

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 First Street, N.E., Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Date: 4/23/24
v.)	Hearing Officer: Michael Lazan
)	Case No. 2024-0031
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services as a student with Autism. 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 February 26, 2024. The Complaint was filed by the Student’s parent (“Petitioner”). A resolution meeting was held on March 4, 2024. The matter did not settle. On March 7, 2024, Respondent filed a response.

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 (“DCMR”), Title 5-A, Chapter 30.

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

III. Procedural History

On April 12, 2024, a prehearing conference was held. Actively participating in the prehearing conference were Attorney A, Esq., for Petitioner, and Attorney B, Esq., for Respondent. On April 16, 2024, a prehearing conference order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case.

The matter proceeded to trial on April 23, 2024. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-30. Objections to exhibits P-1 through P-5, P-28, and P-30 were overruled. Exhibits P-1 through P-30 were admitted. Respondent moved into evidence exhibits R-1 through R-8 and R-10, without objection. Petitioner presented as witnesses, in the following order, Witness A (expert in special education, speech-language pathology, and Individualized Educational Program (“IEP”) programming) and herself. DCPS presented as witnesses, in the following order: Witness B, a resolution specialist; Witness C, an expert in school-based speech-language pathology; and Witness D, a Local Educational Agency (“LEA”) representative (expert in special education). After testimony and evidence concluded on April 23, 2024, the parties presented oral closing statements.

IV. Issues

As identified in the prehearing conference order and in the Complaint, the issue to be determined in this case is as follows:

Did DCPS deny the Student a Free Appropriate Public Education (“FAPE”) by failing to implement his/her IEP during the 2023-2024 school year?

Petitioner contended that DCPS did not provide the required speech-language pathology services. As relief, Petitioner seeks a finding that Student was denied a FAPE; that DCPS shall fund compensatory education and related transportation expenses for the denials of FAPE; that

DCPS shall ensure that compensatory education providers are paid in a timely manner; and that DCPS shall immediately assign a speech-language pathology service provider to implement the terms of the Student's IEP and/or continue to fund compensatory education services until a provider has been assigned.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with Autism. The Student has receptive, expressive, and pragmatic language delays. The Student struggles with peers and misses social cues, though the Student is usually able to make requests consisting of up to three-word utterances and can follow directions if they are repeated. The Student cannot have a conversation with another person, tell another person how s/he is doing, or say how his/her day is going. Testimony of Petitioner; Testimony of Witness D.

2. There is a national shortage of speech-language pathologists due to a decline in the number of people who obtain a degree in speech. As a result, schools nationwide, including in DCPS, have difficulty obtaining speech providers. DCPS currently has ten schools that should have a speech-language pathologist but do not. If a student who is mandated for speech-language pathology services is assigned to such a school, DCPS authorizes independent services for that student. DCPS sends the authorization for independent services to the affected student's parent after the school-based services are missed and DCPS makes a determination about the impact of the missed services. DCPS looks to "the educational impact of those missed services," particularly if the student experiences "significant regression" in communication skills. After DCPS issues the first authorization letter, after one quarter of the school year, the parent must find an independent provider. DCPS provides a list of possible providers to assist parents in

their search. DCPS then sends additional authorizations to the parent for every additional month of missed services. Testimony of Witness B; Testimony of Witness C.

3. For the 2022-2023 school year, the Student “won” a seat at School A through a lottery and began the school year at School A. Testimony of Petitioner. An evaluation was then conducted of the Student, including an Educational Assessment Report dated September 22, 2022, a Comprehensive Occupational Therapy Assessment dated November 4, 2022, a Confidential Psychological Report dated November 4, 2022, and an Initial Speech and Language Evaluation dated November 8, 2022. P-6; P-7; P-8; P-9.

4. According to results on the Battelle Developmental Inventory, which was administered as part of the Educational Assessment Report, the Student’s cognitive abilities were mildly delayed. The Student was able to respond to his/her name, engaged in some eye contact, and used words, pointed, and gestured to communicate his/her needs. The Student was able to look at and identify pictures in a book. The Student knew colors, shapes, body parts, clothing items, and some letters of the alphabet. According to the Autism Spectrum Rating Scale (“ASRS”), which was administered as part of the psychological evaluation, the Student presented with characteristics similar to children on the autism spectrum. The Student’s teacher reported to the psychologist that the Student had delays in his/her social communication and that s/he presented with unusual behaviors. P-8.

