

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, N.E., 3rd Floor
Washington, DC 20002

ADULT STUDENT, by and through
ATTORNEY-IN-FACT¹

Date Issued: November 8, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0206

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: October 29, 2019

Respondent.

Office of Dispute Resolution, Room 423
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the adult STUDENT, by and through GRANDMOTHER, Student's attorney-in-fact, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In the due process complaint, Student seeks relief for DCPS' alleged failure to authorize funding for independent speech-language services, as ordered in a 2016 hearing officer determination, and for failure to develop an appropriate Individualized Education Program (IEP) in January 2019.

Petitioner's Due Process Complaint, filed on August 16, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on August 19, 2019. On

¹ Personal identification information is provided in Appendix A.

August 26, 2019, DCPS filed its response to the due process complaint. On September 9, 2019, Petitioner filed a motion to strike DCPS' response, as not meeting the requirements of 34 CFR § 300.508 and moved to limit DCPS' defenses. On September 12, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. Petitioner's September 9 2019 motions were discussed at the prehearing conference. In my September 12, 2019 Prehearing Order, I denied Petitioner's motion to strike DCPS' response and to limit DCPS' defenses. I ordered, *inter alia*, that DCPS file, by September 19, 2019, an amended response which met the requirements of 34 CFR § 300.508. DCPS filed its amended response on September 19, 2019.

On September 16, 2019, DCPS filed a motion to extend the final decision due date in this case to November 8, 2019, which motion I granted by order issued on September 21, 2019. On October 11, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute.

The due process hearing was convened before the undersigned impartial hearing officer on October 29, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Grandmother appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. Grandmother testified at the hearing and called as additional witnesses INDEPENDENT SPEECH THERAPIST and

EDUCATIONAL ADVOCATE. DCPS called as witnesses THERAPY COORDINATOR and ASSISTANT PRINCIPAL. Petitioner's Exhibits P-1, P-2 and P-7 through P-21 were admitted into evidence, including Exhibits P-1, P-2, P-13 through P-16 and P-19 admitted over DCPS' objections. Petitioner's Exhibits P-3 through P-6 were withdrawn. DCPS' Exhibits R-1 through R-5, R-8, R-11 and R-12 were admitted into evidence, including Exhibits R-1, R-3 and R-8 admitted over Petitioner's objections. DCPS did not offer previously disclosed Exhibits R-6, R-7, R-9 or R-10. Counsel for the respective parties made oral closing arguments.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the September 12, 2019 Prehearing Order, are:

A. Whether in the 2017-2018 school year, DCPS denied Student a FAPE by failing to comply with the order, part f, in the August 15, 2016 HOD which required that DCPS authorize funding for Student to receive 360 hours per calendar year of independent speech-language services until a speech-language evaluation was reviewed and considered by Student's IEP team, which showed that Student's speech-language disability was no more than two standard deviations below the mean;

B. Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on or about January 18, 2019, in that this IEP provides for:

a) Insufficient and/or inappropriate goals in written expression; adaptive/daily living; emotional, social and behavioral development; motor skills/physical

development; and the post-secondary transition plan;

b) Insufficient and/or inappropriate baselines in communication/speech-language; emotional, social and behavioral development, motor skills/physical development; and the post-secondary transition plan and

c) insufficient or no classroom or assessment accommodations.

For relief, Petitioner requests that DCPS be ordered to convene an IEP team meeting within 10 days to review and revise Student's IEP, as appropriate, and that Student be awarded compensatory education for the denials of FAPE alleged in the complaint.²

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an adult student, resides with Grandmother in the District of Columbia. Testimony of Grandmother.

2. Student is eligible for special education under the IDEA disability classification Intellectual Disability (ID). Exhibit P-11. In independent cognitive testing in March 2016, Student's General Intellectual Ability (GIA) score (49) was in the Very Low range. Exhibit P-7.

3. Student has attended PUBLIC CHARTER SCHOOL (PCS) since the 2014-2015 school year. Exhibit P-7. DCPS is the local education agency (LEA) for PCS.

² Petitioner seeks, as compensatory education alternatives, that DCPS be ordered to discuss and determine at Student's IEP team meeting appropriate compensatory education or that DCPS be ordered to fund an independent evaluation at the market rate to determine appropriate compensatory education and following that evaluation, that Petitioner, at Petitioner's option, may bring a new due process complaint.

Hearing Officer Notice.

4. PCS is a public charter day school in the District of Columbia which serves students with moderate to severe cognitive disabilities, including intellectual disabilities and Autism Spectrum Disorder. At PCS, students are placed, based on age, in units of 5 classrooms. Student is in the LEVEL program. Each classroom has 11 to 12 students, served by a special education teacher and 5 to 7 paraprofessionals. Testimony of Therapy Coordinator, Testimony of Assistant Principal.

