

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on January 15, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student _____ resides with her foster parent (“parent”). The student has a Court appointed Guardian Ad Litem (“GAL”) and an Educational Attorney and a Social Worker. The student is eligible a child with a disability pursuant to IDEA with a disability classification of multiple disabilities (“MD”). The student has a number of medical conditions including cerebral palsy and cortical visual impairment (“CVI”). She is considered medically fragile; she does not walk or speak.

DCPS Early STAGES developed the student’s initial individualized educational program (“IEP”) for the student on August 21, 2012, as the student was transitioning to DCPS from a private pre-school program (“School A”). The student attended a self-contained special education program located in a DCPS elementary school (“School B”) for school year (“SY”) 2012-2013.

DCPS convened an IEP meeting for the student on March 20, 2013, at which the student’s services were discussed including the parent’s request that the student have an aide in the classroom. The team discussed, inter alia, whether the student should continue at School B and concluded the student would remain at School B for the remainder of SY 2012-2013 but would attend a newly created program at another DCPS school (“School C”) for SY 2013-2014. The student was provided extended school year (“ESY”) services during Summer 2013. ESY was located a different DCPS school other than School B or School C. At the start of SY 2013-2014 the student began attending the new program at School C specifically designed for students who are considered medically fragile.

On October 28, 2013, Petitioner filed the due process complaint asserting DCPS denied the student a free and appropriate public education (“FAPE”) by allegedly failing to provide her all required services pursuant to her IEP during SY 2012-2013 at School B, during ESY and allegedly failing to provide physical therapy (“PT”) services required by her IEP from the start of SY 2013-2014 until November 2014 at School C. Petitioner seeks as relief an order awarding compensatory education for failure to provide the student all required services and a dedicated aide and ordering DCPS to assign a dedicated aide until the student’s progress can be reviewed at an IEP review meeting and to provide CVI as a related service.

DCPS filed a response to the complaint on November 12, 2013. DCPS denied any alleged denial of a FAPE. A resolution meeting was held November 19, 2013. The issues were not resolved. The parties did not mutually agree to proceed directly to hearing. The 45-day period began on November 28, 2013, and originally ended (and the Hearing Officer's Determination ("HOD") was due) on January 11, 2014. Petitioner requested and was granted a continuance and extension of the HOD due date for seven days. Thus, the HOD is due January 18, 2014. A pre-hearing conference was held on December 23, 2013, and a pre-hearing conference order was issued January 2, 2014, outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to provide CVI services during the SY 2012-2013 as prescribed in the student's 8/21/2012 IEP.
2. Whether DCPS denied the student a FAPE by failing to provide a dedicated aide (as allegedly promised at the 3/20/13 IEP meeting) from 3/21/13 through the end of ESY 2013.
3. Whether DCPS denied the student a FAPE by failing to provide all services in the manner specified by the IEP during ESY 2013 by (a) not administering the student's medication (b) not providing the required adaptive furniture, (c) not providing the full amount of related services as prescribed in the student's IEP: physical therapy ("PT"), and/or occupational therapy ("OT"), and/or speech and language services ("S/L").
4. Whether DCPS denied the student a FAPE by failing to provide PT services from the start of SY 2013-2014 until November 2013 at School C

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 11 and Respondent's Exhibits 1 through 9) that were admitted into the record and are listed in Appendix A

