

**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
August 17, 2015

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: August 17, 2015
Petitioner,)	
)	Hearing Officer: John Straus
v.)	
)	Case No: 2015-0194
District of Columbia Public Schools (“DCPS”))	
)	Hearing Date:
Respondent.)	July 22, 2015 Room 2006
)	

HEARING OFFICER DETERMINATION

Background

The Petitioner, who is the Student’s mother, filed a due process complaint notice on June 3, 2015, alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”). The Petitioner alleged that DCPS failed to evaluate the Student in all areas of suspected disabilities; failed to develop appropriate IEPs in December 2013 and November 2014; failed to fully implement IEPs as written; and failed to provide appropriate school placement, including location of services.

DCPS asserts that Student’s IEPs are appropriate because the Student will be provided ESY services for the Summer of 2015. DCPS states that Elementary School can implement Student’s IEP and is an appropriate location of service.

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.

¹ Personal identification information is provided in Appendix A.

Procedural History

Neither the Petitioner nor the Respondent waived the resolution meeting. The resolution meeting took place on June 15, 2015. At the resolution meeting, the parties did not resolve all of the issues in the complaint. However, the parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on July 3, 2015, the 45-day timeline to issue a final decision began on July 4, 2015 and the final decision is due by August 17, 2015.

The due process hearing took place on July 22, 2015 in Room 2006 at the Office of Dispute Resolution. The due process hearing was a closed hearing. The Petitioner was represented by Carolyn Houck, Esq. and DCPS was represented by Maya Washington, Esq. Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in person.

The Petitioner presented three witnesses: a Literacy Expert, the Petitioner, and an Educational Advocate. DCPS presented two witnesses: Special Education Teacher and Compliance Specialist.

The Petitioner's Disclosure Statement, filed and served on July 15, 2015, consisted of a witness list of 4 witnesses and documents P-01 through P-13. The Respondent objected to the Petitioner's exhibits P-8 and P-13 through P-15 and expert designations for three witnesses. The Hearing Officer overruled the Respondent's objections. The Respondent's Disclosure Statement, filed and served on July 15, 2015, consisted of a witness list of 3 witnesses and documents R-1 through R-12. The Petitioner did not file an objection to the Respondent's disclosures even though the Respondent filed a response to Petitioner's Objection to DCPS Disclosures. Therefore, Respondent's documents were admitted into evidence without objection and Respondent's response is moot.

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

Whether DCPS denied the Student a FAPE by failing to develop IEPs on December 9, 2013 and November 17, 2014 that are reasonably calculated to provide educational benefit; specifically, the hours of specialized instruction outside the general education setting were not sufficient, the goals were not appropriate for the Student's level of achievement and the IEP lacked specialized instruction to implement the written expression goals.

The Petitioner withdrew the following three issues without prejudice:

1. "Failure to fully implement IEPs as written" was withdrawn at the Prehearing Conference.
2. "Failure to evaluate in all areas of suspected disabilities" was withdrawn after the Prehearing Conference.
3. "Failure to provide appropriate school placements, including location of services" was withdrawn before the hearing.

For relief, the Petitioner requested the Hearing Officer to order DCPS to convene a meeting by a certain date to review and revise the IEP to consider goals developed by the Petitioner's

educational consultant and the Hearing Officer to craft a compensatory education plan and order that it be implemented.

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 will be in the fifth grade for the 2015-2016 school year. She was retained in the first grade. (Petitioner's testimony)
2. On March 4, 2013, the Student received a psychoeducational and clinical assessment. The assessment included a Woodcock Johnson Test of Achievement III ("WJ-III"). The results of the WJ-III indicate the Student was performing below grade level in basic reading, reading comprehension, math calculation, math reasoning, basic writing and written expression. Specifically, the Student was functioning in Broad Reading at the 1.6 grade level, in Broad Math at the 1.2 grade level, and in Broad Written Language at the 1.3 grade level. The Student had difficulty sustaining attention and exhibited distractibility. (Exhibit P-6)
3. On December 9, 2013, the IEP team developed an initial IEP. The IEP team drafted academic goals for the Student based on the common core standards for first grade. The IEP team developed the following goals for Mathematics:
 1. Given math problems, [the Student] will add and subtract within 20 in 3 out of 5 trials.
 2. Given number, [the Student] will understand and use place values and pro[p]erties of operations to add and subtract in 3 out of 5 trials.
 3. When presented with a clock, [the Student] will be able to tell and write time in 3 out of 5 trials.
 4. When presented with charts and graphs, [the Student] will be able to represent and interpret data in 3 out of 5 trials.
 5. When given some money, [the Student] will be able to identify values, add up to \$5.00 and make change in 3 out of 5 trials.

