

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

OSSE
Student Hearing Office
October 15, 2013

[Parent], on behalf of
[Student],¹

Petitioner,

Hearing Officer: Jim Mortenson

v

[Local Education Agency],

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner and Respondent are both represented by counsel. The Petitioner

The Petitioner filed two recent complaints. was resolved in a Hearing Officer Determination (HOD) issued March 25, 2012, by Independent Hearing Officer (IHO) Dietrich, which required the Respondent to provide a psychiatric assessment of the Student. Case was filed March 21, 2012, and resolved by settlement agreement on April 4, 2012, and resulted in the provision of a dedicated aide to the Student's Individualized Education Program (IEP).

A response to the present complaint was filed by the Respondent on August 19, 2013. A prehearing conference was convened on August 21, 2013, and a prehearing order was issued on

¹ All proper names have been removed in accordance with Student Hearing Office policy and are referenced in Appendix D which is to be removed prior to public dissemination.

that date. A resolution meeting was held on August 22, 2013, and again on September 9, 2013, and resulted in no agreements.

Disclosures were shared and prehearing briefs filed on September 30, 2013. The Petitioner filed a motion, on October 2, 2013, to permit one of her witnesses to testify via telephone, and the motion was granted, at the hearing, on October 7, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the Independent Hearing Officer (IHO) are:

(1) Whether the Respondent denied the Student a free appropriate public education (FAPE) because the individualized education program (IEP), since February 12, 2013, was not reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, and meet each of her other educational needs that result from her disability, when the IEP: a) lacked extended school year (ESY) service for the summer of 2013; b) lacked sufficient post-secondary goals and transition services; c) lacked an updated behavior intervention plan (BIP); and d) reduced behavioral supports from 90 minutes per week to 60 minutes per week?

(2) Whether the Respondent failed to ensure the Student's placement for the 2012-2013 school year was based on her IEP because the non-public school she was placed at primarily worked with students with emotional disorders?

The Petitioner is seeking a revised IEP consisting of: a new transition plan; an increase in service hours; new annual goals; a BIP, and ESY services. She is also seeking compensatory education consisting of 30 hours of counseling, computer programs, and credit recovery for failed classes.

Any errors in the Student's IEP formulated on February 12, 2013, are merely procedural and did not result in a denial of a FAPE. The Petitioner did not show the Respondent failed to ensure the Student's educational placement for the 2012-2013 school year was based on her IEP.

IV. EVIDENCE

Six witnesses testified at the hearing, five for the Petitioner and one for the Respondent. The Petitioner's witnesses were: the Petitioner herself (P); the Student (S); an Education Advocate, ((and the Student's therapist, (The Respondent's witness was the Student Case Manager during the 2012-2013 school year, (

The parties combined five of their disclosures into five Joint Exhibits (See Appendix A). The remainder of the Petitioner's 54 disclosures were entered into evidence. (See Appendix B). The remainder of the Respondent's 22 disclosures were also entered into evidence (See Appendix C).

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. Any credibility issues are specifically noted in the findings of fact. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

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

1. Student is _____ with a disability currently enrolled at School B.² During the 2012-2013 school year the Student attended School A.³ During the 2011-2012 school year the Student attended School C.⁴
2. The Student's disabilities include: Dyslexia; Conduct Disorder, Childhood Onset Type; Probable Attention-Deficit/Hyperactivity Disorder, Combined Type; and History of Adjustment Disorder, with Mixed Disturbance of Emotions and Conduct.⁵ The IEP team determined that the Student's classification for services under the IDEA is "multiple disabilities."⁶
3. The Student's disabilities affect her ability to learn to read and result in a negative attitude toward school manifested in cursing, sleeping in class, using her cell phone during class, and skipping classes.⁷
4. On July 10, 2012, the Student's IEP team met to review the psychiatric assessment ordered by IHO Dietrich on March 25, 2012, and to discuss the Student's continuing eligibility, revise the IEP, and discuss a location of services and educational placement.⁸ The team determined that the Student's placement at School C needed to be changed to include a place with more therapy services, as well as include a focus on her learning disability needs.⁹ The

Petitioner's educational advocate at the meeting requested a "hybrid LD/ED school" such as School A, or another specific school.¹⁰

