

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
September 17, 2014

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: September 16, 2014
Petitioner,)	
)	Hearing Officer: John Straus
v.)	
)	
District of Columbia Public Schools (“DCPS”))	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

The Petitioner, the Student’s mother, filed a due process complaint notice on June 23, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged that the District of Columbia Public Schools (“DCPS”) failed to provide an appropriate IEP on May 7, 2014 that provides educational benefit; specifically, the IEP does not provide 10 hours per week of specialized instruction in the general education setting, does not have Math or Written Expression goals and does not have a disability category of Multiply Disabled.

The Petitioner sought a meeting to review and revise the student’s individualized education program (“IEP”) by including 10 hours of specialized instruction in the general education setting, adding Math and Written Expression goals and change the disability category to Multiple Disabled.

DCPS asserts the Multidisciplinary Team (“MDT”) met on October 30, 2013 to review and revise the student’s IEP. The team determined the student requires 5 hours per week of specialized instruction in the general education setting, 2 hours per week of specialized instruction outside of the general education setting, and 30 minutes per month of speech

¹ Personal identification information is provided in Appendix A.

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language consultation. The team reconvened on May 7, 2014 at the request of the parent. The team agreed that the student's IEP and services are appropriate.

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; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on June 23, 2014 and assigned to another hearing officer. This Hearing Officer was assigned to the case on June 24, 2014.

Neither Petitioner nor Respondent waived the resolution meeting. A resolution meeting took place on July 8, 2014, at which time parties agreed to keep the resolution period open. The 30-day resolution period ended on July 23, 2014, the 45-day timeline to issue a final decision began on July 24, 2014 and the final decision was initially due by September 6, 2014. *See* 34 C.F.R. §§ 300.510 and .515.

On August 6, 2014, DCPS filed a motion to continue the hearing due to the unavailability of DCPS counsel and witnesses. The Hearing Officer agreed to the continuance over objection on August 10, 2014. The final decision is due September 16, 2014.

Petitioner presented three witnesses: the Petitioner, an Educational Advocate ("EA") and a Paralegal. DCPS presented no witnesses.

The Petitioner's Disclosure Statement, filed and served on August 29, 2014, consisted of a witness list of five (5) witnesses and documents P-01 through P-15. The Petitioner's documents were admitted into evidence without objection.

The Respondent's Disclosure Statement, filed and served on August 29, 2014, consisted of a witness list of four (4) witnesses and documents R-1 through R-11. The Respondent's documents R-1 and R-9 were admitted in to evidence over objection and the remaining documents were admitted in to evidence without objection.

The sole issue to be determined in this Hearing Officer Determination is as follows:

Whether denied the Student a FAPE by failing to provide an appropriate IEP on May 7, 2014 that provides educational benefit; specifically, the IEP does not provide 10 hours per week

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of specialized instruction in the general education setting, does not have Math or Written Expression goals and does not have a disability category of Multiply Disabled.

For relief, the Petitioner requested a meeting to review and revise the student's IEP to include 10 hours of specialized instruction in the general education setting, adding Math and Written Expression goals and change the disability category to Multiple Disabled..

Findings of Fact²

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is a resident of the District of Columbia who attends Elementary School. The Petitioner is the Student's mother.³
2. On December 1, 2011, the student received a neuropsychological assessment. The assessment yielded average cognitive scores. The assessment included the Wechsler Individual Achievement Test – Third Edition (“WIAT - III”) which yielded below average scores in Early Reading Skills, Reading Comprehension, Math Problem Solving and Alphabet Writing Fluency and average scores in Numerical Operations and Spelling. The evaluator stated the student is a student with Attention Deficit Hyperactivity Disorder (“ADHD”). The evaluator recommended the student continue to receive special education and speech and language services and receive a speech and language assessment. The evaluator provided specific strategies for his special education program.⁴
3. On October 30, 2013, the IEP team reviewed the IEP and determined the student is a student with a speech and language impairment under the IDEA. The team shifted speech and language services from direct services outside of the classroom to consultative services to monitor maintenance progress of receptive and expressive language goals and foster independence in the general education setting. The team determined the student required two hours of specialized instruction per week outside of the general education setting which did not make any changes to the amount of services. The team developed Reading and Speech and Language goals but no goals in Math or Written Expression. The team determined the student requires preferential seating and flexible scheduling.⁵

² Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ Petitioner

⁴ P-6

⁵ Petitioner, P-3, R-5

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4. On December 4, 2014, the student received another neuropsychological assessment. The assessment yielded average cognitive scores again. The assessment included a Woodcock-Johnson III Normative Update – Test of Achievement (“WJ-III”). The assessment yielded below average scores in Reading Fluency, Passage Comprehension, Broad Reading, Writing Fluency, Written Expression and Academic Fluency. The assessment yielded average scores in Letter-Word Identification, Word Attack, Basic Reading Skills, Calculation, Math Fluency, Math Calculation Skills, Spelling, Writing Samples and Academic Skills. These scores may be compared to the WIAT-III scores. The evaluator stated the student is a student with ADHD and a Learning Disability (“LD”) and recommended the student’s disability category be changed to Other Health Impairment (“OHI”) and Specific Learning Disability (“SLD”). The evaluator further made classroom supports such as preferential seating, behavior charts, additional time for tests and assignments and recorded textbooks. The evaluator recommended services cover the full period of instructional time in reading and writing (language arts), as well as reading and writing support in other classes as needed.⁶
5. On May 7, 2014, the Multidisciplinary Team (“MDT”) team reviewed the neuropsychological assessment conducted by December 4, 2013. The members of the MDT team included the general education teacher, the case manager, the school psychologist, the speech and language psychologist, the Local Education Agency Representative (“LEA Representative”), the parent and EA. The Petitioner requested the student receive 10 hours of specialized instruction per week.⁷
6. The student’s grades improved remarkably at the end of the 2013-2014 school year. He met the fourth grade standards at a basic level in Math and English and Language Arts.⁸
7. The student attended summer school during the summer of 2014. The student’s behavior met the standard; however, he merely approached the standard in writing and math and did not meet the standard in reading.⁹

Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

“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).

The IEP team convened on May 7, 2014

⁶ P-4

⁷ P-7, R-4

⁸ R-8

⁹ P-9

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Pursuant to 34 C.F.R. § 300.321(a), the IEP team includes the parents of the child; not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child; a representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; is knowledgeable about the general education curriculum; and is knowledgeable about the availability of resources of the public agency; an individual who can interpret the instructional implications of evaluation results; at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and whenever appropriate, the child with a disability.

On May 7, 2014, the general education teacher, the case manager, the school psychologist, the speech and language psychologist, the LEA Representative, the parent and EA met. These individuals match the required members of the IEP team listed above. DCPS asserts that this was a MDT meeting. There is nothing in the regulations that describes a MDT meeting. However, members of the IEP team met on May 7, 2014. Therefore, notwithstanding DCPS' assertions, the Hearing Officer finds that the IEP team met on May 7, 2014 and made no changes to the IEP.¹⁰

The purpose of the IDEA is to provide a "cooperative process" between parents and schools, and a central component of this collaboration is the IEP process. *Schaffer v. Weast*, 546 U.S. 49 (U.S. 2005). The IEP is the cornerstone of the IDEA that sets forth the FAPE that is offered to a child with a disability eligible to receive special education and related services under the IDEA. *See* 34 CFR 300.17. The failure of an IEP team to address a child's educational needs will likely result in a denial of FAPE. *Forest Grove Sch. Dist. v. T. A.*, 52 IDELR 151 (U.S. 2009). Therefore, the hearing officer must determine whether the IEP team's failure to make changes to the IEP resulted in a denial of FAPE.¹¹ Here, the Petitioner asserts that the IEP is not reasonably calculated to provide a FAPE because it does not have the correct disability category, does not provide enough hours of specialized instruction outside of the general education setting and does not have goals in Math or Written Expression.

DCPS did not deny the Student a FAPE by failing to change the student's disability category

¹⁰An IEP is the written document memorializing the collaborative effort between parents and district personnel to develop an educational plan for a student with a disability. The IEP describes the child's individual needs and proscribes the proper placement and services designed to meet those unique needs. *Schaffer*, 546 U.S. 49 (U.S. 2005); 34 C.F.R. § 300.320. As described by the U.S. Supreme Court, the IEP is a comprehensive statement of the educational needs of a child with a disability and the specially designed instruction and related services a district will employ to meet those needs. *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 556 IDELR 389 (U.S. 1985).

¹¹ A district's obligation to provide FAPE to a student with a disability is satisfied when the district provides the student with the personalized educational program necessary to allow the child to derive an educational benefit from that instruction. In other words, the FAPE requirement of the IDEA demands access to educational opportunity only, not the specific achievement of educational results. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).

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An IEP should not be "automatically set aside ... for failing to include a specific disability diagnosis or containing an incorrect diagnosis." *Fort Osage R-1 School District v. Sims*, 641 F.3d 996, 1004 (8th Cir. 2011). Classification of the precise impairment listed within 20 U.S.C. § 1401(3)(A)(i) is "not critical in evaluating FAPE" and IDEA charges schools to develop an "appropriate education, not with coming up with the proper label." *Pohorecki v. Anthony Wayne Local School District*, 637 F. Supp. 2d 547, 557 (N.D. Ohio 2009) (quoting *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997)).

