

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,¹)	
Petitioner,)	
)	Hearing Dates: 7/29/19 (Room 423);
)	8/12/19 (Room 112); 8/26/19 (Room
v.)	423
)	Hearing Officer: Michael Lazan
)	Case No.: 2019-0142
District of Columbia Public Schools,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student who is currently eligible for services as a student with Multiple Disabilities (the “Student”). A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on May 31, 2019. The Complaint was filed by the parent of the Student (“Petitioner”). On June 10, 2019, Respondent filed a response. The resolution period expired on June 30, 2019.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20

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

U.S.C. Sect. 1400 et seq., its implementing regulations, 34 CFR 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

A prehearing conference was held on July 17, 2019. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on July 22, 2019, summarizing the rules to be applied in the hearing and identifying the issues in the case. The hearing proceeded on July 29, 2019. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence exhibits 1-87. There were no objections. Exhibits 1-87 were admitted. Respondent moved into evidence exhibit 2. There were no objections. Exhibit 2 was admitted.

Petitioner presented as witnesses: herself; Witness A, a neuropsychologist (expert: psychology, neuropsychology, and special education); Witness B, an advocate (expert: special education programming and placement); and Witness C, a legal assistant. Respondent presented as witnesses: Witness D, a teacher; Witness E, formerly the Special Education Coordinator at School A; and Witness F, a resolution specialist. Additional hearings were held on August 12, 2019, and August 26, 2019. Because of the need for additional hearing dates, Petitioner moved for a continuance on August 13, 2019. On August 14, 2019, this Hearing Officer signed an order extending the decision date in this case to September 5, 2019. Closing arguments were presented on August 26, 2019. Additional written statements were presented to this Hearing Officer by Petitioner, on August 29, 2019, and by Respondent, on August 30, 2019.

IV. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined in this case are as follows:

1. Did DCPS fail to provide the Student with extended school year (“ESY”) services for summer, 2019? If so, did DCPS act in contravention of 34 CFR 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a Free Appropriate Public Education (“FAPE”)?

2. Did DCPS fail to provide Petitioner with educational records? If so, did DCPS violate 34 CFR Sect. 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

As relief, Petitioner seeks compensatory education and full access to the Student’s educational records.

V. Findings of Fact

1. The Student is eligible for services as a student with Multiple Disabilities and attends School A, a public school. The Student feels that s/he is too bright for a self-contained special education class and has advocated for placement in an “inclusion” setting at school. Nevertheless, the Student’s academic levels are low in reading, mathematics, and writing. Additionally, the Student experiences behavioral difficulties in school because of, among other things, Attention Deficit Hyperactivity Disorder (“ADHD”). Testimony of Witness D; P-25; P-27-9.

2. The Student’s academic issues are reflected by the Student’s “Lexile” scores on the Scholastic Reading Inventory (“SRI”). The Student scored 633 on the SRI

in September, 2015, which is well below grade level. His/her scores decreased over the course of that year to 507 in December, 2015, and 463 in May, 2016. The 463 score is considered to be at the 2nd grade reading level. P-13-3; P-27-7; P-76-9.

3. A comprehensive psychological evaluation of the Student was conducted on or about December 9, 2015. The Student was examined on the Wechsler Intelligence Scale for Children-Fifth Edition (“WISC-V”), and s/he received a Full Scale IQ score of 80. The Student’s standard score for the working memory sub-test was 72, at the 3rd percentile. The evaluator also tested the Student on the Woodcock-Johnson Tests of Achievement-IV (“WJ-IV”). Most of the Student’s scores were considered to be below the 10th percentile, including the 2nd percentile on passage comprehension, 4th percentile in oral reading, 1st percentile in math calculation, 3rd percentile in math facts fluency and applied problems, and 1st percentile in writing samples. P-70-3.

4. During the 2016-2017 school year, the Student scored a 433 on the SRI in September, 2016. This score increased to 521 in December, 2016. On PARCC testing during this school year, the Student scored 691 in English language arts, at the 13th percentile (in the District of Columbia), and 708 in mathematics, at the 33rd percentile (in the District of Columbia). The Student was tested on the i-Ready math assessment at the end of the 2016-2017 school year, scoring a 463 on this measure. P-24; P-15-6; P-26-7.

5. For the 2017-2018 school year, the Student was again tested on the SRI. The Student scored at a Lexile level of 587 in September, 2017, and a Lexile level of 712 in January, 2018 (a 3rd-grade reading level). The Student took the SRI again at the end of the 2017-2018 school year and scored at a Lexile level of 617. The Student’s report card

for the 2017-2018 school year revealed two final grades of “F,” three final grades of “D,” and four final grades of “C.” P-12; P-21-1; P-12-3; P-26-5; P-32-4.