The IEP team developed the following goals for Reading:

1. [The Student] will know and apply phonics and word analysis skills in decoding words.
2. [The Student] will be able to ask and answer questions about key details in a text, Identify the main topic and retell key details of a text. Describe the connection between two individuals, events, ideas, or pieces of information in a text.

² Parenthetical refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. The Hearing Officer has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

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3. [The Student] will be able to read with sufficient accuracy and fluency to support comprehension.
4. [The Student] will be able to compare and contrast the themes, settings, and plots of stories.

The IEP team developed the following goals for Written Expression:

1. [The Student] will be able to write opinion pieces in which they introduce the topic or book they are writing about, state an opinion, supply reasons that support the opinion, use linking words (e.g. because, and, also) to connect opinions and reasons, and provide a concluding statement or section.
2. With guidance and support from adults [the Student] will be able to focus on a topic and strengthen writing as needed by revising and editing.

The IEP team developed the following goals for Speech and Language:

1. [The Student] will identify at least 10 antonyms and synonyms pairs every advisory with 80% accuracy, over 3 consecutive sessions.
2. Expressively, [the Student] will be able to define/ tell the meaning of at least 5 content words per advisory with 80% accuracy, over 3 consecutive sessions.
3. [The Student] will be able to demonstrate the ability to answer WH- questions (who, what, when, where & why) after listening to stories with 80% accuracy, 4/5 trials.

The IEP team developed the following goals for Motor Skills:

1. [The Student] will complete a visual perceptual activity/task (i.e. puzzles, locating hidden words,) with 80% accuracy with minimal cues over 3 consecutive sessions.
2. With modifications as needed (ie. larged lined paper), [the Student] will copy/complete 5-7 word sentences from the black-board or at her desk with attention to letter formation, line orientation, letter sizing, and word spacing with 70% accuracy over 3 consecutive sessions.

The IEP team determined the Student required 120 minutes (2 hours) per day of specialized instruction in Reading outside the general education setting, 60 minutes (1 hour) of specialized instruction in Math outside the general education setting, 180 minutes per month occupational therapy outside the general education setting, 120 minutes per month of speech-language therapy, and 30 minutes per month of behavior support services. The team provided goals in Written Language, but there is no specialized instruction to implement them. The IEP team determined the Student does not require ESY. (Exhibit P-8 and R-4 and Literacy Expert's and Educational Advocate's testimony)

4. On November 17, 2014, the IEP team noted that the Student did not make progress in all of her subjects. The team changed the Reading goals as follows:

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1. Given instructional level text, [the Student] will know and apply phonics and word analysis skills in decoding words.
2. Given instructional level text, [the Student] will be able to ask and answer questions about key details in a text, Identify the main topic and retell key details of a text. Describe the connection between two individuals, events, ideas, or pieces of information in a text.
3. Given instructional level text, [the Student] will be able to read with sufficient accuracy and fluency to support comprehension. [The Student] will increase her reading level by 1 years growth from beginning of year and end of year.
4. [The Student] will be able to compare and contrast the themes, settings, and plots of stories of text read on her instructional level, and text read aloud on grade level with 80% accuracy.

The IEP team changed the first Written Expression goal to:

1. “[The Student] will be able to write opinion pieces in which she introduces the topic or book read or writing about, state an opinion, supply reasons that support the opinion, use linking words (e.g. because, and, also) to connect opinion and reasons, and provide a concluding statement or section.”

