DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 1st Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,[1] through the Parent Petitioner, v District of Columbia Public Schools, Respondent.	Date Issued: Hearing Officer: Case No: Hearing Date: Room:	May 21, 2011 James Gerl May 10, 2011 2006

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HEARING OFFICER DETERMINATION

BACKGROUND

The due process complaint was filed on March 24, 2011. The matter was assigned to this hearing officer on March 25, 2011. A resolution session was convened on April 6, 2011 and the parties did not reach an agreement. The hearing officer decision is due on May 21, 2011. A prehearing conference by telephone conference call was held on April 21, 2011. The due process hearing was convened at the Student Hearing Office on May 10, 2011. The hearing was closed to the public.

[1] Personal identification information is provided in Appendix A.

The student's grandparent attended the hearing and the student did not attend the hearing. Four witnesses testified on behalf of the Petitioner and zero witnesses testified on behalf of the Respondent. Petitioner's exhibits 1-17 were admitted into evidence. Respondent's exhibits 1-4 were admitted into evidence.

JURISDICTION

This proceeding was invoked pursuant to the provisions of the Individuals With Disabilities Education Act (hereafter sometimes referred to as "IDEA"), 20 U.S.C. Section 1400 et seq.; Title 34 of the Code of Federal Regulations, Part 300; Title 5-E of the District of Columbia (hereafter sometimes referred to as "District" or "D.C.") Municipal Regulations (hereafter sometimes referred to as "DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

PRELIMINARY MATTERS

All exhibits and testimony received into evidence and all supporting arguments submitted by the parties have been considered. To the extent that the evidence and arguments advanced by the parties

are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

ISSUE PRESENTED

The following issue was identified by counsel at the prehearing conference and evidence concerning this issue was heard at the due process hearing: Does the February 25, 2011 IEP which was developed for the student by Respondent and which does not include tutoring services provide a FAPE to the student?

FINDINGS OF FACT

After considering all of the evidence as well as the arguments of counsel, I find the following facts:

1. An IEP team meeting was convened for the student on February 25, 2011. At the meeting, Petitioner and her representatives requested that the IEP include two hours per week of tutoring as

supplemental services. The parties were unable to reach agreement as to said tutoring services. (Stipulation by counsel on the record.) (References to exhibits shall hereafter be referred to as "P-1," etc. for the Petitioner's exhibits, "R-1," etc. for the Respondent's exhibits and "HO-1," etc. for the hearing officer exhibits; references to testimony at the hearing is hereafter designated as "T".)

2. The student's date of birth is (Stipulation by counsel on the record.)

3. The student's grandmother is the student's legal guardian and is responsible for making educational decisions for the student. (T of student's grandmother.)

4. Prior to the February 25, 2011 IEP team meeting, the student had been receiving two hours per week of tutorial services as a form of compensatory education. (T of Petitioner's educational advocate; T of tutor.)

5. The participants at the February 25, 2011 IEP team meeting for the student included the student's grandmother, Respondent's progress monitor, Respondent's special education coordinator,

Respondent's social worker, two of the student's teachers, Petitioner's educational advocate, the director of the non-public school attended by the student and the student's tutor. Said IEP includes detailed information concerning the student's present levels of performance and goals in the areas of mathematics, reading, written expression, speech and language, emotional/social/behavioral development, and motor skills and physical development. Said IEP is a full-time special education IEP requiring 28.5 hours per week of specialized instruction outside the general education environment. Said IEP also requires the related services of behavioral support services 30 minutes per week outside the general education environment and speech language pathology one hour per week outside the general education environment. The IEP provides for consultative services for occupation therapy for 30 minutes per month. The IEP provides for the following assistive technology devices for the student: Word Smart and/or Alpha Smart, post-its, spell checker, colored stickers on keyboard and word processor. The IEP provides for the following classroom aids and services: access to

computer-based reading, math and writing reinforcement program; small group or one on one instruction; and lesson reinforcement with various manipulatives. The IEP states that the student uses highlighters, notecards, a speller and other supports. The IEP provides for the following classroom accommodations and statewide assessment accommodations: repetition of directions, simplification of oral directions, reading of test questions, oral responses to tests, calculators, location with minimal directions and small group testing, breaks between subtests and extended time on subtests. The IEP provides for extended year services and lists six extended school year goals for the student. (P-5)

6. The grandparent, Petitioner's educational advocate and the tutor, requested that tutoring be continued in the student's February 25, 2011 IEP. Respondent's staff on the February 25, 2011 IEP team refused to provide tutoring services to the student as a part of the IEP because they felt that the student did not need tutoring in order to continue to make educational progress. (P-6;P-4; T of Petitioner's educational advocate)

7. The student receives individualized instructional services at the non-public school at which his February 25, 2011 IEP is implemented. The instruction includes rotations every 20 minutes at different stations (including English, math and language arts). He receives time on the computer to reinforce the work he has done with his teacher. He also spends time at his desk for independent seat work. (T of director, non-public school attended by student.)

