DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

[STUDENT],[1]
through the Parent/Guardian,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 8/4/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 7/27/11 Room: 2009

2011 AUG -4 PM 12:41
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STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

The student is an year-old male who has been found eligible for special education and related services as a student with the disability classification of a specific learning disability. (R-8) On June 10, 2011 counsel for petitioner filed a due process complaint alleging several issues including DCPS failing to comply with the September 21, 2010 settlement agreement, DCPS failing to develop an appropriate IEP, failing to implement that IEP and failing to provide an appropriate placement. (P-2) On June 23, 2011, counsel for the respondent DCPS filed her response. Counsel for respondent denied that DCPS denied a FAPE to the student. (P-3, R-1) The parties failed to reach an agreement at a resolution meeting held on June 30, 2011. (R-2) On July 11, 2011 a prehearing conference was held with counsel for the petitioner Nicholas Ostrem and counsel for respondent Linda Smalls. A prehearing Order was issued on July 12, 2011 that

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

stated the following issues would be determined at the due process hearing: 1. Did DCPS fail to comply with the September 21, 2010 settlement agreement in not discussing and determining the issue of compensatory education when the agreement called for such a discussion and determination if compensatory education was warranted? 2. Is the IEP developed on March 30, 2011 inappropriate for failing to contain sufficient hours of specialized instruction and sufficient hours for speech and language and counseling services to meet the student's unique needs? 3. Did DCPS fail to implement the March 30, 2011 IEP in not providing the ten hours a week of specialized instruction and two hours a month of speech therapy and two hours a month of counseling services called for in the IEP? 4. Is the student's current placement at School inappropriate because the student has allegedly failed to make progress at School? (P-5)

The due process hearing convened at 9 a.m. on July 27, 2011 in Room 2009 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Nicholas Ostrem represented the petitioner and Linda Smalls represented the respondent DCPS. The hearing was closed. At the outset of the hearing, counsel for petitioner withdrew the fourth issue that School was an inappropriate placement. Petitioner's documents P-1-P-20 were admitted into evidence without objection. Respondent's documents R-1-R-12 were admitted into evidence without objection except for document R-2 that was objected to on the grounds of relevance. This hearing officer admitted all of respondent's documents. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses the parent and educational advocate Dr. Ida Jean Holman who testified in person and who testified by telephone. Counsel for respondent did not call any witnesses and rested on her documents.

JURISDICTION

The hearing was convened on July 27, 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

BACKGROUND

The student is an ·year-old male who has been found eligible for special education and related services as a student with the disability classification of a specific learning disability. (R-8) Counsel for petitioner alleges that DCPS did not discuss compensatory education at the March 16, 2011 MDT meeting, a subject required to be discussed in the September 21, 2010 settlement agreement. Counsel for DCPS maintains that compensatory education was discussed at that meeting. Counsel for petitioner also alleges that DCPS failed to implement the student's IEP. Counsel for DCPS argues that the IEP Progress Report shows the IEP was implemented. Counsel for petitioner also asserts that the IEP was inappropriate for not containing sufficient hours of specialized instruction. Counsel for respondent maintains that the student's IEP is reasonably calculated to provide educational benefits to the student. Counsel for petitioner withdrew at the hearing the issue of the inappropriateness of the student's placement. Counsel for petitioner is requesting as relief compensatory education. Counsel for respondent argues that there was no denial of a FAPE to justify an award of compensatory education.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Did DCPS fail to comply with the September 21, 2010 settlement agreement in not discussing and determining the issue of compensatory education when the agreement called for such a discussion and determination if compensatory education was warranted?

2. Is the IEP developed on March 30, 2011 inappropriate for failing to contain sufficient hours of specialized instruction and sufficient hours for speech and language and counseling services to meet the student's unique needs?

3. Did DCPS fail to implement the March 30, 2011 IEP in not providing the ten hours a week of specialized instruction in the general education setting and two hours a month of speech therapy and two hours a month of counseling services called for in the IEP?

The relief sought is compensatory education of 225 hours of independent tutoring, 50 hours of independent speech-language therapy and 50 hours of independent mentoring. (P-3 at p.4)

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 on issue one-the failure to comply with the settlement agreement:

I.