The IEP team did not change the Mathematics, Speech and Motor Skills goals. The team reduced the Student’s Reading to 8 hours per week and Mathematics to 5 hours per week outside the general education setting. No hours of Written Instruction were provided. (Exhibit P-9 and R-3 and Literacy Expert’s and Educational Advocate’s testimony)

5. Although the November 17, 2014, IEP stated the Student was to receive a total of 13 hours per week of specialized instruction outside the general education setting, the Student actually received 20 hours per week of specialized instruction outside the general education setting in Mathematics, Reading, and Written Instruction. (Special Education Teacher’s testimony)
6. On May 30, 2015, the Student received another WJ-III assessment. The assessment yielded the following grade equivalent scores: 1) Broad Reading at the 1.4 grade level, 2) Broad Math at the 1.1 grade level and 3) Broad Written Language at the 1.6 grade level. (Exhibit P-10) A curriculum based assessment indicates the Student made progress during the 2014-2015 school year and was reading at a 3rd grade level. (Special Education Teacher’s testimony. However, the WJ-III is a valid and accurate academic achievement assessment. (Literacy Expert’s testimony)
7. The Student was absent 15 times during the 2014-2015 school year. (Exhibit R-9 and Special Education Teacher’s testimony)
8. The Petitioner requested 150 hours of tutoring services as compensatory services. (Exhibit P-12 and Literacy Expert’s testimony)

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).

DCPS denied the Student a FAPE by failing to develop IEPs on December 9, 2013 and November 17, 2014 that are reasonably calculated to provide educational benefit.

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. *School Committee of the Town of Burlington v. Dep't of Education, Massachusetts*, 471 U.S. 359 (1985). 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. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Each IEP developed for a child with a disability must include a statement of measurable annual goals, including academic and functional goals. 34 C.F.R. § 300.320(a)(2).

The December 9, 2013 IEP goals were based on the March 4, 2013 psychoeducational and clinical psychological assessment. The Student's annual goals did not change very much between December 9, 2013 and November 17, 2014. The team's only change to her Reading goals was to state that the Student would be given instructional level text for Reading. The Written Expression goals are similarly taken from the prior IEP with the exception of a small change to the first goal. The Petitioner argues that the goals are not appropriate for the Student's level. The Reading goals were to be based on the 4th grade common core standards even though the Student is reading at a first grade level. However, the November 17, 2014 IEP team did not make significant changes to the goals which were based on 1st grade common core standards.

Pursuant to *Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009), the Hearing Officer must focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits. 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). DCPS argues that the IEP was appropriate at the time it was developed and the goals were appropriately similar because the IEP team concluded that she still had not mastered relevant skills. There is no requirement that the IEP team change the Student's goals on an annual basis. Therefore, the Hearing Officer finds the goals are appropriate for the Student's level of achievement.

The November 17, 2014 IEP team reduced the Student's service hours from 15 hours per week of specialized instruction in Reading and Mathematics outside the general education setting to 13 hours per week of Reading and Mathematics outside the general education setting. The Petitioner argues that the hours of service are not appropriate because the Student has no service hours for Written Expression to implement her writing goals and that the IEP team reduced the hours of specialized instruction even though the Student continues to struggle academically.

The evidence indicates the IEP team did not provide any service hours to implement the Student's goals in written expression. DCPS states that this was merely a procedural oversight. Although the IEP team did reduce the hours of instruction, the Student actually received 20 hours per week of specialized instruction; which was more than either of her IEPs. This shows that the school administration believed that the Student required more hours of special education than what the IEP team provided. Although, the Student received specialized instruction in Mathematics, Reading, and Written Expression; the Student was denied a FAPE as a result of the November 17, 2014 IEP team's failure to offer an IEP reasonably calculated to provide educational benefit. *See, e.g., Rowley*. Consequently, the Hearing Officer will direct in the order below that the Student's IEP be amended to provide appropriate special education services.

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 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 the student was denied a FAPE as a result of DCPS' failure to provide an IEP that was reasonably calculated to provide educational benefit. However, the fact that the Student received more services than what was offered in the IEP, shows that the Student was not harmed by the fact that her IEP was inappropriate. Therefore, the Hearing Officer will not order any compensatory services for the Student.

ORDER

- (1) DCPS shall convene an IEP team meeting to revise the Student's IEP to provide appropriate at least 20 hours of specialized instruction per week;
- (2) For everyday of delay by the Petitioner, DCPS shall have one day to convene the IEP team meeting;
- (3) The above referenced IEP team meeting shall be scheduled through the Petitioner's counsel; and
- (4) 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: August 17, 2015

/s/ John Straus
Hearing Officer

Copies to:

Petitioner (U.S. mail)
Petitioner's Attorney: Carolyn Houck, Esq. (electronically)
DCPS' Attorney: Maya Washington, Esq. (electronically)
DCPS (electronically)
ODR (electronically)