

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
August 18, 2014

STUDENT, ¹)	
through the PARENT,)	
)	Date Issued: August 18, 2014
<i>Petitioner,</i>)	
)	Hearing Officer: NaKeisha Sylver Blount
v.)	
)	
District of Columbia Public Schools,)	
)	
<i>Respondent.</i>)	

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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; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on June 4, 2014, on behalf of Student, a resident of the District of Columbia, by Petitioner, Student’s parent, against Respondent, District of Columbia Public Schools (“DCPS”).

On June 6, 2014, the undersigned was appointed as the Impartial Hearing Officer (“IHO”). On June 14, 2014, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The undersigned IHO held a Pre-hearing Conference (“PHC”) by telephone on June 30, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by Tuesday, July 29, 2014 and that the Due Process Hearing (“DPH”) would be held on August 5, 2014. The PHC was summarized in

¹ Personal identification information is provided in Appendix A.

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the Pre-Hearing Conference Order and Summary (“PHO”) issued June 30, 2014. The hearing officer determination (“HOD”) in this matter is due on August 18, 2014.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, the following documentary exhibits were admitted into evidence without objection: P-1, P-2; P-5 through P-11; P-13 through P-16; P-19 through P-28; P-30; P-31, P-32; P-35; P-36; and P-38 through P-41 and R-1 through R-9. The following exhibits were admitted over the Petitioner’s objection: R-1, R-2, R-2B, R-3 through R-7. The following exhibits were admitted over Respondent’s objection: P-3, P-4, P-17, P-18, P-29, P-33, P-34, P-37. Petitioner withdrew exhibit P-12 during the DPH, and it was not admitted into evidence.

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) Parent (Petitioner);
- (b) Parent’s Educational Advocate (Educational Advocate);
- (c) Compensatory Education Advocate (Drafter of the Compensatory Education Plan); Offered as an expert in special education, IEP programming and compensatory education development. Not qualified as an expert; however, permitted to offer lay opinion testimony, consistent with Rule 701 of the Federal Rules of Civil Procedure;
- (d) Parent’s School Psychologist Expert (School Psychologist).

The following witness testified on behalf of Respondent at the DPH:

- (a) Special Education Teacher (Special Education Teacher/Building LEA Representative at District Elementary School).

The parties gave oral closing arguments.

ISSUE

As discussed at the PHC and reflected in the PHO, the following issue was presented for determination at the DPH.

- (a) Whether DCPS denied the student a free appropriate public education (“FAPE”) by failing to propose or provide a May 13, 2014 IEP reasonably calculated to provide educational benefit when, given the student’s significant deficits and continued below grade level performance, the IEP should have provided for least 15 hours of specialized instruction outside the general education setting.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding in Petitioner’s favor as to the issue raised;

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- (b) an Order that DCPS revise the student's IEP to increase the hours of specialized instruction outside the general education setting to at least 15 hours per week in the areas of reading, mathematics and written expression;
- (c) an Order that DCPS provide the student with compensatory education services in the form of specialized tutoring by an outside provider.

FINDINGS OF FACT

2. Student resides with his mother, the Petitioner ("Parent"), in Washington, D.C.
3. Student has been determined to be eligible for special education and related services under the IDEA with the disability classification "Developmental Delay."²
4. During the 2013-2014 school year, Student was a first grade student at District Elementary School.
5. Student is a willing learner, but is not on grade level and cannot yet read or write.³
6. At the end of February 2014, Parent requested an MDT/IEP meeting due to her concerns with Student's academic difficulty, especially in reading, and an MDT/IEP meeting in which Parent and Parent's Educational Advocate participated was convened.⁴
7. The MDT/IEP team reconvened on May 13, 2014, and the full team agreed Student needed more hours of services. Parent and Parent's Educational Advocate believed Student needed more hours of support than the DCPS members of the team believed he needed. The meeting was a collaborative, and Parent and Parent's Educational Advocate were able to fully participate.⁵
8. Student's current Individualized Education Program ("IEP") is dated May 13, 2014.⁶ The IEP immediately preceding Student's current IEP was dated July 1, 2013, and was Student's initial IEP.⁷ The previous IEP provided approximately 5 hours and 34 minutes of specialized instruction and related services per week, and the current IEP provides approximately 7 hours and 40 minutes of specialized instruction and related services per week.

² P-14-1.

³ Testimony of Parent.

⁴ Testimony of Parent's Educational Advocate.

⁵ Testimony of Parent's Educational Advocate.

⁶ R-7-1.

⁷ P-13.

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9. A general comparison of the hours⁸ of specialized instruction provided for by the two IEPs is as follows:

	Special Education <i>(outside the general education setting)</i>	Special Education <i>(inside the general education setting)</i>	Total Time Per week
Current IEP	5 hrs. and 40 mins. per week (in reading, mathematics, written expression)	1 hr. per week (in reading, mathematics)	6 hrs. and 40 mins.
Previous IEP	0 hours per week	5 hrs. per week (undifferentiated by subject area.)	5 hrs.

10. A general comparison of the hours⁹ of related services provided for by the two IEPs is as follows:

	Direct OT (outside the general education setting)	Consultative OT (inside the general education setting)	Behavioral Support (inside the general education setting)	Behavioral Support (outside the general education setting)	Total Time Per Week
Current IEP	30 mins. per week ¹⁰	0 mins. per week	15 mins. per week	15 mins. per week	1 hr.
Previous IEP	30 mins. per week	3.75 mins. per week	0 hrs. per week	0 hrs. per week	33.75 mins.