1. The parties entered a settlement agreement on September 21, 2010 that included that DCPS will convene an IEP meeting within 30 business days of receipt of the final evaluation to "discuss and determine compensatory education, if warranted." (P-1)

2. An MDT meeting was convened on March 16, 2011 to comply with the terms of the September 21, 2010 settlement agreement. The MDT Meeting Notes state under the topic "Discuss and determine compensatory education services" that "Team doesn't agree that comp ed is warranted at this time. Advocate/ parent aren't in agreement." (R-5 at p.2) The parent testified that there was a discussion of compensatory education, but there was no agreement. (Testimony of Parent) The education advocate who also participated in that meeting agreed there was a short discussion about compensatory education. She testified that the case compliance manager brought up the issue of compensatory education and polled all the teachers and service providers present at the meeting who stated that compensatory education was not warranted. The educational advocate disagreed and gave her position that the student needed compensatory education. (Testimony of Dr. Holman)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows on issue two- the failure to develop an appropriate IEP:

II.

1. On March 30, 2011 an MDT meeting convened with the parent and educational advocate in attendance. The meeting was held to develop an initial IEP after the MDT had determined the student eligible for special education and related services at the March 16, 2011 MDT meeting. The IEP draft called for seven hours a week of specialized instruction in the general education setting, but the MDT increased the hours to ten hours of specialized instruction a week upon request of educational advocate for more hours. (R-8)The special education teacher would provide these

services. There were only two students with IEPs in the student's classroom and the special education teacher would only be providing specialized instruction to these students in the general education setting. (R-7) The IEP also called for 30 minutes a week of speech therapy or two hours a month and 30 minutes a week of behavioral support services or two hours a month. (R-8)

2. The IEP Progress Report of June 18, 2011 developed by the special education teacher states the student is progressing in meeting all his mathematics goals. He was making progress with 60% accuracy on addition and subtraction problems and 70% accuracy on division problems and 60% accuracy to add common fractions as measured by work samples and informal assessments. He was making progress in three of his reading goals, but showing no progress on two of his goals. He did not show progress in his written expression goals. (R-11 at 1-3)
3. The IEP Progress Report of June 18, 2011 prepared by the speech and language pathologist showed him progressing in meeting all is speech and language goals. (R-11 at 4)
4. The IEP Progress Report of June 18, 2011 prepared by the clinical social worker showed him progressing in meeting all his emotional, social and behavioral development goals. (R-11 at 5)
5. The student's Report Card for the 2010-2011 School Year shows that in the last advisory when the student's IEP was in place, the student went from beginning skills to developing skills in Reading in four areas and from beginning skills to developing skills in one area of Writing. (P-12) The report card shows educational progress since the IEP was developed and implemented at

6. Dr. Natasha Nelson conducted an independent psychological evaluation of the student on September 29, 2010. Brown and Associates faxed a copy of her evaluation to DCPS to review on November 10, 2011. (P-13) Counsel for petitioner disclosed Dr. Nelson's evaluation, but that report was dated November 11, 2011. The November 11, 2011 report for recommendation one at the last sentence states: "It is recommended that he receive specialized instruction in a full time special education classroom for his difficulties in these areas." (P-7 at p.11) On cross-examination of Dr. Holman who relied on that recommendation, counsel for DCPS showed the witness Dr. Nelson's evaluation report that was dated November 4, 2010 and shows it was faxed by Brown and Associates on November 10, 2010 to DCPS. The November 4, 2010 report states for recommendation one on the last sentence: "It is recommended that he receive specialized instruction in the general education classroom (inclusion) as based on these findings." (HO-1) Dr. Nelson was not called as a witness and therefore no explanation was given by her for these contrary recommendations.
7. Dr. Ida Jean Holman did not evaluate the student, did not observe him in the classroom and did not talk to his teachers, but based her opinions on review of the documents and discussions with the parent. (Testimony of Dr. Holman)

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue three-the failure to implement the student's IEP- are as follows:

III.

