

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
September 29, 2014

PETITIONER ¹)	
On behalf of STUDENT)	
)	
Petitioner,)	Date Issued: September 27, 2014
)	
v.)	Hearing Officer: Christal E. Edwards, Esq.
)	
District of Columbia Public Schools (DCPS))	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This is a Due Process Complaint ("DPC") proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*

On May 20, 2014, Petitioner _____ filed its original Due Process Complaint Notice _____, on behalf of the Student, who resides in the District of Columbia, against Respondent, District of Columbia Public Schools ("Respondent") alleging that Respondent had violated IDEA. Petitioner specifically alleged that such violation occurred when Respondent denied the Student a Free Appropriate Public Education ("FAPE") by refusing to honor the Student's parent's requests to reconvene the Student's Multidisciplinary Team ("MDT") and Individualized Education Program ("IEP") Meeting. *See* Original Complaint at p.3; 34 C.F.R. §300.324(b).

¹ Personal identification information is provided in Appendix A

Pursuant to the agreement of both parties, on or about July 14, 2014, Petitioner filed an Amended Complaint (“Amended Complaint”) in case number 2014-0320. The Petitioner now alleges that Respondent has denied the Student a FAPE by (1) failing to implement the Student’s December 6, 2013 IEP; (2) failing to provide the Student with appropriate placement/location of services; and (3) failing to allow the parent meaningful participation in the placement decision-making process for Student. *See* Amended Complaint at p. 5 – 7; 34 C.F.R. §300.17; 34 C.F.R. §300.115(a); 34 C.F.R. §300.116(a)(1).

The Respondent timely filed a response to the original complaint on May 22, 2014 and July 24, 2014 to the Amended Due Process Complaint and made no challenges to jurisdiction. Respondent, stating, *inter alia*, that Respondent has not denied the Student a FAPE. Specifically, stating that (1) Respondent has implemented the Student’s December 6, 2013 IEP; (2) Petitioner may not use this forum to file a Due Process Complaint that challenges the qualifications of Student’s teacher (explaining that such complaint should be filed with the State Education Agency) (“SEA”), (3) Petitioner has alleged facts that concern the standards for retention or promotion of students with disabilities, which are matters that are beyond the scope of the IDEA, and (4) Student’s parent has participated in both the development of the Student’s IEP and the decision to place Student in a self-contained class room setting.

During the Prehearing Conference, on or about August 18, 2014, the parties agreed that five-day disclosures would be filed by August 29, 2014 and that the Due Process Hearing (“DPH”) would be held on September 8 and 10, 2014.

The resolution meeting in case number _____ took place on June 3, 2014. The resolution meeting in case number 2014-0320 took place on July 24, 2014. However, no agreement was reached in either meeting. The Parent and Respondent agreed to continue to

attempt to resolve the complaints prior to the end of the 30-day resolution period and the 45-day timeline to file the Hearing Officer Determination (“HOD”). The 30-day resolution period ended on August 13, 2014, the 45-day timeline to issue a final decision began on August 14, 2014 and the final decision is due by September 27, 2014. Petitioner elected for the hearing to be closed.

Petitioner’s Disclosure Statement, dated August 29, 2014, consisted of a witness list of eight (8) witnesses and documents P-1 through P-32. Respondent submitted written objections to Petitioner’s Disclosures at P-1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 23, 28, 29, 30, and 31. Petitioner withdrew disclosure at P-1, 2, 4, 5, 31. Over the objection of the Respondent, Petitioner’s disclosures at P- 3, 6, 7, 8, 9, 10, 28, 29, and 30 were admitted. The objection for Petitioner’s disclosure at p-23 was sustained and not admitted. Further, Petitioner’s Disclosures at P-11 through P- 27, P-32 were admitted into the record. The Petitioner presented the following witnesses in her case in chief:

- (a) Petitioner;
- (b) Petitioner's Student Educational Advocate;
- (c) Petitioner’s Representative from Recommended Placement;
- (d) Petitioner’s ABA Therapist; and
- (e) Petitioner’s Student Nurse.