6. The Student was again tested through the i-Ready measure in math during the 2017-2018 school year. The Student scored a 431 on this measure at beginning of the school year; a 476 in January, 2018; a 469 in March, 2018; and a 488 in May, 2018. P-32-2; P-35-2.

7. The Student’s second-term progress report for the 2017-2018 school year stated that the Student’s reading level “has continued to regress since [his/her Nth] grade year.” P-34-5.

8. An Individualized Education Program (“IEP”) was developed for the Student on December 7, 2017. This IEP recommended that the Student receive ten hours per week of specialized instruction inside general education, 2.5 hours per week of specialized instruction outside general education, and ninety minutes per month of behavior support services. P-26-11.

9. For the 2018-2019 school year, the Student was again tested on SRI. On September 4, 2018, the Student scored 534, in the “below basic” range, at the 1st percentile. On May 9, 2019, the Student scored 752, an increase of over 200 points, but still in the “below basic” range. P-8-6; P-21-1; P-82-75.

10. The Student’s IEP dated November 19, 2018, recommended five hours per week of reading instruction and five hours per week of math instruction inside general education, with ninety minutes per month of behavior support services. P-25

11. A DCPS evaluator tested the Student in December, 2018. On the WJ-IV, the Student tested below level in reading and math, but was considered to be in the “low

average” range in both. The Student was also considered to be in the “above average” range in writing. On the Reynolds Intellectual Assessment System-2 (“RIAS-2”), the Student scored at the 1st percentile in verbal intelligence index. On the Test of Nonverbal Intelligence-4 (“TONI-4”), the Student scored at the 42nd percentile. Finally, on the Comprehensive Test of Phonological Processing-2 (“CTOPP-2”), the Student scored at the 16th percentile in phonological memory. P-70; Testimony of Witness A.

12. After the issuance of a Hearing Officer Determination (“HOD”) by Impartial Hearing Officer (“IHO”) Keith Seat on April 8, 2019, Petitioner’s counsel formally requested the Student’s education records in an email dated April 25, 2019. Petitioner sought second-term records per the HOD; the Student’s IEP of January 20, 2016; service trackers for occupational therapy services; all IEPs prior to January, 2017; and progress reports for the 2016-2017 school year. P-79-2-3.

13. In May, 2019, per the HOD of IHO Seat, the parties met in a multi-disciplinary team (“MDT”) meeting to discuss the Student’s ESY services for the summer of 2019. The meeting lasted about an hour. Petitioner and her representatives (Attorney A and Witness B) appeared by phone. Attendees included the Special Education Coordinator at School A (Witness E), the Student’s special education teacher (Witness E), a general education teacher, and a resolution team representative (Witness F). There was no reference to Beginning of Year (“BOY”), Middle of Year (“MOY”), or End of Year (“EOY”) data at this meeting. The team reviewed the Student’s report cards, discussed the Student’s truancy, reviewed the Student’s progress, and filled out a worksheet to determine whether the Student was eligible for ESY services. Witness E had spoken to other teachers who stated that they also did not notice any issues with the

Student during breaks, including the Christmas and February breaks in the 2018-2019 school year. Through speaking with teachers, the team determined that the Student would be able to recoup information over breaks, and that there would be minimal regression of skills if the Student was “engaged” during instruction. The team, which did not review the HOD of IHO Seat at this meeting, was influenced by the fact that the Student had recently moved to an inclusion setting, suggesting that the Student was making progress. Testimony of Petitioner; Testimony of Witness B; Testimony of Witness D; Testimony of Witness E; P-38.

14. During the 2018-2019 school year, the Student made progress in his/her core classes but missed some of his/her “special” classes, particularly music. The Student lacked initiative, needed to study more, did not complete all class assignments, and was absent too often. The Student’s cumulative grade point average for 2018-2019 was 1.78, but progress was reported on goals during the school year. P-8; P-28; Testimony of Witness D.

15. In July, 2019, Petitioner sought additional documentation from Respondent for 2018-2019 school year. Petitioner sought the Student’s second-term report cards; records of incident reports, disciplinary actions, and suspensions; itemized attendance records, including day and month, broken down by classes; SRI data; BOY, MOY, and EOY data; MAPP, PARCC, and i-Ready testing; and progress reports for the second, third, and fourth terms. P-77-2.

VI. Conclusions of Law

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

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

D.C. Code Sect. 38-2571.03(6)(A)(i).

