

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 11, 2014

STUDENT, ¹)	
through the PARENT,)	
)	Date Issued: September 10, 2014
<i>Petitioner,</i>)	
)	Hearing Officer: NaKeisha Sylver Blount
v.)	
)	
District of Columbia Public Schools,)	
)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

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.

The DPC was filed on June 27, 2014, by the Parent on behalf of the Student, a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”).

On June 30, 2014 the undersigned was appointed as the Impartial Hearing Officer (“IHO”). On July 7, 2014, Respondent filed its timely Response, denying that Respondent denied the Student a free appropriate public education (“FAPE”).

The undersigned IHO held a Pre-hearing Conference (“PHC”) by telephone on July 17, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by August 7, 2014 and that the Due Process Hearing (“DPH”) would be held on August 14, 2014.² The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued July 17, 2014.

¹ Personal identification information is provided in Appendix A.

² August 18, 2014 was subsequently added to accommodate the need for additional time in order to complete the hearing.

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Petitioner's and Respondent's disclosures were timely filed. At the DPH, Petitioner's exhibits P-1 through P-5, P-7 through P-15 and P-18 through P-36, and Respondent's exhibits R-1 through R-11 were admitted without objection. Petitioner's exhibits P-6, P-16 and P-17 were admitted over Respondent's objection.

The following witnesses testified on behalf of Petitioner at the DPH:

- Parent/Petitioner;
- Student's Aunt;
- Student;
- Parent's Educational Advocate ("Educational Advocate").

The following witness testified on behalf of Respondent at the DPH:

- Special Education Coordinator/LEA Representative, District Middle School ("Special Education Coordinator");
- Special Education Teacher at District Middle School ("Special Education Teacher");
- Assistant Principal in charge of Special Education Services at District Senior High School ("Assistant Principal").

The parties gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- A. Whether DCPS denied the student a free appropriate public education ("FAPE") by failing to develop an appropriate IEP and placement/setting/location of services. The IEP in dispute is the Student's current IEP (which on information and belief is dated February 2014) and the Petitioner raises the following specific issues with respect to the IEP.
1. whether the number of service hours outside the general education setting were inappropriately decreased from one version of the IEP to another in February 2014;
 2. whether the service hours outside the general education setting as reflected on the IEP are insufficient;
 3. whether the IEP goals are reasonably calculated to provide the Student educational benefit in all areas of academic concern, based on the student's March 2012 Confidential Psychological Evaluation — Tri-annual Re-evaluation;
 4. whether the IEP goals were sufficiently revised based on the student's demonstrated lack of academic progress;
 5. whether the social and emotional goals as written in the IEP are too vague and are not reasonably calculated address the student's academic malaise and frustration;

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6. whether the valid and current IEP and services being implemented for the student were made clear to the Student.
 7. whether the IEP goal related to “Other Classroom Aids and Services” is too vague and not reasonably calculated to provide the student educational benefit
- B. Whether DCPS denied the student a FAPE by failing to implement the Student’s IEP throughout the 2013-2014 school year. DCPS failed to provide the student access to technology that would help the student access her general education, and teachers’ notes, as required in the section of the IEP labeled “Other Classroom Aids and Services.”
- C. Whether DCPS denied the student a FAPE by failing to provide access and/or timely access to records.

RELIEF REQUESTED

Petitioner requested the following relief:

- A. an Order that DCPS fund placement and transportation to a public or a non-public school that can provide the student with educational benefit;
- B. an Order that DCPS immediately furnish and implement an appropriate IEP or, in the alternate, immediately and fully implement the student’s current IEP;
- C. an Order that DCPS update and implement appropriate behavioral support services and or counseling services;
- D. an Order that DCPS devise and implement an appropriate attendance intervention plan as part of any behavioral intervention plan;1
- E. an Order that DCPS provide the student with compensatory education services in the form of one-on-one tutoring to occur outside the school setting at a place and location to be agreed upon by the parent and by DCPS as follows:
Reading: 66 hours at a rate of 120 minutes 1 time weekly for 8.5 months
Written Language: 66 hours at a rate of 120 minutes 1 time weekly for 8.5 months
Math: 66 hours at a rate of 120 minutes 1 time weekly for 8.5 months

FINDINGS OF FACT

Background

1. The Student _____ resides with her mother, the Petitioner, in Washington, D.C.

2. The Student has been determined to be eligible for special education and related services under the IDEA with the disability classification “Specific Learning Disability.”