5. The IEP revision of July 10, 2012, required 25.5 hours per week of specialized instruction outside of the general education setting, two hours per month of speech-language pathology outside of the general education setting, and 90 minutes per week of behavioral support services outside of the general education setting.¹¹ The IEP did not specifically require placement in a special education day school, but that is where the Student was at the time (in School C).¹²
6. The two schools requested by the Petitioner's advocate were contacted and one of the schools rejected the Student, while the other, School A, accepted her, and she enrolled there for the 2012-2013 school year.¹³
7. An IEP team meeting was held on January 15, 2013, because the Petitioner had several concerns including: that the Student was not taking Science or Spanish classes; that the Student did not like group therapy; that Student did not like the rule about not dating classmates (the violation of which had resulted in a suspension and increased frustration by the Student); and that a "Letter of Understanding" listing the Student's progress toward graduation was not available.¹⁴ Concerns about the Student's transition plan were raised and it was agreed that some additional transition assessments would be completed and the IEP team would reconvene to finish reviewing and revising the IEP.¹⁵

8. The IEP team reconvened on February 12, 2013, and the IEP was revised.¹⁶ The revised IEP included: a statement of the Student's present levels of academic achievement and functional performance; annual academic goals in the areas of mathematics, reading, and written expression; annual functional goals in the areas of communication, behavior, and transition activities; a statement of the special education and related services to be provided, including the setting for some of the services, anticipated beginning and ending dates, and the frequency of some of the services; and post-secondary goals and services, but without a list of the courses of study the Student must complete to reach her post-secondary goals.¹⁷ The Student's behavioral support services were reduced from 90 minutes per week to 60 minutes per week in the revision, and without explanation other than that the IEP team agreed.¹⁸ There were five behavioral goals, each with multiple objectives, in the IEP.¹⁹
9. During the 2012-2013 school year the Student performed well both academically and functionally.²⁰ She ended the year earning Bs in all classes but for a C in World History.²¹ The Student was reported as being an active participant in class during both 3rd and 4th quarters at School A and was suspended twice after February 2013: once for cursing, being disrespectful, and leaving school, and once for seeing a schoolmate outside of school, without permission, in violation of a school rule.²² The Student was making progress on most of her IEP goals at the end of the 2012-2013 school year, had mastered at least one, and two dealing with transition areas had not yet been introduced.²³
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10. The Student did not participate in ESY services over the summer of 2012, during breaks in the 2012-2013 school year, and ESY was not included in the February 2013 revision of the IEP.²⁴ At the Student's most recent IEP team meeting, at School C, ESY was not recommended.²⁵
11. School A's therapeutic milieu included group therapy as well as individual counseling on an as-needed basis.²⁶
12. The Student constantly changes her mind with regard to what she wants to do when she graduates, expressing interest in everything from teaching, to law, to nursing, to working with cars.²⁷ Her current post-secondary goals include attending a nursing program in a four-year college in order to live alone or with friends and practice nursing.²⁸ The Student currently has a job, a checking account, a telephone, and pays her phone bill as instructed by her mother.²⁹

VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden
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of proof.” D.C. Mun. Regs. 5-E3030.14. The recognized standard is a preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. The stated purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1). In providing a FAPE states and the District of Columbia must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 203 (1982). The special instruction and services “must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s [individualized educational program].” *Id.* In *Rowley*, the Supreme Court held that courts in the position of assessing whether a child is receiving FAPE must focus on whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Rowley*,

458 U.S. at 201. The Court noted further that there existed “no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children.” *Id.* 198. However, “[a]cademic success is an important factor ‘in determining whether an IEP is reasonably calculated to provide education benefits.’ Roark ex rel. Roark v. District of Columbia, 460 F.Supp.2d 32, 44 (D.D.C. 2006) (emphasis added). Accord Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir.1998) (“An appropriate public education under IDEA is one that is ‘likely to produce progress, not regression.’ ”) (citations omitted); Danielle G. v. N.Y. City Dept. of Educ., 2008 WL 3286579, at *7 (E.D.N.Y. Aug. 7, 2008) (“A school district will fulfill its substantive obligations under the IDEA if the student is likely to make progress, not regress, under his IEP, and if the IEP affords the student with an opportunity ‘greater than mere trivial advancement.’ ”) (citations omitted); P.K. v. Bedford Cent. Sch. Dist., 2008 WL 2986408, at *11 (S.D.N.Y. Aug. 1, 2008) (“[I]n determining whether a school district has met its obligations under the IDEA, a court must look for objective evidence in the record indicating whether the student would likely have progressed or regressed under the challenged IEP). See Hunter v. District of Columbia, 2008 WL 4307492 at *7 (D.D.C. 2008). In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide education benefits. Suggs v. District of Columbia, 679 F. Supp. 2d 43, 51 (D.D.C.2010). “An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see Reid v. District of Columbia*, 401 F.3d [516,] 519-20 [(D.C.Cir. 2005)]; the nature and effects of the child's disability have not been adequately monitored, *see Harris v. District of Columbia*, 561

F. Supp. 2d [63,] 68 [(D.D.C. 2008)]; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” *Suggs*, 679 F. Supp. 2d at 51-52.