8. There was no disagreement at the February 25, 2011 IEP team meeting as to any portion of the student's IEP or educational program with the exception of the lack of tutorial services. (P-6, P-7, P-8; T of Petitioner's educational advocate)

9. The student is making educational progress. In the third quarter of the 2010-2011 school year, the student received grades of A in social studies and physical education; a grade of B in dance; grades of C in language arts, math and science and a grade of D in reading. Said grades approximate the grades received by the student in the previous two quarters. (R-3)

10. Some of the educational progress that the student has made is attributable to the individualized instruction received by the student at his non-public school pursuant to this February 25, 2011 IEP. The student is making progress because of the small class size at the non-public school that implements his February 25, 2011 IEP. (T of educational advocate; T of student's grandmother; T of the director of the non-public school attended by the student.)

11. The student's February 25, 2011 IEP, as written, is reasonably calculated to provide educational benefit. (P-5; record evidence as a whole.)

CONCLUSIONS OF LAW

Based upon the evidence in the record, the arguments of counsel, as well as my own legal research, I have made the following Conclusions of Law:

1. A parent is defined under IDEA as follows:

> "(a) parent means –
>
> ...
>
> (4) an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent or other relative),

> with the child lives, or an individual who is legally responsible for the child's welfare...
> 34 C.F.R. § 300.30; see IDEA § 602(23).

In the instant case, the student's grandmother is the student's legal guardian and has educational decision making rights. Accordingly, the student's grandmother is his "parent" for purposes of IDEA.

2. The United States Supreme Court has established a two-part test for determining whether a school district has provided a free and appropriate public education (hereafter sometimes referred to as "FAPE") to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the Individuals with Disabilities Education Act, 20 U.S.C. §§1400 et seq. (hereafter sometimes referred to as "IDEA") and an analysis of whether the Individualized Educational Plan (hereafter sometimes referred to as "IEP") is reasonably calculated to enable a child to receive some educational benefit. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent

D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

3. IDEA does not require that a local education agency, such as Respondent, maximize the potential of a child with a disability; rather requires that the school district provide the basic floor of educational opportunity. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

4. In the instant case, the IEP developed by Respondent for the student on February 25, 2011 is reasonably calculated to confer educational benefit on the student as written. Accordingly, it is concluded that the February 25, 2011 IEP developed for the student by Respondent provides him with FAPE as written.

DISCUSSION

Issue No. 1: Did Respondent deny a FAPE to the student by failing to include two hours per week of tutoring services in the student's February 25, 2011 IEP?

Petitioner contends that Respondent denied FAPE to the student by failing to include two hours of tutoring services per week in the student's February 25, 2011 IEP. Respondent contends that the student does not need tutoring in order to continue to make educational progress.

Each of Petitioner's witnesses testified that the student "needs" tutoring services. It is clear from an analysis of the testimony, however, that Petitioner's witnesses were employing a potential maximizing standard rather than the FAPE standard to determine the student's needs. Accordingly, the credibility and persuasiveness of their testimony is diminished.

Perhaps Petitioner's counsel said it best in closing argument when he noted that in order for the student to receive the educational benefit "that he has been making," he would require to continue to receive tutoring services. In order to receive FAPE, however, the student need not continue to receive benefit at the same level that he is currently receiving benefit. A local education agency, such as Respondent, is not required to maximize the potential of a student with a disability. Instead, all that is required is that the Respondent provide the basic

floor of educational opportunity by providing an IEP that is reasonably calculated to confer educational benefit. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Kerkam v. Superintendent D.C. Public Schools, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The testimony of the Petitioner's educational advocate, on cross-examination, included an admission that some of the student's progress is the result of the small group specialized instruction the student receives at his current non-public school. Similarly, the student's grandmother, who is his legal guardian, testified that the student has accomplished a lot at his current non-public school and that he benefits in particular from the small group classroom setting with a teacher and an aide and no more than six students in a classroom. Similarly, the director of the non-public school that the student attends admitted on cross-examination that the individualized instruction the student receives at his non-public school has contributed to the student's educational progress. Moreover, in describing the student's tutoring program, the student's tutor noted that the tutoring has caused the student to make "tremendous progress."