In this case, the evidence demonstrates that the IEP team erred in failing to determine the student is no longer a student with a speech and language disability under the IDEA and should have determined the student is either a student with OHI under the IDEA, SLD under the IDEA or Multiply Disabled under the IDEA. 34 C.F.R. § 300.8(c). However, the team's failure to change the disability category did not result in a denial of FAPE. Instead, the Hearing Officer must look at the services and goals to determine whether the IEP is reasonably calculated to provide FAPE.

DCPS did not deny the Student a FAPE by failing to provide 10 hours per week of specialized instruction in the general education setting

In order to comply with FAPE requirements, the IDEA requires that districts provide special education services to every student with a disability. Special education services include specially designed instruction, provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability..39(a)(1). Specially designed instruction means adapting, as appropriate, to the needs of the child, the content, methodology, or delivery of the instruction to address the unique needs of the child that result from the child's disability; and to ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all child. 34 C.F.R. § 300.39 (b)(3).

Pursuant to 34 C.F.R. § 300.320(a)(4), the IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

In this case, the December 2, 2014, neuropsychological assessment states services cover the full period of instructional time in reading and writing (language arts), as well as reading and writing support in other classes as needed. There is nothing in the record indicating how much time the student is actually in reading and writing (language arts) per week. The Petitioner requests the IEP be changed from five hours of specialized instruction outside the general education setting per week to ten hours of specialized instruction outside the general education

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setting per week. Based on the evidence presented, the hearing officer finds that the IEP team could reasonably determine the student continues to require five hours of specialized instruction per week. Therefore, the team's failure to increase the hours of specialized instruction did not result in a denial of FAPE.

DCPS denied the Student a FAPE by failing to add Written Expression goals to the IEP

The IDEA requires each IEP to include a statement of measurable annual goals designed to meet the child's disability-related needs. 34 C.F.R. § 300.320(a)(2)(i).¹² The goal of this requirement is to permit the IEP team to monitor the student's progress in areas of need. *Los Angeles Unified Sch. Dist.*, 110 LRP 34448 (SEA CA 06/03/10). An IEP that lacks meaningful educational goals is likely to be fatally defective. *See, e.g., Susquentia Sch. Dist. v. Raelee S.*, 25 IDELR 120 (M.D. Pa. 1996) (parents were entitled to two years' reimbursement at a private school because the student's IEP lacked meaningful educational goals and, as a result, also lacked adequate short-term objectives, criteria for measuring progress, and adequate programming or services to address the student's identified problem areas). *See also Conemaugh Twp. Sch. Dist.*, 23 IDELR 1233 (SEA PA 1996) (recognizing that no program can appropriately address a student's needs without first defining the goals it is expected to achieve).

In this case, the December 4, 2014 Neuropsychological assessment yielded below average scores in Writing Fluency and Written Expression. The IEP has no goals in Math or Written expression. Although the student has average educational achievement in Math, these scores reflect the below average scores in Alphabet Writing Fluency on the December 1, 2011 neuropsychological assessment. Although he met the fourth grade standard for Language Arts at the end of the school year. He merely approached the standard in writing in summer school.

The standard for determining if a student has received FAPE is whether the IEP was reasonably calculated to provide educational benefit to the student. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982). Whether an IEP is reasonably calculated to provide educational benefit is determined prospectively. *Fuhrmann v. East Hanover Bd. of Educ.*, 19 IDELR 1065 (3d Cir. 1993); and *Adams v. State of Oregon*, 31 IDELR 130 (9th Cir. 1999). In this case, the May 7, 2014 IEP team did not have the report cards to review in determining whether the IEP should contain writing goals. Based on the evidence, the hearing officer concludes the IEP team reasonably should have added writing goals to the IEP. Therefore, the IEP is not reasonably calculated to provide educational benefit.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must

¹² Each IEP developed for a child with a disability must include a statement of measurable annual goals, including academic and functional goals designed to 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 or meet each of the child's other educational needs that result from the child's disability.

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be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

The Hearing Officer concludes based on the evidence offered at hearing that as of May 7, 2014, the IEP should have included written language goals. Therefore, the student's IEP was deficient from May 7, 2014 through June 20, 2014. However, the hearing officer finds the six week period where the student did not have written expression goals in his IEP *de minimus* harm. Despite the conclusion that the IEP was inappropriate the Hearing Officer concludes that no award for compensation for the inappropriate IEP is equitable.

ORDER

- (1) DCPS shall convene an IEP team meeting within 10 school days to develop written language goals and services for the student;
- (2) For everyday of delay by the Petitioner, DCPS shall have one day to convene the meeting; and
- (3) No further relief is granted.

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).

Date: September 16, 2014

/s/ John Straus
Hearing Officer