FINDINGS OF FACT:³

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

³ The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

1. The student is _____ with her parent. The student is eligible a child with a disability pursuant to IDEA with a MD disability classification. The student has a number of medical conditions including cerebral palsy and CVI and is considered medically fragile. She does not walk or speak. (Parent's testimony, Respondent's Exhibit 3-1, Petitioner's Exhibits 3-1, 11-1)
2. The student first attended school at School A from 2010 and continued there until the end of SY 2011-2012. (Witness 1's testimony)
3. At School A the student was provided pull-out vision services of 1 hour per week and the vision services provider regularly consulted with the student's classroom teacher at School A as to routines to be provided in the classroom to support the student's vision. (Witness 2's testimony)
4. DCPS Early STAGES developed the student's initial IEP on August 21, 2012, as the student was transitioning to DCPS from School A. The IEP prescribed the following services outside general education: 24 hours per week of specialized instruction (to address global delays), 4 hours per month (to address CVI), 2 hours per month of OT services, 4 hours per month of S/L and 4 hours per month of PT. (Respondent's Exhibit 3-7, 3-8)
5. On July 31, 2012 DCPS conducted an observation of the student to assess her vision. The evaluator recommended interventions to assist in developing the student's visual functioning of four times per month for 1 hour per session to build consistent visual behavior. The evaluator recommended that the IEP team work with a "Teacher of the Visually Impaired" to develop specific interventions to address the student's CVI related needs. The evaluator suggested goals that were incorporated into the student's IEP and resulted in three goals related to her vision under the area of Adaptive/Daily Living Skills. (Petitioner's Exhibit 3-1, 3-7, 3-8, Respondent's Exhibit 3-2, 3-3)
6. The student's initial IEP and prescribed goals in the following areas: (1) Adaptive / Daily Living Skills, (2) Communication / Speech & Language, (3) Health / Physical, (4) Motor Skills / Physical Development. (Respondent's Exhibit 3-2, 3-3, 3-4, 3-5, 3-6)
7. The student attended a self-contained special education program located at School B for school SY 2012-2013. (Parent's testimony)
8. The student's private social worker often visited the student's classroom at School B and spoke with her classroom teacher. The teacher expressed to the social worker on at least one occasion that the teacher was not aware that the student should be provided vision services and no vision service provider from DCPS had ever consulted with the teacher about vision services to be provided to the student. (Witness 2's testimony)
9. DCPS did not provide the student CVI services during the SY 2012-2013 as prescribed in the student's 8/21/2012, IEP. (Witness 2's testimony)

10. DCPS convened an IEP meeting for the student on March 20, 2013, at which the student's services were discussed including the parent's request that the student have an aide in the classroom. The student's parent, attorney and social worker participated in the meeting along with DCPS personnel. (Witness 4's testimony, Respondent's Exhibit 4)
11. School B had also requested that DCPS conduct a least restrictive environment ("LRE") assessment to determine if School B was an appropriate location for the student. That assessment was conducted and at the March 20, 2013, meeting it was determined the student would remain at School B with the addition of another instructional aide in the classroom to help support the student's needs. However, the additional aide was not dedicated solely to the student and the student's IEP was not amended to include a dedicate aide. (Witness 4's testimony, Petitioner's Exhibit 5-1, Respondent's Exhibit 5-9)
12. At the meeting in March 2013, meeting the DCPS representative stated that the student would be attending a different program for the next school year. She described a classroom for medically fragile children where the student would not need an aide. (Parent's testimony)
13. At the March 2013 meeting the team discussed the student's schedule that the additional aide would help administer. The student social worker later visited the classroom after the meeting and observed that there was an additional aide in the classroom. (Witness 2's testimony, Petitioner's Exhibit 4)
14. As a result of the March 20, 2013, meeting the student's IEP was amended and is dated May 9, 2013. The services prescribed in the IEP were changed as follows: 24 hours per week of specialized instruction (to address global delays), 50 minutes per month (to address global delays), 3 hours per month of OT services, 30 minutes per month of S/L and 4 hours per month of PT. The student's OT and PT services were increased by 1 hour each per month, her S/L services were reduced from 4 hours per month to 30 minutes and the second category of specialized instruction was changed from 4 hours per month to 50 minutes per week and the justification column in the LRE section of the IEP did not reference the student's CVI. The IEP does not prescribe a dedicated aide. The IEP in the classroom accommodations section indicates that that adaptive or special furniture is needed but the specific equipment is not named. (Respondent's Exhibit 5-1, 5-9, 5-10, 5-11)
15. The May 9, 2013, IEP also prescribed services and goals for ESY to provided for four weeks from July 8, 2013, to August 2, 2013. There were seven goals delineated in the following areas (1) Communication / Speech & Language, (2) Heath / Physical, (3) Motor Skills / Physical Development. The related services that were to be provided were as follows: 1 hour of S/L per week, 30 minutes of PT per week and 30 minutes of OT per week. (Respondent's Exhibit 5-12, 5-13)