5. For students in Student's program, PCS has a vocational/life skills focus and provides vocational opportunities in school and in the community. Off site, PCS works with partner organizations, to where students are escorted by a job coach, 2-3 times per week, to engage in vocational opportunities. At PCS, students also learn cooking and food shopping skills. Testimony of Assistant Principal.

6. On July 8, 2014, Grandmother filed a previous administrative due process complaint on behalf of Student (Case No. 2014-0315). That complaint alleged, *inter alia*, that DCPS failed to comprehensively reevaluate Student in all areas of suspected disability. In a September 22, 2014 Hearing Officer Determination, former Impartial Hearing Officer NaKeisha Blount denied all relief. Grandmother appealed that decision to the U.S. District Court of the District of Columbia (Civil Case No. 14-cv-02147). In a Memorandum Opinion issued June 21, 2016, U.S. District Judge Amit Mehta found, *inter alia*, that it was unclear whether Student had a speech and language disability. Judge Mehta remanded that issue to the hearing officer to determine whether Student

had such a disability, determine whether DCPS failed to provide a timely speech-language evaluation and to determine an appropriate remedy, if any, for that failure.

Exhibit P-1.

7. On August 15, 2016, Hearing Officer Blount issued a “Final Determination regarding on District Court’s Remand Order” (the 2016 Remand Decision). In that decision, Hearing Officer Blount found, *inter alia*, that more likely than not, Student had a speech-language disability in 2010 and thereafter that DCPS has failed to provide a timely speech-language evaluation, as required by the IDEA in 2010 and 2013. Hearing Officer Blount also made a Finding of Fact that “[w]hile Student’s speech-language disability is not likely to be eliminated entirely, an appropriate and realistic goal for [Student] is to close the gap between [Student’s] speech-language abilities and [Student’s] cognitive abilities, so that [Student’s] speech-language deficiency is no more than two standard deviations below the mean with where [Student’s] cognitive abilities fall.” Exhibit P-2, ¶ 12. As compensatory education for DCPS’ failure to provide Student speech-language services, Hearing Officer Blount ordered DCPS to authorize funding for Student to receive 360 hours per calendar year of independent speech-language services until a DCPS-conducted speech-language evaluation “showed that Student’s speech-language disability [was] no more than two standard deviations below the mean (*i.e.*, Student has ‘met the target’).” Exhibit P-2.

8. In independent cognitive testing in March 2016, the independent psychologist administered the Woodcock-Johnson IV Tests of Cognitive Abilities (WJ-

IV). Student's WJ-IV General Intellectual Ability (GIA) score (49) was in the Very Low range compared to same-age peers. The WJ-IV has a mean score of 100 and a standard deviation of 15. Student's GIA score of 49 was more than three standard deviations below the mean. Student's Oral Vocabulary subscore (59) and Phonological Processing subscore (58) were also close to three standard deviations below the mean. Exhibit P-7.

9. Independent Speech Therapist administered a Speech-Language IEE Assessment of Student in December 2016. In that testing, Student's reported standard scores were:

Peabody Picture Vocabulary Test - Fourth Edition (PPVT-4) – 60

Expressive Vocabulary Test - Second Edition (EVT-2) – 72

Comprehensive Assessment of Spoken Language (CASL) Subtests –

Antonyms	59
Synonyms	66
Grammaticality Judgment	85
Nonliteral Language	45
Meaning from Context	65
Ambiguous Sentences	75
Pragmatic Judgment	87

Exhibit P-8.

10. Since the 2016-2017 school year, Student has received IEP direct speech therapy services for four hours per month at PCS. Exhibits P-10, P-11.

11. According to a June 28, 2018 PCS Speech and Language Evaluation Report, when reevaluated in June 2018, Student's scores on the Peabody Picture Vocabulary Test -4th Edition (PPVT-IVB), the Expressive Vocabulary Test - 2nd Edition

(EVT-2) and the Comprehensive Assessment of Spoken Language - 2nd Edition (CASL-2) were all within two standard deviations below the mean. Student's score on the PPVT-IVB was within one standard deviation. Student's scores on the EVT-2 and the CASL-2 were within two standard deviations. Exhibit R-7.

12. Neither party introduced documentary evidence of what funding DCPS authorized for independent speech-language services pursuant to the 2016 Remand Decision. Grandmother testified that DCPS had authorized speech and language services for Student after the 2016 Remand Decision. She testified that DCPS only did it once, and she was unable to remember what services were authorized, who provided the services, the frequency of services or when the services started or ended. Testimony of Grandmother.