If Respondent were required to do what is best for the student, clearly, the tutoring would have to be kept in the student's IEP. Without the tutoring, it is likely that the student will not do as well as he has been doing with the tutoring. That is not, however, the standard for whether there has been a denial of FAPE

It is significant that none of Petitioner's witnesses have pointed to any specific deficiencies with regard to the student's IEP other than the lack of tutoring services. There is no claim that the present levels of performance are inaccurate or that the goals are inappropriate. Moreover, there is no criticism of the educational program outlined by the student's February 25, 2011 IEP. The student's educational program is delivered at a non-public full-time special education school. The student is a full-time special education student under his IEP. The February 25, 2011 IEP states detailed present levels of performance and goals in the areas of mathematics, reading, written expression, speech and language, emotional/social/behavioral development, and motor skills and physical development. The IEP requires 28.5 hours per week of specialized instruction outside the general education environment. The IEP requires 30 minutes per week of the related

service of behavioral support services outside the general education environment and one hour per week of speech language pathology outside the general education environment. The IEP also requires 30 minutes per month of consultation services with regard to the related service of occupational therapy. The IEP provides for assistive technology to help the student, including Word Smart and/or Alpha Smart, Post-Its, spell checker, colored stickers on keyboard, and word processor. The IEP provides for the following classroom aids and services: computer-based math, reading, and writing reinforcement program, small group of one on one tutorial instruction, lesson reinforcement with various manipulatives. The student uses highlighters, notecards, a speller and other supports as deemed necessary. The IEP provides for the following classroom accommodations and statewide assessment accommodations: repetition of directions, simplification of oral directions, reading of test questions, oral responses to tests, calculators, location with minimal directions and small group testing, breaks between subtests and extended time on subtests. The IEP provides for six extended school year goals for the student. It is clear that the February 25, 2011 IEP for the student

provides a good program and is reasonably calculated to confer educational benefit.

Moreover, the student's educational program as implemented provides reinforcement activities similar to the tutoring services at issue herein. The director of the student's non-public school testified that the student receives individualized instructional services at his non-public school. He has rotations every 20 minutes at various stations, including English, math and language arts. He uses the computer to reinforce the work that he has done with his teacher. He also performs independent seat work at his own desk. The student's IEP and the individualized instruction he receives at the non-public school contribute to the student's educational progress.

The student's February 25, 2011 IEP is reasonably calculated to confer educational benefit, and it clearly has provided educational benefit to the student. Respondent has provided FAPE to the student.

The hearing officer is concerned, however, by the fact that the notes of the representative of Respondent who attended the student February 25, 2011 IEP team meeting state that Respondent does not provide tutorial services as a supplemental service. This statement is

indeed troubling. If the evidence had revealed that the student required tutorial services in order to benefit from his IEP, Respondent would have to provide tutorial services to the student. The evidence in this case, however, does not support that the student needed tutorial services in order to receive educational benefit. The blanket statement by Respondent's representative that tutorial services are not provided could result in future liability for the Respondent if such services were not provided to a student who needed them in order to receive FAPE. Because the evidence does not support a conclusion that the student in the instant case required tutorial services in order to benefit from his IEP, however, this statement does not affect the result in this case. Moreover, it is clear from the record evidence herein that the statement is incorrect. Petitioner has produced documentary evidence in the form of a redacted IEP of another student in respondent's school system who receives tutoring as a supplemental service on his IEP. So it appears that the statement was just an error and not a policy declaration on behalf of respondent.

The Petitioner has not carried her burden with regard to the issue alleged by the Complaint. The Respondent has prevailed on the issue herein.

ORDER

Based on the foregoing, it is HEREBY ORDERED that the Complaint in this matter is dismissed with prejudice. None of the relief requested by Petitioner is awarded.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).

Date Issued: May 21, 2011

/s/ James Gerl
James Gerl,
Hearing Officer