Issue #1 involves the appropriateness of the Student's IEP and placement.

Therefore, the burden of persuasion must be on Respondent for this issue, provided that Petitioner presents a *prima facie* case. Issue #2 does not directly involve the appropriateness of the Student's IEP and/or placement. Accordingly, the burden of persuasion must be on Petitioner for this issue. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did DCPS fail to provide the Student with ESY services for summer, 2019? If so, did DCPS act in contravention of 34 CFR 300.320, Andrew F. v. Douglas County School District, 137 U.S. 988 (2017), and Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

ESY Services are only necessary to the receipt of a FAPE when the benefits that a disabled child gains during a regular school year will be significantly jeopardized if s/he is not provided with an educational program during the summer months. S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp. 2d 56, 66-67 (D.D.C. 2008); see also Johnson v. D.C., 873 F. Supp. 2d 382, 386 (D.D.C. 2012). "Likely" regression is not a sufficient basis to establish the need for ESY services. Johnson, 873 F. Supp. 2d at 386 (citing to MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537-38 (4th

Cir. 2002)). A hearing officer must take into consideration that “all students, disabled or not, may regress to some extent during lengthy breaks from school.” Id.; see also 34 C.F.R. Sect. 300.106(a), (b).

The only clearly relevant information in the record on the Student’s regression during breaks is the testimony of Witness D, who said that the Student made progress during the school year and that no regression was noticed during the Christmas and Winter breaks. This was the view of both Witness D and several of her peers, who Witness D consulted before she spoke at the May 23, 2019, MDT meeting.

Petitioner’s argument was mainly premised on the Student’s SRI scores, which dropped over the summer of 2018. The Student’s Lexile score of 617 on June 5, 2018, went down to 534 on September 4, 2018. While the difference of over eighty points appears significant, both scores fall within a range that corresponds to a third-grade reading level.² In fact, according to one of the Student’s report cards, a Lexile score of 712 also reflects a third-grade level (P-12-3). Moreover, the Student’s SRI scores did not drop as much, or at all, during breaks in prior years. Regarding the summer of 2016, the Student’s Lexile score was 463 in May, 2016, and 433 in September, 2016, a modest drop. In December, 2016, the Student’s Lexile score rose to 521, and the next score reported in the record, from September, 2017, was an even higher 587.

Petitioner also pointed to the Student’s memory issues, but there is nothing in the Student’s psychological evaluations, or in the record generally, to suggest that the Student has any long-term memory issues that might impact his/her ability to retain

² Witness B indicated that the Lexile score of 617 reflects work at the fourth grade level (P-76-9), but then indicated, in the same document on the same page, that the higher Lexile score of 633 was at the third grade level (P-76-9).

information during a break. There are suggestions in the record that the Student has some issues with “working memory,” but this is defined as “short-term memory” in DCPS’s recent psychoeducational evaluation (P-70-7). Witness A suggested that ADHD affects long-term memory in some instances but did not clearly or definitively explain how the Student’s ADHD impacted his/her long-term memory or his/her ability to retain information over the summer.

Petitioner also pointed to the Student’s i-Ready math assessment performances from 2016-2017 as evidence that the Student regresses during summer months. At the end of the 2016-2017 school year, the Student scored a 463 on the i-Ready measure. The Student began the following school year by scoring 431 on the i-Ready measure, a 32-point decrease. Yet there is nothing in the record to establish that this decrease is anything more than a typical drop in scores that occurs with most students because of the lack of instruction during the summer break. Petitioner also pointed to the Student’s MAP scores as evidence of regression, but a single MAP score (August 29, 2018) cannot support the contention that the Student regresses academically during the summer months.

Petitioner also contended that DCPS conducted a superficial review of the Student’s right to ESY at the May 23, 2019, MDT meeting. Petitioner pointed to the lack of discussion about work samples at the MDT meeting, but Petitioner did not establish that DCPS had an obligation to save the Student’s classwork samples from prior years. Petitioner also did not specifically explain how the Student’s class work samples would have established that the Student regressed over summers. Petitioner’s contentions along these lines are purely speculative. Additionally, Petitioner suggested that the Student’s

MOY data would have shown that the Student had regressed. But MOY data does not show a student's decline during breaks; it measures the extent to which a Student's educational program is working for him or her during the school year. Petitioner also criticized the lack of focus on the Student's SRI testing at the MDT meeting. Given the language in the HOD by IHO Seat (which raises the possibility of ESY eligibility because of the Student's SRI scores), one would have thought that DCPS would have closely analyzed the Student's SRI scores at this meeting to determine whether the Student was eligible for ESY. In fact, nothing in the meeting notes referenced the Student's SRI scores. However, if DCPS had thoroughly reviewed the SRI data at the MDT meeting, it would have come to the same conclusion as this Hearing Officer, i.e., that the Student was not entitled to ESY services because the SRI scores did not show regression.