3. During the 2013-2014 school year and the previous two school years, Student attended District Middle School. Testimony of Parent.

5. She did not do well during the 2013-2014 school year. Parent had a lot of concerns about the student’s progress in reading math and her core subjects.

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6. The Student has been retained one time, at a previous school.
Testimony of Aunt.

7. Student's special education teacher in the 2013-2014 school year was Special Education Teacher.

8. Student's disability classification is SLD, which has been her classification since her initial eligibility determination. Testimony of Special Education Coordinator.

9. Student is well-behaved in school. Testimony of Parent's Educational Advocate.

10. Student's current IEP is dated February 10, 2014 ("2014 IEP"). Her IEP immediately prior to the current IEP is February 26, 2013 ("2013 IEP"). R-2 and R-3.

11. In February 2014, one IEP meeting for Student, and it was the second attempt in 2014 to convene an IEP meeting for the student. The first attempt was in January 2014, and Parent was not available to participate in that meeting. Parent's former educational advocate joined the attempted meeting via teleconference; however, she was not yet conversant enough with the case to feel comfortable going forward with the meeting at that time; therefore, she requested that the meeting be rescheduled. The meeting was rescheduled for February and that was only IEP meeting for Student in February 2014. Testimony of Parent; Testimony of Special Education Coordinator.

12. Parent was not available to attend the February 2014 meeting either. While witness testimony differed as to whether Parent knew about the meeting, the hearing officer finds that Parent knew the school was working to set up an IEP meeting and knew that the proposed/tentative date was February 10, 2014 but that Parent was unclear that the finalized date was February 10, 2014, and the school did not know Parent was unclear about the date. In reaching this finding, the hearing officer credits Parent's testimony that she requested the meeting to be rescheduled, and Special Education Coordinator's testimony that she communicated the date of the meeting to the former educational advocate by phone, but did not communicate the date in writing, such as through a Prior Written Notice, to either Parent or the former educational advocate. Testimony of Parent; Testimony of Special Education Coordinator.

13. A full IEP meeting and eligibility meeting was conducted on February 10, 2014. Student's current IEP was developed at that time, and this is the only IEP developed for Student in February 2014. Testimony of Special Education Coordinator.

14. Parent did not request, nor did the school offer to convene, a follow up IEP team meeting after the February 10, 2014 meeting. Testimony of Parent; Testimony of Special Education Coordinator.

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15. District Middle School sent Student's 2014 IEP home to Parent by way of Student; however, Parent never received and never signed the IEP. Testimony of Parent; Testimony of Special Education Coordinator.

16. Special Education Coordinator did not follow up with Parent by phone to inquire about why Parent had not returned a signed copy of the IEP. Testimony of Special Education Coordinator.

17. Special Education Coordinator did not provide a copy of the IEP to Parent or ask her to sign it at that time. Testimony of Special Education Coordinator.

18. Parent met with some of the members of Student's IEP team, including Student, during the second advisory period. This meeting was not an IEP team meeting. During this meeting, Parent expressed concern about the extent to which Student was receiving her assistive technology. Testimony of Parent; Testimony of Special Education Coordinator; Testimony of Special Education Teacher.

19. Parent did not request and District Middle School did not provide a copy of the 2014 IEP to Parent during the second advisory meeting. Testimony of Parent; Testimony of Special Education Coordinator.

20. From the 2013 IEP to the 2014 IEP, Student received an increase in service hours in each area, except for Written Expression, which decreased by one hour, and Occupational Therapy, which decreased from two hours per month to thirty minutes per month. R-2 and R-3.

21. The 2013 and 2014 IEPs indicate that Student benefits from or has access to the following assistive technologies during inclusion English class: teacher notes, graphic organizers, a computer and an Alpha Smart, and audio short stories. R-2 and R-3.

