School A PCS or DCPS that the Student is no longer eligible for services, and there is no authority to suggest that the transfer between School A PCS and DCPS somehow affected the Student’s status under the IDEA. This claim must be dismissed.

RELIEF

When a hearing officer concludes that a school district has failed to provide a student with a FAPE, s/he has “broad discretion to fashion an appropriate remedy,” which can include compensatory education. B.D. v. District of Columbia, 817 F.3d 792, 797–98 (D.C. Cir. 2016) (quoting Boose v. District of Columbia, 786 F.3d 1054, 1056

(D.C. Cir. 2015)). 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 521-23. An award of compensatory education aims to put a student in the position s/he would have been in absent the FAPE denial and “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.” B.D., 817 F.3d at 797-798 (quoting Reid, 401 F.3d at 524). The District of Columbia Circuit Court of Appeals has “explicitly disavowed” compensatory education in the form of “cookie-cutter” lump-sum awards when the hearing officer does not explain how the remedy is tailored to provide the services the student was denied. Branham v. District of Columbia, 427 F.3d at 7, 11 (D.C. Cir. 2005). Moreover, the court emphasized that, in determining the “complicated work” of fashioning such a remedy, the hearing officer should play close attention to the question of assessment. B.D., 817 F.3d at 800.

Petitioner seeks compensatory education, submitting a report from an expert in special education programming who recommended 230 hours of independent academic tutoring as a result of the FAPE deprivation from August, 2019, to the present.³ This expert, Witness A, conducted a review of, among other things, the Student’s recent IEPs, progress reports, and evaluations. Witness A also testified at the hearing in support of her proposal, arguing that the Student made academic progress when s/he received

³Petitioner’s closing argument did not reference any of the other relief requested in the Complaint or referenced in the prehearing order. Accordingly, it is assumed that Petitioner is no longer seeking any such relief. Moreover, a review of the record indicates that the requested relief, in particular the request for a school that can implement the Student’s current IEP, is not necessary because Respondent has proposed two schools that can implement the current IEP.

twenty-seven hours of specialized instruction per week outside general education at School A PCS, and that if the Student had received the same level of services at School B from August, 2019, to January 23, 2020, the Student would have made meaningful progress in reading, writing, and mathematics. Witness A referenced research from the “Council for Exceptional Children,” which suggested that intense tutoring is the appropriate remedial measure where children like the Student are denied a FAPE.

There is no contrary testimony or report in the record. Witness A’s proposal of 230 hours of academic tutoring for the Student is considerably less than the approximately 400 hours of specialized instruction the Student was due between August, 2019, and January, 2020. Witness A correctly acknowledged that there need not be a 1:1 correlation between the requested relief and the period of harm. It is again noted that the Student received little benefit from his/her academic classes at School B during the 2019-2020 school year. The Student’s reading level continues to be at the kindergarten level despite years of school. Moreover, as previously discussed, the Student’s academic level in mathematics has decreased as a result of the lack of appropriate mathematics instruction during the 2019-2020 school year. The DCPS psychologist who recently evaluated the Student summed it up by stating that the Student is “lost” academically.

Accordingly, Petitioner’s proposed award is appropriate, except that Witness A indicated that the end date for the period of FAPE denial should be January 23, 2020. DCPS offered a school that could implement the Student’s current IEP on January 14, 2019. As a result, the award of compensatory academic services for the Student will be adjusted from Witness A’s calculation of 230 hours of 1:1 academic tutoring to 215 hours

of 1:1 academic tutoring, to be provided by a licensed special education teacher at a reasonable and customary rate in the community.

VII. Order

As a result of the foregoing, the following is hereby ordered:

1. Respondent shall pay for 215 hours of 1:1 academic tutoring for the Student, to be provided by a certified special education teacher, at a rate that is usual and customary in the community;
2. All services shall be used by February 10, 2021;
3. Petitioner's other requests for relief are denied.

Dated: February 10, 2020

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Petitioner's Representative: Attorney A, Esq.
Respondent's Representative: Attorney B, Esq.
OSSE Division of Specialized Education
[REDACTED]/DCPS
[REDACTED]/DCPS

VIII. Notice of Appeal Rights

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 Sect 1415(i).

Dated: February 10, 2020

Michael Lazan
Impartial Hearing Officer