It is worth pointing out that the Student's December, 2018 psychoeducational testing showed that the Student has made academic gains since his/her 2015 testing. For instance, in 2015, the Student's reading comprehension score was at the 2nd percentile, but in 2018, the Student's broad reading scores improved to the "low average" range. In writing, the Student's improvement was even more dramatic. The Student scored at the 1st percentile in the writing samples sub-test on the WJ-IV in December, 2015, then scored in the "above average" range on the same test in December, 2018.

Under the circumstances, DCPS correctly determined that the Student was ineligible for ESY services for the summer, 2019. Issue #1 is dismissed.

2. Did DCPS fail to provide Petitioner with educational records? If so, did DCPS violate 34 CFR Sect. 300.501 and related provisions? If so, did DCPS deny the Student a FAPE?

A Local Educational Agency (“LEA”) must grant parents access to the educational records of their children no more than forty-five days after the request. 20 U.S.C. Sect. 1232g(a)(1)(A). The IDEA regulations provide in pertinent part: “(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child.” 34 C.F.R. 300.501(a). The term “education records” means the type of records covered under the definition of “education records” in 34 C.F.R. Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. Sect. 1232g (FERPA)). 34 C.F.R. 300.611-300.625. Education records as defined under FERPA are “directly related to a student” and “maintained by an educational agency or institution or by a party acting for the agency or institution.” The term does not include “records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.” “Record” means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. 34 C.F.R. Sect. 99.3.

On several dates in 2019, including February 22, 2019, April 25, 2019, May 20, 2019, May 22, 2019, and July 11, 2019, Petitioner requested access to the Student’s records. Witness A and Witness B testified that, by the time of this hearing, Petitioner should have received: the Student’s PARCC testing documents for the 2016-2017 and 2018-2019 school years; all of the Student’s BOY, MOY and EOY testing for the past

two years; SRI scores in the “actual SRI report format;” all of the Student’s work samples; the Student’s full attendance records; and any other school-based assessments of the Student.

While DCPS should of course provide Petitioner with all of her child’s available educational records, DCPS did provide Petitioner with the Student’s entire cumulative file. Moreover, during the hearings and in her closing argument, Petitioner did not specifically link her requests for educational records to features of the Student’s education at School A. There is nothing in the record to indicate that additional PARCC or MOY testing results would measure the Student’s regression, nor is there anything in the record to suggest any special significance to SRI scores in the “actual SRI report format” or a detailed breakdown of the Student’s attendance records. Moreover, Petitioner only requested BOY and EOY data for the 2018-2019 school year (P-78-1, 3, 4, P-82-1), which has been provided. (P-82-75).³

Notably, United States Magistrate G. Michael Harvey recently opined on a case where a parent contended that DCPS’s failure to produce education records amounted to FAPE denial under the IDEA. Magistrate Harvey rejected this claim and ruled that a parent must be specific when alleging that a denial of education records amounts to a denial of FAPE. As explained by Magistrate Harvey:

Plaintiff has not explained how, precisely, the other missing evidence—progress reports, additional report cards, counseling tracking forms, and the like—were necessary to her preparation for the due process hearing. Rather, she paints in the broadest of strokes, asserting that the evidence “would have provided the basis for services” and that they

³ As previously stated, the record indicates that DCPS did not store the Student’s old work samples, and Petitioner did not point to any LEA obligation to store student classwork after the school year has ended.

“related to the identification, evaluation, and educational placement” of M.S. [Dkt. 22 at 4–5]. While that might establish a procedural violation of the IDEA, it does not provide a “rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of education benefits.

Simms v. D.C., No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *23 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17-970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018); compare Amanda J. v. Clark Cty Sch. Dist., 267 F.3d 877, 894 (9th Cir. 2001) (records revealed that the student was autistic, a diagnosis not known by her parents or IEP team).

It is further noted that Petitioner presented no federal caselaw where a records denial claim by a parent on behalf of a special needs student has resulted in a finding of FAPE denial against an LEA. This claim must be dismissed.

VII. Order

As a result of the foregoing, Petitioner’s Complaint is hereby dismissed with prejudice.

Dated: September 5, 2019

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
[REDACTED]/DCPS
[REDACTED]/DCPS

VIII. Notice of Appeal Rights

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

Date: September 5, 2019

Michael Lazan
Impartial Hearing Officer