5. The speech-language evaluation included administration of the Preschool Language Scales-5th Edition (“PLS-5”), which found that the Student scored in the 1st percentile in auditory comprehension and expressive language. On the Expressive One Word Picture Vocabulary Test-4th Edition (“EOWPVT-4”), the Student also scored in the 1st percentile. Scores from the Clinical Evaluation of Language Fundamentals Preschool-3rd Edition (“CELF-

P3”) indicated that the Student presented with pragmatic language delays. The Student was not able to consistently use nonverbal and verbal communication to initiate and sustain appropriate peer and adult interactions, follow conversational rules, or ask for, provide, and respond to information across multiple environments and speakers. The Student’s language delays were characterized by difficulty following directions without repetition or gestural cues, difficulty understanding basic concepts, limited expressive vocabulary, difficulty using words and phrases for a variety of pragmatic functions (e.g., requesting assistance, calling attention, and answering “yes” or “no”), and difficulty using different word combinations. P-9.

6. On November 15, 2022, the Student was determined to be eligible as a student with Autism. The resulting IEP indicated that the Student required constant one-on-one support from the school staff to maintain his/her personal safety, which affected the classroom staff’s ability to effectively address the needs of the other students in the classroom. The IEP indicated that the Student had mild delays in his/her overall cognitive abilities, including his/her attention and communication skills. The IEP indicated that the Student’s communication skills were moderately delayed. Although s/he was able to use words to express him/herself, the Student did not always use functional communication. S/he had difficulty responding to “wh” questions and following instructions and was unable to translate his/her pre-academic knowledge to real-life situations. The Student could not state his/her peers’ names on cue. S/he knew the names “randomly” but not when s/he would try to refer to a peer. The IEP indicated that the Student could attend to a task for five minutes with one-on-one assistance but struggled to do so during circle or classroom activities. The IEP provided for 20.5 hours of specialized instruction per week outside general education, five hours of specialized instruction per week inside general education, 240 minutes of speech-language pathology services per month outside general

education, and 240 minutes of occupational therapy per month outside general education. The IEP contained eight goals: four in the “cognitive” section and four in the speech/language section. The cognitive goals related largely to communication issues. The IEP did not recommend assistive technology and/or services. P-14.

7. After testing, the Student transferred to School B in November 2022. The Student was placed in a full-time, self-contained special education classroom in the Early Learning Support (“ELS”) program. When the Student first attended, s/he displayed defiance and engaged in screaming and throwing items. However, the Student adjusted to the classroom. Speech-language pathology services were not regularly provided to the Student during the 2022-2023 school year. Testimony of Witness B; Testimony of Witness D.

8. In August 2023, Petitioner filed a due process complaint alleging, among other things, that DCPS failed to implement the Student’s speech services for the 2022-2023 school year. That complaint was resolved pursuant to a settlement in October 2023, which provided for twenty hours of independent speech services, among other things. P-2.

9. The Student has continued to attend School B for the 2023-2024 school year. At the beginning of August 2023, the speech-language pathologist at School B resigned. The Student has thus received no speech services at School B for the 2023-2024 school year. This has affected the Student’s performance in the classroom. However, the Student’s tantrum-related behavioral issues have declined during the 2023-2024 school year. The Student has also been socializing with peers and initiating play. The Student still needs small-group support and often has to be redirected to follow directions or remain on task. Testimony of Witness C; Testimony of Witness D.

10. An IEP was developed for the Student on October 26, 2023. The IEP provided for twenty-five hours of specialized instruction per week outside general education, two hours of occupational therapy per month outside general education, 1.5 hours of social work services per month, and four hours of speech-language pathology services per month outside general education. This IEP contained four speech-language pathology goals. P-15.

11. In November 2023, an assistive technology assessment of the Student was conducted. The ensuing report, dated November 8, 2023, indicated that the Student had needs in the areas of receptive language, expressive language, vocabulary, and pragmatics; that the Student's speech needs impacted him/her in the classroom; and that the Student was unable to participate effectively in classroom assignments due to the fact that s/he responded in jargon and was sometimes off-task. The report indicated that the Student had difficulty communicating with his/her peers in both the general education and special education setting, and that the Student had tantrums because s/he was unable to communicate what s/he wished to say. As a result of the assistive technology assessment, high-tech and low-tech augmentative and alternative ("AAC") supports were recommended for the Student. P-11.