13. The last annual review of Student's IEP at PCS was completed on or about January 18, 2019. The January 18, 2019 IEP identifies Mathematics, Reading, Written Expression, Adaptive/Daily Living Skills, Communication/Speech and Language, Emotional, Social and Behavioral Development and Motor Skills/Physical Development as Areas of Concern. Each Area of Concern, except Mathematics, provides a single annual goal. There are two annual goals for Mathematics. The IEP provides for full-time, 28.25 hours per week, of Specialized Instruction, 1 hour per month of Occupational Therapy (OT), 2 hours per month of Behavioral Support Services and 4 hours per month of Speech-Language Pathology. All services are to be provided outside general education in a separate school, that is, at PCS. For Other Classroom Aids and

Services, the IEP provides for visual schedule, picture symbols, adapted/modified text, calculator, manipulatives, small staff/student ratio and small classroom size of no larger than 15 students. The IEP includes a Post-Secondary Transition Plan that identifies academic, functional, employment and independent living interests and goals. The IEP indicates that Student is projected to exit from services with a high school certificate at age 22. Exhibit P-11.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

A. In the 2017-2018 school year, did DCPS deny Student a FAPE by failing to comply with the order, part f, in the 2016 Remand Decision which required that DCPS authorize funding for Student to receive 360 hours per calendar year of independent speech-language services until a speech-language evaluation was reviewed and considered by Student's IEP team, which showed that Student's speech-language disability was no more than two standard deviations below the mean?

Petitioner first alleges that in the 2017-2018 school year, DCPS denied Student a FAPE by not complying with the August 15, 2016 Remand Decision order to provide funding for Student to receive 360 hours per calendar year of independent speech-language services until Student's speech-language disability was "no more than two standard deviations below the mean." In her complaint, Petitioner alleged that DCPS authorized funding for one year of independent speech-language services, but did not provide such funding in the 2017-2018 school year. (Petitioner concedes that when reevaluated in June 2018, Student's Speech and Language evaluation scores were within two standard deviations below the mean.)

The IDEA does not empower due process hearing officers to enforce Hearing Officer Determinations. *See Robinson v. Pinderhughes*, 810 F.2d 1270, 1273-1274 (4th Cir. 1987) (The federal statute does not contain any provision for enforcing final administrative orders.) However, if an LEA's non-compliance with a hearing officer order results in failure to provide FAPE, this failure may constitute a separate, actionable, violation of the IDEA. *Cf. Sellers by Sellers v. School Bd. of City of Manassas*, 141 F.3d 524, 531 (4th Cir. 1998) (Simple failure to provide a child with a free

appropriate public education constitutes a violation of the statute.)

To meet her burden of persuasion for this claim, Petitioner had to show (1) that DCPS did not comply with the 2016 Remand Decision order to fund independent speech-language services for the time period specified and (2) that DCPS' alleged non-compliance resulted in a denial of FAPE to Student. At the due process hearing, Petitioner offered no probative evidence that DCPS did – or did not – comply with the 2016 Remand Decision order to fund independent speech-language services until Student's speech-language disability tested at no more than two standard deviations below the mean. Grandmother first testified that DCPS only provided one funding authorization, but admitted on cross-examination that she could not remember when the independent speech-language services started or ended or whether other services were authorized. Due to Grandmother's admitted lack of recollection, I did not find her testimony here to be sufficiently credible. Nor did Petitioner offer any other testimonial or documentary evidence to show what independent speech and language services DCPS funded for Student after the 2016 Remand Decision, or the quantum of services allegedly not provided. *Cf. Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (addressing failure to implement claims) ("Courts 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.") Because Petitioner had the burden of persuasion that DCPS did not provide funding for independent speech-language services as mandated by the 2016 Remand Decision, I must conclude

that this claim was not established.³

B. Did DCPS deny Student a FAPE by failing to develop an appropriate IEP for Student on or about January 18, 2019, in that this IEP provides for:

a) Insufficient and/or inappropriate goals in written expression; adaptive/daily living; emotional, social and behavioral development; motor skills/physical development; and the post-secondary transition plan;

b) Insufficient and/or inappropriate baselines in communication/speech-language; emotional, social and behavioral development, motor skills/physical development; and the post-secondary transition plan and

c) Insufficient or no classroom or assessment accommodations?