1. The IEP Progress Report of June 18, 2011 shows that the special education teacher is providing the specialized instruction required by his IEP and that the speech and language pathologist and clinical social worker are providing the related services of speech and language therapy and counseling required by his IEP. (R-11)
2. The mother was unable to say if the IEP was being implemented because she did not visit the student's classroom. (Testimony of Mother)

CREDIBILITY FINDING

A hearing officer is responsible for assessing the credibility of witnesses. *See Shore Regional High School Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3rd Cir. 2004) This hearing officer does not find the testimony of Dr. Ida Jean Holman on the issue of the inappropriateness of the IEP for not requiring all specialized instruction and related services outside of general education to be that credible based on observation of testimony where she did not seem that familiar with the student in her answers and her stating she based her opinions only on a review of documents and discussions with the parent. She did not evaluate the student, did not observe him in the classroom and did not talk to his teachers. (See Findings of Fact II. #7) Moreover, her expert opinions are not independent and unbiased because she is the educational advocate for the student in the employ of counsel for petitioner's law firm James Brown and Associates.

DISCUSSION/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 on issue one:

"The burden of proof shall be the responsibility of the party seeking relief. 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. 3030.3*

Counsel for petitioner has failed to meet his burden of proof that DCPS failed to comply with the terms of the September 21, 2010 settlement agreement. The MDT Notes of the March 16, 2011 meeting, the testimony of both the mother and educational advocate all demonstrate there was a discussion and determination of compensatory education if warranted as required by the settlement agreement. The parent remembers that there was a discussion of compensatory education at the March 16, 2011 MDT meeting and there was no agreement. (See Findings of Fact I. #2) The educational advocate admits the compensatory education issue was raised by the compliance case manager. Each member of the team was asked by the compliance case manager if they thought compensatory education was warranted and all the teachers said no. The educational advocate testified she disagreed with that position and while the discussion was short she did have an opportunity to voice her objection to the DCPS position. (See Findings of Fact I. #2)

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 on issue two:

In determining if the IEP is appropriate this hearing officer must answer the question "is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, at 206-07 (1982). *Rowley* also held that the IEP "need not maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Id.*

In *A.I. ex rel. Iapalucci v. D.C*, 402 F. Supp. 2d 152 (D.D.C. 205) the Court upheld a hearing officer's decision that the IEP goals were appropriate based on reference to IEP progress reports that "contain a myriad of specifics that substantiate the hearing officer's finding of progress." *Id. at p.169* In this case, the IEP progress reports contain many specifics that also support a finding of progress on the student meeting his annual IEP goals. (See Findings of Fact II. #2-#4) The IEP was only in place for two and half months, yet the IEP Progress Report show the student is making progress in mathematics and reading. The student's Report Card for the last school year shows that in the last advisory when his IEP was in place he went from beginning skills to developing skills in four areas in Reading and one area in Writing. (See Findings of Fact II. #5) Findings of Fact II. # 2-5 shows that the IEP "is reasonably calculated to enable the child to receive educational benefits", *Rowley, Id.*, and the student is receiving educational benefits. Counsel for petitioner has failed to meet his burden of proof that the IEP is inappropriate and the student has been denied a FAPE.

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 on issue three:

Counsel for petitioner has failed to meet his burden of proof that the IEP was not implemented. The mother testified she was unable to say if the IEP was being implemented because she did not observe the student in his classroom. The IEP Progress Report of June 18, 2011 shows that the special education teacher was providing the specialized instruction required by the IEP. The IEP Progress Report further shows that the speech and language pathologist and clinical social worker were providing the related services required by the IEP. (See Findings of Fact III. #1 & 2) Because counsel for petitioner has failed to meet his burden of proof that there was an implementation failure, it is not necessary to do a legal analysis as to whether the aspects of the IEP not followed were "substantial or significant" or whether the deviations from the IEP's stated requirements were "material" so as to deny a FAPE. *Wilson v. D.C.* (Civil Action 09-02424, March 18, 2011) *Houston Independent School District v. Bobby R.* , 200 F. 3d 341 at 349 (5th Cir. 2007), *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5 J, 502 F. 3d 811 (9th Cir. 2007); *Catalan v. D.C.*, 478 F. Supp. 2d 73 (D.D.C. 2007)

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

Issue one on non-compliance with the September 21, 2010 settlement agreement is DISMISSED with prejudice

Issue two on the IEP being inappropriate for not containing sufficient hours is DISMISSED with prejudice.

Issue three on the IEP not being implemented is DISMISSED with prejudice.

Counsel for petitioner's request for relief is DENIED and the case is DISMISSED with prejudice.

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).

Date: 8/4/11 Seymour DuBow /s/

Hearing Officer