Respondent’s Disclosure Statement dated August 29, 2014 consisted of a witness list of five (5) witnesses and documents R-1 through R-9. Petitioner submitted written objections to Respondent’s disclosure at R-1, 2, 8, and 9. Respondent withdrew their disclosure at R-9 and Petitioner withdrew their objections to R – 1 and R-8. Respondent’s disclosure at R-2 was admitted over the objection of the Petitioner. Therefore, Respondent's disclosures at R-2, 3, 4, 5,

6, and 7 were all admitted. The Respondent presented the following witnesses:

- (a) Respondent's Resolution Compliance Case Manager;
- (b) Respondent's Autism Coordinator;
- (c) Respondent's Progress Monitor and/or Program Manager;
- (d) Respondent's Special Education Teacher; and
- (e) Respondent's School Speech and Language Pathologist.

Neither party requested or filed any post hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f), and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case, as identified in the Prehearing, are:

Issue #1 – Whether Respondent denied Student a Free and Appropriate Public Education (“FAPE”) by failing to implement the Student’s December 6, 2013 Individualized Education Program (“IEP”).

Issue #2 – Whether Respondent denied Student a FAPE by failing to provide the Student with appropriate placement/location of services.

Issue #3 – Whether Respondent denied Student a FAPE by failing to allow the parent meaningful participation in the placement decision-making process for Student.

RELIEF REQUESTED

Petitioner requests the following relief:

- (1) A finding of a denial of a FAPE on the issue(s) as stated in this Prehearing Order;
- (2) An Order that DCPS shall reconvene the Student’s MDT/IEP team meeting, within 5 days to identify and discuss no less than three possible placement options for the Student’s 2014/2015 school year. This meeting shall include representatives from the various programs who can discuss the advantages and disadvantages of the kindergarten programs. Following such discussion, the Student’s IEP team shall make a determination of placement in a kindergarten classroom for the 2014/2015 school year;

- (3) An Order that if DCPS is unable to find appropriate placement in a kindergarten classroom for the Student's 2014/2015 school year, DCPS shall fund that placement choice of the parent and provide transportation services;
- (4) An Order for Compensatory Education; and
- (5) Any other appropriate relief.

FINDINGS OF FACTS

After considering all of the evidence, as well as argument of counsel, this Hearing Officer's findings of facts are as follows:

- 1) Student is _____ matriculated as a student in Pre-Kindergarten at Attending School for the last two academic school years
- 2) Student is a resident of the District of Columbia. *Id.*
- 3) Student has been found eligible for Special Education services since 2011 with a disability classification of Multiple Disabilities. (Testimony of Petitioner, P-9, 13, 14, and 15) Since Student was found eligible, she has had several IEPs. The one at issue here is dated December 6, 2013, which required Student to receive 25.5 hours per week of specialized instruction outside the general education setting, 4 hours per month of speech and language pathology outside the general education setting and 4 hours per month of occupational therapy outside the general education setting. (P-13)
- 4) Petitioner attended several Resolution, IEP and Multi-Disciplinary Team ("MDT") meeting regarding the Student. (Testimony of Petitioner, Student Educational Advocate, P-17, P-18, and P-19) In the Resolution meeting held on or about June 3, 2014, among other things, the team discussed the parent's concern regarding the

² When citing to exhibits, the third range represents the page number within the referenced exhibit, in this instant, page 1.

failure to reconvene the MDT/IEP meeting upon the parent's request, the Student's date of birth and her eligibility to pass to the kindergarten class, the Student's progress, the IEP goals, the delivery of the Student's required related services for speech and language and occupational therapy, the tools used to access the Student's progress, Extended School Year ("ESY") services, revising the Student's IEP, the difference between the Student's progress and ability at school and home, end of the school year assessments, the services the Student received while regular special education teacher was on maternity leave for two and a half months, the team reviewed the home video of Student, and decided to hold the next IEP meeting on June 16, 2014. (Testimony of Petitioner, Student's Educational Advocate, Respondent's Resolution Compliance Case Manager, Special Education Teacher, and P-18