22. Student's 2014 IEP contains a number of errors, such as incorrect dates of completion, incorrect age listed for Student, and incorrectly reflecting that Student was making progress in mathematics, when she was actually failing mathematics. R-3-7 through R-3-12; Testimony of Parent's Educational Advocate; Testimony of Special Education Coordinator.

23. Some of Student's goals changed from the 2013 IEP to the 2014 IEP; however many remained the same. Testimony of Parent's Education Advocate; Testimony of Special Education Teacher; R-2 and R-3.

24. Some of the goals that did not change remained the same because Student needed additional time to master the goals, and/or because they were adaptable to her new grade level. Testimony of Special Education Teacher.

25. Student greatly struggles in the areas of reading and written expression. Student's handwriting is quite poor. These foundational skills deficits hold Student, who has good critical

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thinking skills, back from making as much progress as she otherwise could. Testimony of Parent; Testimony of Aunt; Testimony of Special Education Coordinator; Testimony of Special Education Teacher.

26. Student had dyslexia or a similar disability. Student can perform better on tests when the testing material is read aloud to her, because when she reads it the words herself, the words get “jumbled up.” When someone reads the material to her she understands more clearly. Testimony of Student.

27. When she cannot understand what is going on, she feels frustrated. In the larger classroom, she is not able to understand much of the curriculum. Testimony of Student.

28. Student has difficulty advocating for herself and her needs. Testimony of Parent’s Educational Advocate; P-7-6. Student was previously bullied and teased because she had to get help in class and the kids noticed the modifications she received. As a result, she self-conscious and reluctant to participate in anything that makes her seem deficient. Testimony of Parent

29. Student does not need much, if any, support in classes such as music and physical education (“specials”). She needs small group and/or one-on-one support for her academic classes. Testimony of Student; Testimony of Special Education Teacher.

30. Student benefited from some of the same interventions for her deficits in written expression as for reading. Inside the general education setting, Student received her reading and written expression support in English class. The hours of support reflected in her current IEP cover most of the hours Student was in English class each week. Testimony of Special Education Coordinator; Testimony of Special Education Teacher.

31. Special Education Teacher was Student’s inclusion teacher in English and mathematics. Special Education Teacher was with Student for the entirety of each of these classes, except when he had a conflict. Special Education Teacher.

32. Student was pulled out of the general education setting into the “Resource Room” for a little over an hour per day, four days per week. The Resource Room was a small special education only class of fewer than ten students. Special Education Teacher was able to give these students, including Student, additional support and assistance in the Resource Room, including with foundational skills. Testimony of Special Education Teacher.

33. Student benefited from her time in the Resource Room, because she felt more comfortable asking her questions there, and Special Education Teacher was able to help her gain a firmer grasp on the material that had been covered in the general education setting. Student’s performance in the general education classroom was improved due to her time in the Resource Room. Testimony of Student; Testimony of Special Education Teacher.

34. Student failed three classes in the 2013-2014 school year, but was promoted to the next grade. Testimony of Parent. The fact that Student was promoted to the next grade does not

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necessarily mean that she mastered the coursework she was taught in 2013-2014. Testimony of Special Education Teacher.

35. During the summer of 2013, Student received reading support and instruction from a program through a company specialized phonics/decoding tools with Student, and Student's reading scores improved greatly from the beginning of that program through the end of the program. Parent shared the testing data with Special Education Coordinator; however, Special Education Teacher was not aware of Student's participation. Testimony of Parent; Testimony of Aunt; Testimony of Parent's Educational Advocate.

36. Special Education Teacher used reading interventions with Student which he drew from his teaching experience, such as providing individual attention, material with Student, and giving Student modifications as appropriate. He did not use a specific phonic/decoding tool or a dyslexia specific reading intervention method. Testimony of Special Education Teacher.

37. In addition to working on reading with Special Education Teacher in the Resource, Student also participated in a special class at District Middle School called "Read 180," meant to support Student's comprehension and fluency through small group work, use of software, and independent reading. Testimony of Special Education Teacher.