11. Student has not had any recent educational assessments by which to gauge his present level of performance. Student's current IEP, his final 2013-2014 report card, and his final 2013-2014 IEP progress report reflect that Student had academic difficulty during the 2013-2014 school year, but made some minimal degree of progress over the course of the school year, including in the areas of mathematics¹¹ and reading.¹²

⁸ The two IEPs do not quantify all services in hour-increments. Some services are quantified by minutes; however, for ease of reference, this general comparison/summary chart converts those services minutes into the roughly equivalent hour increments.

⁹ The two IEPs do not quantify all services in hour-increments. Some services are quantified by minutes; however, for ease of reference, this general comparison/summary chart converts those services minutes into the roughly equivalent hour increments.

¹⁰ The IEP quantifies the time by hours per month; however, for ease of reference, this general comparison/summary chart converts the service hours per month into the roughly equivalent minute per week increments.

¹¹ R-2-2; P-14-3; R-8-1; R-9.

¹² R-2-3; P-14-4; R-8-1; R-9.

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12. There are no indicators as to whether Student was progress or regressing during the last month of school, after his May 13, 2014 IEP was finalized.¹³

13. The MDT/IEP team considered Student's minimal degree of academic progress, as well as Student's progress toward being able to sit still and listen in class in determining what his least restrictive environment would be.¹⁴

CONCLUSIONS OF LAW

"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). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR §5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

I. Whether DCPS denied the student a free appropriate public education ("FAPE") by failing to propose or provide a May 13, 2014 IEP reasonably calculated to provide educational benefit when, given the student's significant deficits and continued below grade level performance, the IEP should have provided for least 15 hours of specialized instruction outside the general education setting.

Evaluating whether an IEP comports with IDEA and provides a student a FAPE involves a two part analysis: (1) whether the District has complied with IDEA's procedural requirements in composing the IEP, and if so (2) whether the IEP is "reasonably calculated" to enable the child to receive educational benefit. *See Smith v. District of Columbia*, 63 IDELR 77 (D.D.C. 2014). In this case, Plaintiff does not challenge the procedural sufficiency of the IEP; rather, she alleges that the IEP is not reasonably calculated to provide Student educational benefit, to the extent that it does not provide Student at least 15 hours of specialized instruction per week.

When assessing whether an IEP is reasonably calculated to provide a student educational benefit, the IEP must be evaluated prospectively. "[T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008). IDEA does not require an IEP to guarantee a student's academic success; rather, the relevant inquiry is whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201. The "basic floor of opportunity" under IDEA, according to the Supreme Court, is

¹³ Testimony of Parent's Educational Advocate; testimony of Parent's Expert School Psychologist; testimony of Special Education Teacher.

¹⁴ Testimony of Special Education Teacher.

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whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005), quoting *Rowley*, 458 U.S. at 201. IDEA does not necessitate that the services provided be sufficient to maximize each child’s potential commensurate with the opportunity provided other children. *Id.* at 198 (internal quotations and citations omitted.) However, Congress, “did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir.1985).

IDEA’s Least Restrictive Environment requirement mandates that, “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled” and “[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.114(a)(2)..

The evidence in this case does not establish that the May 13, 2014 IEP was not reasonably calculated to provide Student educational benefit, or that he required a minimum of 15 hours per week of specialized instruction, rather than the 7 hours per week to which the IEP was increased. Student did not perform on grade level during the 2013-2014 school year; however, given his disability and the fact that he has only had an IEP in place for one full school year, this not outside the bounds of reason. Though Student did not attain mastery of his IEP goals or earn strong grades on his report card, he did make some measure of progress under his previous IEP, which offered fewer hours of services than does his current IEP. Student’s current IEP not only increased the total number of service hours Student receives, but it gives Student a more restrictive educational environment, going from no hours of specialized instruction outside the general education setting to approximately 5 hours and 40 minutes per week of specialized instruction outside the general education setting, in addition to an hour per week of specialized instruction inside the general education setting. While the previous IEP did not differentiate which subject areas in which Student would received specialized instruction, the current IEP gives specific attention to reading and mathematics, and Student’s performance in reading is one of Parent’s foremost concerns. While not what Parent had hoped for, the changes the team made with Student’s current IEP were significant, were tailored to his needs as demonstrated during the 2013-2014 school year, and took into consideration the minimal progress Student made under the previous IEP.

The law requires the team to place Student in his least restrictive environment, and the fact that Student made some degree of progress under his previous IEP was one factor the team considered when deciding on Student’s least restrictive environment. With the exception of Parent and Parent’s Educational Advocate, the team felt that making the even more drastic change of increasing Student’s hours of specialized instruction and related services to 15 hours per week would be more restrictive than Student needed, and would not represent his least restrictive environment. “While parents may desire ‘more services and more individualized attention,’ when the IEP meets the requirements discussed above, such additions are not required.” *Smith v. District of Columbia*, 63 IDELR 77 (D.D.C. 2014), quoting *K.S. v. Dist. of*

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Columbia, No. 12-624, 2013 WL 4506969 (D.D.C. Aug. 26, 2013). Here, Parent had an opportunity to participate fully in the IEP development process, but the remainder of the team came to a different conclusion than she and her advocate reached about the number of service hours Student needed. This disagreement does not necessarily make the decision the team ultimately reached incorrect or a denial of FAPE, and the record does not support a finding that 15 hours per week of specialized instruction would be required to enable Student to access his education.

For these reasons, Petitioner did not meet her burden of proving that DCPS denied the student a (“FAPE”) by failing to propose or provide a May 13, 2014 IEP reasonably calculated to provide educational benefit.

Accordingly, all relief Petitioner requested in the complaint is **DENIED**.

This complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

Date: August 18, 2014

/s/ NaKeisha Sylver Blount
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 U.S.C. §1415(i).