- 5) During the IEP meeting on or about June 20, 2014, the team again discussed the Student's IEP goals, the Student's progress, the Student's educational benefit from the special education services as tracked by the Verbal Behavior Milestones Assessment and Placement Program ("VB-MAPP"), the issue of whether or not the Student was receiving special education services and her Applied Behavior Analysis charting while regular special education teacher was on maternity leave, the Student's placement for the school year 2014/2015, the parent requested a more restrictive school setting and ESY services, and the parent requested more occupational therapy services, and compensatory education. (Testimony of Petitioner, Petitioner's Educational Advocate, and P-19) During this same meeting, Petitioner learned that Student did not receive the required special education services or the ABA behavior

charting during time the regular special education teacher was on maternity leave.

(Testimony of Petitioner and Student's Educational Advocate)

CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended "(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. §1400(d)(1); *accord*, DCMR §5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a free appropriate public education ("FAPE"). FAPE means:

special education and related services that -

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also*, 34 C.F.R. §300.17 and DCMR §5-E3001.1.

Procedural Violations of IDEA

1. Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -

(I) impeded the child's right to a free appropriate public education;

- (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

20 U.S.C. §1414(f)(3)(E). *See also*, 34 C.F.R. §300.513(a); *accord*, *Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (B.C. Cir. 2006).

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

BURDEN OF PROOF

In a Special Education DPH, the burden of persuasion is on the party seeking relief. DCMR §5-E3030.3; *Schaffer v. Weast*, 546 U.S.49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *See also*, *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

Analysis

Issue #1 – Whether Respondent denied Student a Free and Appropriate Public Education (“FAPE”) by failing to implement the Student’s December 6, 2013 Individualized Education Program (“IEP”).

Petitioner claims that DCPS has denied Student a FAPE because Respondent failed to implement the services required as denoted by the Student’s IEP dated December 6, 2013 during the two and half months the Student’s regular special education teacher was out for maternity leave. I find that Petitioner has met her burden of proof on this issue.

The IDEA is violated when a school district deviates materially from a student’s IEP. *See Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). A petitioner “must show more than a *de minimis* failure to implement all elements of [the student’s] IEP, and

instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP in order to prevail on a failure-to-implement claim. Courts applying this 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.” *See Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (D.D.C.2013) (citations and internal quotations omitted.)

In the instant case, the Student’s regular special education teacher went out for maternity leave from about March 3, 2014 until April 28, 2014 – approximately nine (9) weeks. During this time Respondent provide a substitute teacher in Student’s classroom. However, as discussed during the June 3, 2014 and June 20, 2014 RSM and MDT meetings, the Student did not receive the required special education services and the ABA behavioral charting as denoted in the Student’s IEP during the timeframe of March 3, 2014 to April 28, 2014, when the regular special education teacher was on maternity leave. (Testimony of Petitioner, Petitioner’s Educational Advocate) Respondent did not present any evidence refuting this fact. I find that DCPS’ failure to provide the Student with the required special education services and the ABA behavioral charting during this timeframe was a material deviation from her IEP, and therefore a denial of FAPE. *See 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) (In reviewing failure-to-implement claims, Hearing Officer must ascertain whether the aspects of the IEP that were not followed were “substantial or significant,” or, in other words, whether the deviations from the IEP’s stated requirements were “material.”) I will order DCPS to make up such services.

Issue #2 – Whether Respondent denied Student a FAPE by failing to provide the Student with appropriate placement/location of services.

Petitioner next claims that Respondent denied the Student a FAPE by failing to promote the Student to a kindergarten classroom for the academic school year 2014/2015 as her appropriate placement/location of services. I find that this claim has no merit.