38. Inherent to some of Student's IEP goals is the assumption that Student will gain assistance from her peers and/or teachers while in the general education setting. Testimony of Parent's Educational Advocate; Testimony of Special Education Teacher.

39. Student did some of her homework in the Resource Room; however, she rarely if ever took her homework home and did it at home. One reason she did not take her homework home is because she was afraid she would lose it. Testimony of Student; Testimony of Special Education Coordinator.

40. Student's 2013-2014 academic performance was impeded to some degree by tardiness and her failure to do homework. Testimony of Special Education Teacher; Testimony of Special Education Coordinator.

41. District Middle School offered after school tutoring to Student and others; however, Student did not participate in after school tutoring. Testimony of Student; Testimony of Special Education Coordinator.

42. Student had access to the Alpha Smart tool whenever she wanted it, but she did not want to use it and did not use it, mostly because she was embarrassed to use it. Testimony of Student; Testimony of Special Education Teacher.

43. Student received teacher notes, which were sometimes written out completely, and sometimes had blanks the teacher purposely left for her to fill in. Testimony of Student; Testimony of Special Education Teacher.

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44. Student had access to a calculator, computer, graphic organizer and audio short stories. Sometimes the stories were pre-recorded, and sometimes Special Education Teacher read aloud to her. Sometimes the calculator was withheld if Special Education Teacher did not believe it would be beneficial to Student, either because of the type of mathematics problem she was working on, or because he felt she would benefit from attempting to solve the problem without the calculator. Access was inconsistent in classes where Special Education Teacher was not present. Testimony of Student; Testimony of Special Education Teacher.

45. District Middle School did not receive any records requests from Parent between November and the filing of the DPC. It provided records to Parent on or around July 21, 2014 and in November 2013. Testimony of Special Education Coordinator; R-11.

CONCLUSIONS OF LAW

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *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).

A hearing officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

I. Whether DCPS denied the student a free appropriate public education (“FAPE”) by failing to develop an appropriate IEP and placement/setting/location of services in the specific ways listed below:

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). When a Petitioner challenges an IEP as inappropriate, the hearing officer must consider the allegation in light of a two-part inquiry. First, the hearing officer must consider whether DCPS complied with IDEA’s procedural requirements in crafting the IEP. No procedural violations are alleged with respect to the IEP in question, dated April 28, 2014 IEP (procedural violations are alleged with respect to the determination of the Student’s placement, as discussed in Section IV below). The second part of the inquiry is whether the IEP is “reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential.” *D.S. v. Bayonne*

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Bd. of Educ., 54 IDELR 141 (2010) (quoting *Chambers v. Philadelphia Bd. of Educ.*, 587 F.3d 176, 182 (3d Cir. 2009)). The IEP need not guarantee benefit; rather, the IEP need only be reasonably calculated to allow the student to derive educational benefit. *Smith v. District of Columbia*, 63 IDELR 77 (D.D.C. 2014). Academic progress is a significant factor in determining whether an IEP is reasonably calculated to provide a student with educational benefit. See *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 45 (D.D.C.2006); see also *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 81 (D.D.C.2004).

(a) *whether the number of service hours outside the general education setting were inappropriately decreased from one version of the IEP to another in February 2014;*

There was only one February 2014 IEP; therefore, Student's hours could not have been decreased from one version of a February 2014 IEP to another version of a February 2014 IEP.

(b) *whether the service hours outside the general education setting as reflected on the IEP are insufficient;*

Student's service hours included a balance of hours inside and outside the general education setting that seemed to work well for the student. Student's hours outside the general education setting were roughly doubled in the 2014 IEP, and the team considered her least restrictive setting when determining the balance, as Student also benefits from working with her peers inside the general education setting. Therefore, the hearing officer does not find the hours outside the general education setting to be insufficient.

(c) *whether the IEP goals are reasonably calculated to provide the Student educational benefit in all areas of academic concern, based on the student's March 2012 Confidential Psychological Evaluation — Tri-annual Re-evaluation.*

Student's triennial evaluation took place nearly two years prior to the current IEP, and one would need to take into account the extent to which Student's needs had evolved as addressed by the several IEPs Student has had since the triennial.