16. The student was provided ESY services during Summer 2013. ESY was not held at School B or School C, but a different DCPS school. During the time the student attended ESY the student's parent visited once. The staff were not certain how to address the student's needs and asked the parent to bring in a piece of equipment to allow the student to be removed from her wheel chair and sit up. The next school day, however, the school staff had obtained the needed piece of equipment. (Parent's testimony)
17. During ESY the student was provided the following services: 2 hours of S/L out of the 4 hours prescribed. The student was not available the first week of ESY and service provider was not available the second week. (Respondent's Exhibits 6-1, 7-1)
18. During ESY the student was provided all the prescribed OT services: four 30 minutes sessions. (Respondent's Exhibits 6-3, 6-4, 7-2, 7-3)
19. During ESY the student was provided all the prescribed PT services for a total of 2 hours during the four-week period. The student missed services in the first two weeks of ESY but the provider made up the services by extending the PT sessions by 30 minutes each session. (Respondent's Exhibits 6-4, 7-2, 7-3)
20. At the start of SY 2013-2014 the student began attending the new program at School C. The program at School C is specifically designed for students who are considered medically fragile like the student. (Witness 4's testimony)
21. Since attending School C the student has made some progress toward her IEP goals. At School C the student first began receiving PT services on November 12, 2013, and has received these services consistent with the IEP since that date. The student missed approximately 8 hours of PT services. The student's progress reports indicate that the goals related to CVI have not yet been introduced. (Respondent's Exhibits 8, 9-1, 9-2, 9-3, 9-4)
22. On October 16, 2013, the student visited her physician. The physician noted that the student seemed stiffer than on previous visits and that based on information provided by the parent the student was not receiving all prescribed therapies at school. The physician prepared a letter noting the student's additional stiffness and requesting that the school based therapies be reinstated. (Petitioner's Exhibit 11-1)
23. The student's parent provides the student the some of the same therapies in the home as are provided to the student at school. Because the student lies down most times the parent massages the student's limbs to prevent stiffness in her body. The student is prescribed medications for spasms and stiffness, for her stool and she uses a nebulizer as needed. (Parent's testimony)

24. The student seems to not have made the level of progress that was expected when she exited School A. Her gross motor skills and tracking with eyes has not been as good. There were things she could do with her feet, head and eyes she seems not to currently do. She seems able to do less now and she has increased stiffness in hands and legs. (Witness 1's testimony)
25. At School C the classroom to which the student is assigned has five adults and seven students. There are two nurses, a medically trained paraprofessional, a teacher and another paraprofessional. The classroom is designed for students with medical complexities to provide one to one discrete instruction and language development. (Witness 4's testimony)
26. The student has been improving since she has been attending School C. The student's current private social worker has conducted school visits and met with the student's after school nurse who has noted the student has increased stiffness that she attributes to the lack of consistent PT services. (Witness 3's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means 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 Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent

⁴ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented

is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to provide CVI services during the SY 2012-2013 as prescribed in the student’s 8/21/2012 IEP.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student was not provided CVI services at School B.

The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “mandates for each child.” *Harris v. District of Columbia*, 561 F.Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). See 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. “The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch .Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

The evidence⁵, including the credible testimony of Witness 2, that the student’s classroom teacher at School B was not aware the student had vision goals and had not consulted with a vision service provider, was sufficient to prove that the student was not provided the vision services. Although the vision services were not prescribed in the IEP to be provided in a separate setting as they were apparently provided to the student at School A, the IEP had goals related to CVI that were to be worked by the special education teacher in the classroom. The DCPS witness (Witness 4) could not confirm that the student’s teacher at School B had worked on these goals.

The evidence⁶ also indicates that the student has less abilities that when she arrived at School B and specifically her eye tracking has diminished. The DCPS vision assessment indicated that the services were critical and that the student IEP team needed work with a teacher of the visually impaired to craft specific routines to support the student vision.⁷ These services were critical for this student and the evidence demonstrates she was harmed as result of the services not being provided during the student’s time at School B.

sufficient evidence to meet the burden of proof.

⁵ FOF #s 8, 9

⁶ FOF # 24

⁷ FOF # 5

The student's current IEP developed at the March 2013 meeting and dated May 9, 2013, contain the same goals and are to be administered in the classroom setting. Although the student seems to be progressing since she began attending School C, the student most recent progress report indicates that these CVI related goals have not yet been introduced.⁸ The Hearing Officer is concerned that the student has not been provided critical services recommended by the 2012 DCPS evaluation and thus directs that DCPS conduct another vision assessment and amend the student's IEP to specifically state in the IEP that 50 minutes per week of specialized instruction is to be provided relative to her CVI goals.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to provide a dedicated aide (as allegedly promised at the 3/20/13 IEP meeting) from 3/21/13 through the end of ESY 2013.