3. Federal Regulations at 34 C.F.R. § 300.320 require the following components in an IEP:

- (a)(1) A statement of the child’s present levels of academic achievement and functional performance, including—
 - (i) How the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
 - (ii) For preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities;
- (2)(i) A statement of measurable annual goals, including academic and functional goals designed to —
 - (A) 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; and
 - (B) Meet each of the child’s other educational needs that result from the child’s disability;
- (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
- (3) A description of— (i) How the child’s progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
- (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
- (4) 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 —
 - (i) To advance appropriately toward attaining the annual goals;
 - (ii) 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
 - (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
- (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
- (6)(i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16) of the Act; and
- (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why—
 - (A) The child cannot participate in the regular assessment; and
 - (B) The particular alternate assessment selected is appropriate for the child; and
- (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications.
- (b) Transition services. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include —
 - (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
 - (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

4. District of Columbia Municipal Regulations provide, regarding IEP development, that:

In developing an IEP for a child with a disability, the IEP team shall consider and document:

- (a) Strengths of the child;
- (b) Concerns of the parent for enhancing the education of the child;
- (c) Results of the initial or most recent evaluation; and
- (d) As appropriate, the results of the child's performance on any District-wide assessment programs.

and

If a child's behavior impedes the child's learning or the learning of others, the IEP team shall consider strategies, including positive behavioral intervention, strategies, and supports, to address that behavior. An individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

D.C. Mun. Regs. 5-E3007.2 and 5-E3007.3.

5. The Student made academic and functional progress under the IEP formulated February 12, 2013, despite some procedural flaws in the IEP. The IEP did not require ESY services and the Petitioner did not demonstrate the Student required such services. The IEP included measurable post-secondary goals and services, but lacked the courses of study the Student must take to reach those goals. This was a procedural violation that the Respondent must correct, but it did not result in a denial of FAPE as demonstrated by the Student's academic and functional progress since the February 12, 2013, IEP. The IEP included goals and services to address the Student's behavior. Despite the Student's behavior and dyslexia, she has been able to make considerable academic progress despite her conflicts with school rules. Finally, the reduction of behavioral supports from 90 minutes per week to 60 minutes per week was not unreasonable and the Student did not suffer educationally (either academically or functionally) as a result, and so the IEP cannot be determined to have not been reasonably calculated to provide educational benefit as a result of that change. Because maximization is not the standard for measuring educational benefit, the changes in grades experienced by the

Student (e.g. “A” to “B”) did not signify a denial of FAPE, and any compliance violations in the February 12, 2013, IEP likewise did not result in a denial of FAPE to the Student.

6. “In determining the educational placement of a child with a disability, . . . each public agency must ensure that - . . . (b) The child’s placement - . . . (2) Is based on the child’s IEP[.]” 34 C.F.R. § 300.116.
7. The Petitioner failed to demonstrate that the Student’s placement for the 2012-2013 school year was not based on her IEP or that the nonpublic special education day school was in any way improper. The Petitioner, through her advocate, requested the school as a result of concerns with the nonpublic school the Student had been in the year prior. The change of schools from one with a focus on children with learning disabilities to a “hybrid” school that focused on children with both learning disabilities and emotional disorders was a change in educational placement. It was a change made by the IEP team, however, including the Petitioner, and reflected the team’s desires for the Student, even though it was not accurately recorded in the IEP. Despite the Student’s continued attitude problems, she made academic and functional progress during the course of the school year, and her school was changed, yet again, for the 2013-2014 school year. There is no violation regarding the Student’s educational placement for the 2012-2013 school year.

VII. DECISION

1. Any errors in the Student’s IEP formulated on February 12, 2013, are merely procedural and did not result in a denial of a FAPE.
2. The Petitioner did not show the Respondent failed to ensure the Student’s educational placement for the 2012-2013 school year was based on her IEP.

VIII. ORDER

The Complaint is dismissed with prejudice.

IT IS SO ORDERED.

Date: October 14, 2013

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a long, horizontal, slightly wavy line.

Independent Hearing Officer

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 USC §1415(i).