12. In November 2023, the Student began using a DCPS speech authorization for weekly, thirty-minute, virtual sessions with a speech-language pathologist. Petitioner could not find a speech-language pathologist to provide in-person services. The Student has benefitted from the sessions, though the Student tends to pay less attention after about twenty minutes of therapy. Testimony of Petitioner.

13. The Student's IEP was amended on December 13, 2023. The amended IEP did not change the Student's entitlement of four hours of speech-language pathology services per month. The IEP indicated that the team was prepared to move forward with an AAC trial and

characterized the Student as a child who struggles to understand basic concepts such as quantity, spatial relationships, pronouns, and negatives in sentences. The IEP indicated that the Student's expressive vocabulary was weak, that the Student had difficulty using words and phrases for various pragmatic functions, and that the Student faced challenges in using a variety of words, including modifiers, actions, and pronouns. The IEP stated that, in terms of pragmatic language, the Student was unable to consistently use nonverbal and verbal communication to initiate and sustain appropriate peer and adult interactions, and that the Student found it challenging to follow conversational rules. The IEP contained four communication/speech-language goals about following directions, using word combinations, using two-word phrases for basic needs, and interacting with peers. P-16.

14. In February 2024, the Student received an authorization from DCPS for twenty hours of speech-language pathology services (at a maximum cost of \$124.73 per hour), corresponding, hour-for hour, to missed services from August 2023 to January 2024. In March 2024, DCPS issued another authorization for four hours of speech-language pathology services, corresponding to missed services in February 2024. In April 2024, DCPS sent another authorization for four hours of speech-language pathology services, corresponding to missed services in March 2024. R-1; R-5; R-6.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed in 2014. The law 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). The issue here does not directly relate to the appropriateness of the Student's program or placement. As a result, the burden of persuasion is on Petitioner. Schaffer v. Weast, 546 U.S. 49 (2005).

Did DCPS deny the Student a FAPE by failing to implement his/her IEP during the 2023-2024 school year?

Petitioner contended that DCPS did not provide the required speech-language pathology services. As relief, Petitioner seeks a finding that Student was denied a FAPE; that DCPS shall fund compensatory education and related transportation expenses for the denials of FAPE; that DCPS shall ensure that compensatory education providers are paid in a timely manner; and that DCPS shall immediately assign a speech-language pathology provider to implement the terms of the Student's IEP and/or continue to fund compensatory education services until a provider has been assigned.

The IDEA is violated when a school district materially deviates from a student's IEP. Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C.2011). A material failure occurs when there is a "more than a minor" discrepancy between services a school provides to a disabled child and services required by the child's IEP. Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir.2007). "(T)he materiality standard does not require that the child suffer demonstrable education harm in order to prevail." Wilson, 770 F. Supp. 2d at 275 (emphasis in original) (quoting Van Duyn, 502 F.3d at 822). Rather, "it is the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement." Turner v. District of Columbia, 952 F. Supp. 2d 31, 41 (D.D.C. 2013) (citing Wilson, 770 F. Supp. 2d at 775).

There is no dispute that DCPS did not provide this young autistic student, who has severe speech delays, with any speech-language pathology services during the 2023-2024 school year.

DCPS did not argue that its failure to provide the Student with 100 percent of his/her mandated speech-language pathology services was a “procedural” violation. DCPS’s failure to provide the Student with any speech-language pathology services during the 2023-2024 school year was a material failure to implement the Student’s IEP. As a result, DCPS denied the Student a FAPE.