Conclusion: Petitioner did not sustain the burden of proof by preponderance of the evidence that the team agreed that the student would be provided a dedicated aide.

The evidence demonstrates that the IEP team at the March 2013 meeting discussed whether School B was an appropriate location for the student and determined that the supports to the student should be augmented with additional classroom aide.⁹ Despite the impression of Witness 2 and the parent that the additional aide was solely for the student, the testimony of Witness 4 and statement made at the meeting that the student would be placed the following school year in a setting that would not require an aide was sufficient to demonstrate that the team did not intend at the meeting to add a dedicated aide to the student's IEP. Witness 4 credibly¹⁰ testified that the additional aide was to support all children in the student's classroom at School B. The IEP was not amended to include such an aide.¹¹ There was little if any testimony regarding the classroom services during the student's time in ESY and no indication that there was a lack of an additional classroom aide during that period and there appears to be no need for a dedicated aide in the current classroom at School C. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof as to this issue.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to provide all services in the manner specified by the IEP during ESY 2013 by (a) not administering the student's medication (b) not providing the required adaptive furniture, (c) not providing the full amount of related services as prescribed in the student's IEP: PT, and/or OT, and/or S/L.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student was denied a FAPE during ESY for a lack of administering medication or providing adaptive furniture.

There was insufficient evidence that the student's IEP requires that medication be administered at school and there and insufficient evidence that it was not administered during ESY. Although the parent testified that the ESY classroom teacher asked the parent to provide the student

⁸ FOF # 21

⁹ FOF # 11

¹⁰ The witness was forthright and direct in her testimony.

¹¹ FOF # 14

needed equipment, the school was quickly able to provide the equipment prior to the parent doing so and there is no evidence of harm to the student as a result.

However, as to S/L services the evidence demonstrates that the student was not provided all these services during ESY. The student missed 1 hour of S/L services. There was insufficient evidence that the student missing 1 hour of S/L service created harm. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) "To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant portions of the IEP." *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000). The Hearing Officer concludes there was not evidence of harm to the student for these missed services and Petitioner did not sustain the burden of proof as to this issue.

ISSUE 4: Whether DCPS denied the student a FAPE by failing to provide PT services from the start of SY 2013-2014 until November 2013 at School B

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS failed to provide the student at least 8 hours of PT services since she began attending School C.

The evidence demonstrates that the student was not provided PT services at School C from the start of the current school year until November 12, 2013.¹² During that period the student should have received approximately 8 hours of PT services. The evidence demonstrates that the student has had increased stiffness because she has not had consistent services and that she was thus harmed and denied a FAPE. The Hearing Officer directs in the Order below that DCPS provide the student an additional 4 hours of PT services than her current IEP prescribes and that these additional 4 hours be provided to the student prior to the end of SY 2013-2014 in a manner and frequency that the student can reasonably tolerate.

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. 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." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

¹² FOF #21, 22

However, "*Reid* certainly does not require [a] plaintiff to have a perfect case to be entitled to a compensatory education award"; on the contrary, "[o]nce a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with *Reid*." *Stanton*, 680 F. Supp. 2d at 207. Petitioner has requested compensatory education but did not provide any specific evidence to support a compensatory education award. To award the student nothing would be inequitable. Thus the Hearing Officer will award what he considers to be nominal compensatory services to student for the missed PT services and direct DCPS conduct an updated assessment of the student's CVI to determine and address her current needs in that regard due to missed CVI services.

ORDER:¹³

1. DCPS shall immediately amend the student's IEP to prescribe that the 50 minutes per week of specialized instruction in the student's current IEP to be delivered out of general education be provided to support CVI related issues.
2. DCPS shall within 30 calendar days of the issuance of this Order conduct an updated CVI assessment and report for the student and convene an IEP meeting to review the results of the assessment and update the student's IEP as the IEP team deems appropriate based on the recommendations of the report.
3. DCPS shall provide the student 4 hours of PT services to compensate for the missed services and that these additional hours of service be provided to the student prior to the end of SY 2013-2014 in a manner that the student can reasonably tolerate.
4. All other requested relief is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: January 18, 2014

¹³ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.