(d) *whether the IEP goals were sufficiently revised based on the student's demonstrated lack of academic progress*

A number, but not all, of Student's service goals were repeated from the 2013 to the 2014 IEP. However, Special Education Teacher testified credibly that the goals were repeated because Student still needed to make progress on them, and that they were adaptable to meet her new grade level

(e) *whether the social and emotional goals as written in the IEP are too vague and are not reasonably calculated address the student's academic malaise and frustration*

The inclusion of the incorrect age for Student in the socio-emotional goals gives the hearing officer pause; however, the goals as related to Student's difficulty with self advocacy were also supported by witnesses at the DPH, and cannot be said to be inappropriate.

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(f) whether the valid and current IEP and services being implemented for the student were made clear to the Student.

Student was able to discuss her IEP services during her testimony at the DPH; therefore, the hearing officer is satisfied that she had a sufficiently clear understanding of the services that were to be available to her.

(g) whether the IEP goal related to “Other Classroom Aids and Services” is too vague and not reasonably calculated to provide the student educational benefit

The IEP specifies that Student would have access to certain assistive technologies during inclusion English class (which addressed some of her largest deficits in reading and written expression). The testimony was that by and large she had access to the technologies during English, where Special Education Teacher was present with her, and/or in Resource Room. Additionally, Student likely had at least some access to the technologies beyond inclusion English class. Therefore, while the access may not have been universal outside of English class, the goal was not vague, she had access to the technologies in key class specified in the IEP, and she derived some educational benefit from them. In reaching this conclusion, the hearing officer considered the Student’s difficulty in advocating for herself, and the fact that if she did not understand when she should be given access to the technologies, she may not speak up for herself. However, the language is essentially the same as from the previous year’s IEP, which Parent did not indicate she believed was vague. Therefore, at the time the team developed the IEP, it would not have had a reason to believe the language was unacceptably vague.

The hearing officer does not find Petitioner met her burden of proof that there was a denial of FAPE on this issue.

II. Whether DCPS denied the student a FAPE by failing to implement the Student’s IEP throughout the 2013-2014 school year. DCPS failed to provide the student access to technology that would help the student access her general education, and teachers’ notes, as required in the section of the IEP labeled “Other Classroom Aids and Services.”

It is well established that not every failure to provide services according to a student’s IEP amounts to an IDEA violation, but a material failure to implement an IEP violates the IDEA. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. A showing of educational harm is not required. *See Department of Education, State of Hawaii v. R.F. by Pauline F.*, 57 IDELR 197 (2011).

As stated above, the IEP specifies that Student would have access to certain assistive technologies during inclusion English class (which addressed some of her largest deficits in reading and written expression). The testimony was that by and large she had access to the technologies during English, where Special Education Teacher was present with her, and/or in

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Resource Room. Additionally, Student likely had at least some access to the technologies beyond inclusion English class. Even if DCPS could be said to have fallen short in providing assistive technologies consistent with the IEP to some extent, it would not rise to the level of a material failure.

The hearing officer does not find Petitioner met her burden of proof that there was a denial of FAPE on this issue.

III. Whether DCPS denied the student a FAPE by failing to provide access and/or timely access to records.

A parent is entitled to receive records from DCPS related to the provision of a FAPE to her child. *See* 34 CFR §§ 300.501 (a), 300.613(a); *Jalloh ex rel. R.H. v. District of Columbia*, 535 F.Supp.2d 13, 21 (D.D.C.2008) (Parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records.). Parent did not receive the IEP DCPS sent home by way of Student. However, based on the evidence presented, DCPS did not deny a request from Parent for a copy of the IEP. Rather, it provided records when they were requested in November 2013 and July 2014, and erroneously assumed that Parent had received the copy of the IEP it sent home by Student who has trouble keeping track of paperwork. Therefore, no denial of FAPE is found on this basis.

The hearing officer does not find Petitioner met her burden of proof that there was a denial of FAPE on this issue.

Order

Accordingly, all relief Petitioner requested in the complaint is **DENIED**.

This complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

Date: September 10, 2014

/s/ NaKeisha Sylver Blount
Hearing Officer

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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).