RELIEF

When remedying a violation of the IDEA, a hearing officer may “grant such relief as [he or she] determines is appropriate.” 20 U.S.C. Sect. 1415(i)(2)(C); Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359, 369 (1985) (discussing the “broad discretion” of the court to craft relief). Compensatory education is an award of services “to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 522 (D.C. Cir. 2005). This is a common form of relief awarded in IDEA cases. Glass, next friend of A.G. v. District of Columbia, No. CV 19-2148 (RC), 2020 WL 6799139, at *8 (D.D.C. Nov. 19, 2020). A compensatory education award is crafted to remedy what might be termed an education deficit created by an educational agency’s failure over a period of time to provide a FAPE to a student. Reid, 401 F.3d at 523. A parent need not “have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011). It has been held in this jurisdiction that if a student is denied a FAPE, a hearing officer may not “simply refuse” to grant one. Henry v. District of Columbia, 750 F. Supp. 2d 94 (D.D.C. 2010). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Witness A’s modest proposal to provide the Student with twenty hours of compensatory speech services (corresponding to FAPE deprivation from August 29, 2023, to April 23, 2024) is appropriate. Though DCPS offered the Student its own form of relief through speech-language

pathology service authorizations, those authorizations did not authorize speech-language pathology services until after the Student had attended school for three months without such services, which impacted the Student's performance in the classroom. DCPS did not issue a strong objection to the request for an additional twenty hours of compensatory speech-language pathology services, which this Student so clearly benefits from and needs.

The main issue in this case is Petitioner's request to ensure that School B provides the Student with a speech-language pathologist going forward. Petitioner suggests that this Hearing Officer can require DCPS and School B to hire a speech-language pathologist to provide in-person services to the Student.

However, DCPS is already trying in good faith to find a speech-language pathologist for School B to hire, and Petitioner did not present any authority suggesting that hearing officers should weigh in on the national shortage of speech therapists by ordering a school district to hire a speech therapy provider when the district is already looking for such a provider. Indeed, the little authority that exists in this area suggests that hearing officers should avoid this kind of direct involvement in the administration of a school district's human resources. For instance, in Alex R., ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221, 375 F.3d 603, 614 (7th Cir. 2004), the court characterized the hearing officer's requirement for the school district to hire consultants (and impose a "disability awareness and sensitivity curriculum") as "extreme" and found that the hearing officer intended to substitute her "judgment for that of school administrators" instead of simply implementing the IDEA.

In another case, a hearing officer required a school district to enter into a contract with a team of consultants, who had expertise in autism, to develop an IEP for a student. Meza v. Bd. of Educ. of the Portales Mun. Sch., No. CIV.10-0963-JB/WPL, 2011 WL 1128876, at *1

(D.N.M. Feb. 25, 2011). However, under state law, supervision and correction of unsatisfactory work performance of certified school personnel relied exclusively with the school board and superintendent. The court, enjoining the hearing officer's order, found that the school board and superintendent bore the burden of ensuring that staff who work with children were appropriately qualified and supervised, that staff maintained professional standards, and that staff passed background checks that included fingerprinting and criminal background checks. 2011 WL 1128876, at *18. The court noted that the hearing officer's order to hire consultants for a one-year period was not "tied to the record." 2011 WL 1128876, at *16. Here, similarly, the record does not support Petitioner's request for an order requiring the school district to hire a speech-language pathologist for School B. The record makes it clear that DCPS is trying its best to find speech-language pathologists. There is nothing in the record to suggest that DCPS could do more to attract candidates for this position. There is also nothing in the record to suggest that a hearing officer's order can do anything to effectively add bodies to the District of Columbia's speech-language pathologist hiring pool and therefore enable School B to access more speech-language pathologists who are ready and able to work for DCPS. Though one can certainly understand Petitioner's request, given how much this young autistic Student needs speech-language pathology services, and though this Hearing Officer agrees with Petitioner that it is imperative for School B and other DCPS schools to hire speech-language pathologists as soon as possible, a hearing officer's order directing a school district to hire staff in this situation is *ultra vires*. Accordingly, this Hearing Officer must deny this request.

VII. Order

As a result of the foregoing:

1. The Student is hereby awarded twenty hours of compensatory speech-language pathology services, including transportation to and from the therapy sessions if the sessions are in-person, to be delivered by a licensed provider at a reasonable and customary rate in the community;

2. Providers shall be reimbursed promptly for services rendered upon submission of an appropriate, accurate invoice;

3. Petitioner's other requests for relief must be denied.

Dated: May 11, 2024

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.

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 days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. Sect. 1415(i).

Dated: May 11, 2024

Michael Lazan
Impartial Hearing Officer