Petitioner alleges that PCS' January 18, 2019 IEP was inappropriate for Student for want of appropriate annual goals and baselines and insufficient classroom and assessment accommodations. DCPS responds that the IEP was appropriate when

³ This hearing officer also respectfully suggests that the basis in the 2016 Remand Decision for ordering independent speech language services, until Student's speech-language disability was no more than two standard deviations below the mean, was flawed. In the 2016 Remand Decision, the hearing officer cited the testimony of Independent Speech Therapist that Student's cognitive abilities fell two standard deviations below the mean. However, it appears that Independent Speech Therapist relied on a 2010 cognitive assessment for his assertion that Student's cognitive abilities were within two standard deviations of the mean, and ignored the March 2016 independent psychological reevaluation of Student, which reported that Student's General Intellectual Ability (GIA), as measured by the WJ-IV, was 49 – more than *three* standard deviations below the mean. Student's 2016 Oral Vocabulary subscore (59) and Phonological Processing subscore (58) were also close to three standard deviations below the mean. Based on the 2016 cognitive scores, it appears that if Student's speech-language deficits were approximately three standard deviations below the mean, this was not disparate from Student's cognitive abilities, also approximately three standard deviations below the mean. This makes it problematic whether DCPS' alleged failure to fund independent speech-language services, until Student's speech-language disability was no more than *two* standard deviations below the mean, would have resulted in a denial of FAPE.

developed. DCPS has the burden of persuasion on the appropriateness of this IEP.

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, — U.S. —, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), for what constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*specially designed*" to meet a child's "*unique needs*" through an "*individualized education program.*" An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

In this case, Petitioner does not contend that the special education and related services in the January 18, 2019 IEP were not appropriately designed to meet Student's needs or that Student's educational placement at PCS is not appropriate. However, Grandmother contends that the IEP annual goals and baselines are not adequate which would be a procedural violation of the IDEA. *See, e.g., W.T. & K.T. ex rel. J.T. v. Bd. of Educ. of Sch. Dist. of New York City*, 716 F. Supp. 2d 270, 289 (S.D.N.Y. 2010) (Alleged

inadequacies in IEP annual goals did not rise to level of material procedural violation.)

The IDEA requires that each student's IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability.

See 34 CFR § 300.320(a)(2)(i).

Petitioner's expert, Educational Advocate, who did not participate in Student's IEP team meetings, opined in her testimony that the annual goals for Student in the January 18, 2019 IEP were inadequate because, except for Mathematics, there was only one annual goal for each IEP area of concern. DCPS' expert, Assistant Principal, explained that the IEP team tailored Student's annual goals so as to meet Student's most important needs with an emphasis on Student's functional needs. I found Assistant Principal's explanation credible given his years of working with Students at PCS with intellectual disabilities.

"Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." *Endrew F.*, 137 S.Ct. at 999 (emphasis in original). Moreover, particularly at a special school such as PCS which specializes in educating students with moderate to severe intellectual disabilities, special educators are entitled to a degree of deference in crafting IEP goals for the students they

serve. *See, e.g., T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (DCPS personnel had special education expertise requiring deference.) I conclude that DCPS has offered a cogent and responsive explanation for the decision of Student's IEP team to provide limited, tailored goals for Student in the January 18, 2019 IEP. *See Andrew F., supra*.

With regard to the baselines in the January 18, 2019 IEP, the IDEA requires that IEPs include present levels of performance, but does not require baselines for students. *See Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424-25 (8th Cir. 2010) (Plaintiff has not cited any case in which any court has read such an implied requirement for baseline data into the law.) In the present case, Grandmother has not challenged the adequacy of the Present Levels of Academic Achievement and Functional Performance recited in the January 18, 2019 IEP. Educational Advocate opined that some of the baselines in the January 18, 2019 IEP did not match up to the annual goal objectives. Therapy Coordinator testified that at the IEP team meeting, the IEP baselines were edited at the request of Petitioner's Counsel to be more specific. However, assuming that Educational Advocate were correct that the baselines did not match up to the related objectives, I find that this purported procedural inadequacy should not be deemed a denial of FAPE or keep the IEP, from being "reasonable" for Student. *See* 34 CFR § 300.513(a)(2); *Andrew F.*, 137 S.Ct. at 999.

Petitioner also claims that the January 18, 2019 IEP is inadequate because it has no or not sufficient classroom and assessment accommodations. An IEP must include a

statement of any supplementary aids and services, as well as appropriate accommodations that are necessary for district wide assessments. *See* 34 CFR §§ 300.320(a)(4), 320(a)(6). The January 18, 2019 IEP does in fact provide for classroom aids and services, namely visual schedule, picture symbols, adapted/modified text, calculator, manipulatives, small staff/student ratio, and small classroom size no larger than 15 students. Further the IEP is replete with additional accommodations for Student, including a highly structured environment, visual supports, verbal and gestural prompting and modified materials. I conclude that DCPS has shown that the January 18, 2019 IEP includes appropriate classroom accommodations. The IEP specifies that due to Student's age, Student does not take district wide assessments. Therefore, as Assistant Principal explained, no IEP accommodation are required for district-wide assessments.

In sum, I conclude that DCPS has met its burden of persuasion that the January 18, 2019 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *See Endrew F., supra*, 137 S.Ct. at 1002.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

All relief requested by the Petitioner herein is denied.

Date: November 8, 2019

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

cc: Counsel of Record
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