“Under the IDEA, DCPS is obligated to devise IEPs for each child with disabilities, ‘mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs.’ *See Jenkins v. Squillacote*, 935 F.2d 303, 304–305 (D.C.Cir.1991). The appropriateness of the location of services depends upon ‘the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the school, the placement’s cost, and the extent to which the placement represents the least restrictive environment.’” *See N.G. v. D.C.*, 556 F.Supp.2d 11, 37 (D.D.C.2008) (citing *Branham v. D.C.*, 427 F.3d 7, 12 (D.C.Cir.2005)). *Jalloh v. District of Columbia*, 968 F.Supp.2d 203, 214 (D.D.C.2013). “A local government meets its federal and local statutory obligations to implement a student’s IEP – and thus provide a FAPE – where public placement is ‘reasonably calculated to enable the child to receive educational benefits.’” *T.T. v. District of Columbia* 2007 WL 2111032, 9 (D.D.C. 2007), quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982). *See, also, G. ex rel. Ssgt RG v. Fort Bragg Dependent Schools*, 324 F.3d 240, 252 (4th Cir. 2003) (proper standard is whether public agency is able to provide student educational benefit under the IEP).

As early as the June 3, 2014 RSM meeting, Petitioner was informed that the date of birth deadline to promote children to kindergarten was September 30th. The Student’s date of birth is November 15, which is over a month and half past the cut-off date. Furthermore, Respondent

informed Petitioner that promotion to kindergarten is determined by age and not progress level. This Hearing Officer did take note that Student was making some progress toward her IEP goals as evidenced by the VB MAPP and the discussing during her various IEP meetings. Specifically, regarding the VB MAPP, Student must master 3 -4 levels in order to be moved to another classroom. Respondent reported that Student had not mastered all of her goals. Further, Petitioner attempts to address the difference between the Student's progress and interaction at home and school. To address this matter, Respondent agreed to change some of the IEP goals and work on her 'carry over' skills as discussed during the June 20, 2014 MDT meeting. However, the only reason Student is not being promoted to Kindergarten is her date of birth is after the September 30th birth date deadline. For this reason, I find Petitioner has not met her burden regarding this claim. Respondent prevails.

Issue #3 – Whether Respondent denied Student a FAPE by failing to allow the parent meaningful participation in the placement decision-making process for Student.

The IDEA requires that for all IEP team meetings, the education agency take steps to ensure that the parent is present or is afforded the opportunity to participate, including—

- (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- (2) Scheduling the meeting at a mutually agreed on time and place.

34 CFR § 300.322(a).

Lastly, Petitioners contend that DCPS failed to comply with the IDEA's procedures because the Parents were not able to meaningfully participate in the placement decision making process for the Student. This claim is without merit.

Parental participation in IEP formulation is undoubtedly a hallmark of the IDEA. *See, e.g., A.I. ex rel. Iapalucci*, 402 F.Supp.2d at 164 (noting that procedural violations that seriously

infringe upon the parents' opportunity to participate in the IEP formulation process clearly result in a denial of a FAPE). It is noted that part of the IEP process includes the placement decision of the minor child. Here, however, Parents, in person and by their representatives, Educational Advocate and Petitioners' Counsel, fully participated in all of Student's IEP, RSM, and MDT meetings dated June 3, 2014, June 20, 2014, and a RSM meeting on July 24, 2014. Both the parent and the educational advocate participated in those meetings regarding, not limited to, the Student's IEP goals and placement. Specifically regarding placement, Petitioner expressed concerns with the Student's current placement because of the lack of special education services being provided during the special education teacher's maternity leave and the lack of the Student making progress in school as she is at home, Petitioner requested Respondent to locate another placement for Student. Petitioner also requested that they be provided a list of various placement/school options for Student and the opportunity to visit such placement options. Respondent submitted two such options to Petitioner – Houston Elementary, which is closer to Student's home and Barnard Elementary, where the Student would be in the classroom of her ESY teacher. However, the parents were not able to visit the school because the schools were closed for the summer but the parents would be able to visit once school resumes in the fall. I find that Petitioner has not shown that DCPS failed to ensure their right to participate in the placement decision making process for the Student. Furthermore, now that school has resumed, Petitioner should visit the two placement/school options suggested by Respondent.

Compensatory Education Remedy

Petitioner seeks an award of compensatory education for Public Charter Schools' failure to provide Student a FAPE for the 2012-2013 school year. The IDEA gives Hearing Officers "broad discretion" to award compensatory education as an "equitable remedy" for students who

have been denied a FAPE. *See Reid v. District of Columbia*, 401 F.3d 516, 522-23 (D.C.Cir. 2005). The award must “provide the educational benefits that likely would have accrued from special education services” that the school district “should have supplied in the first place.” *Id.* at 524. A compensatory education award must “rely on individualized assessments” after a “fact specific” inquiry. *Id.* “In formulating a new compensatory education award, the hearing officer must determine ‘what services [the student] needs to elevate him to the position he would have occupied absent the school district’s failures.’” *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) (quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527.) *See, also, e.g., Turner v. District of Columbia*, 2013 WL 3324358, 10 - 11 (D.D.C. July 2, 2013). 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. *Gill v. District of Columbia*, 770 F.Supp.2d 112, 116-117 (D.D.C.2011), *aff’d.*, *Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011).

In the instant case, once the Student’s special education teacher returned to work and provided assessments of the Student, it showed the Student was making progress, however, there was still a discrepancy with the Student’s progress in the home-setting and the school-setting. This issue needs to be further addressed. However, the evidence provided during the due process hearing sheds no light on what additional educational benefits the Student would have received if provided to required special education services during such time the regular special education teacher was on maternity leave or what services she would need to compensate her for being deprived of these services. Petitioner submitted a Compensatory Education Proposal and called the Student’s Educational Advocate as a witness in support of her compensatory education claim.

However this witness' testimony offered no insight on "the educational benefits that likely would have accrued" had Respondent provided Student special education services as required. I find, therefore, that Petitioner has failed to support her claim for compensatory education for this denial of FAPE. *See, Gill v. District of Columbia*, 770 F.Supp.2d 112, 118 (D.D.C.2011), *aff'd*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011) (Due to the lack of evidentiary support, the Court is compelled to find that Plaintiffs have failed to support their claim for compensatory education.) While a court has discretion to take additional evidence concerning the appropriate compensatory education due a student, *see Gill*, 751 F.Supp.2d at 114, I am constrained under the DCMR to issue my final Hearing Officer Determination in this case no later than September 27, 2014. *See* DCMR tit. 5-E, § 3030.11. Therefore, based on the record before me, I will deny, without prejudice, Petitioner's request for a compensatory education award. Under the D.C. Circuit's decision in *Reid*, a hearing officer may not delegate his authority to an IEP team to formulate a compensatory education award. Therefore, I strongly encourage, but do not order, Respondent to convene Student's IEP team to consider what educational deficits resulted to Student from her not receiving special education services from March 3, 2014 to April 28, 2014 – maternity leave of special education teacher - and to determine what supplemental programming and services Student now needs "to elevate her to the position she would have occupied absent Respondent's failures." *See, Stanton, supra*.

ORDER

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

- (1) Petitioner's request for a compensatory education award is denied without prejudice. I encourage, but do not order, the parties to endeavor to reach a voluntary agreement on appropriate compensatory education for the failure of Respondent to provide Student with 25.5 hours per week of specialized instruction outside the general education setting, 4 hours per month of speech and language pathology outside the general education setting and 4 hours per month of occupational therapy outside the

general education setting while the regular Special education teacher was on maternity leave; and

(2) All requested relief by Petitioner in this matter is DENIED.

IT IS SO ORDERED.

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).

09/27 /14

Dated

Christal E. Edwards /s/

Christal E. Edwards, Esq.

Hearing Officer