DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE

STUDENT,[1]	)	
By and through PARENT,	)	
	)	
	)	**Case No.**
Petitioner,	)	
v	)	**Bruce Ryan, Hearing Officer**
	)	
DISTRICT OF COLUMBIA	)	**Hearing: February 22, 2010**
PUBLIC SCHOOLS,	)	**Decided: March 4, 2010**
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The complaint was filed December 17, 2009, against Respondent District of Columbia Public School ("DCPS"). It concerns a ·year old student (the "Student") who resides in the District of Columbia, currently attends a public charter school located in D.C. (the "Charter School"), and has been determined to be eligible for special education and related services as a child with a disability under the IDEA. DCPS acts as the LEA for the Charter School.

The complaint alleges that DCPS denied the Student a free appropriate public education ("FAPE") by failing to provide Extended School Year ("ESY") Services for the 2009 Summer. According to the complaint, at a June 24, 2009 meeting, the Student's Multi-disciplinary Team ("MDT") agreed that the Student required ESY services but that it would be detrimental to his progress to enroll in his neighborhood DCPS school ("DCPS School") where such services were

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

offered. As a result, the Student was instead enrolled in the regular summer school program at the Charter School. Petitioner alleges that the Student has been harmed as a result of failing to receive ESY services and seeks compensatory education services, among other relief.[2]

DCPS filed a Response denying the allegations. DCPS responds that (1) the MDT did not in fact determine that ESY was warranted, and (2) even if there were such a determination, Petitioner rejected ESY at the DCPS School. DCPS asserts that the summer school services at the Charter School were available to the Student and provided him educational benefit.

A Prehearing Conference ("PHC") was held on January 26, 2010, following the end of the 30-day resolution period. A Prehearing Order was issued on January 31, 2010. Five-day disclosures were thereafter filed by both parties as directed, on or about February 12, 2010.

The Due Process Hearing was held on February 22, 2010. Petitioners elected for the hearing to be closed. At the hearing, 22 documentary exhibits submitted by Petitioner (identified as ·1" through ·22") and 11 documentary exhibits submitted by DCPS (identified as "DCPS-1" through "DCPS-11") were admitted into evidence without objection. Testifying at the hearing on behalf of Petitioner were: Parent-Petitioner; Psychologist Julie Kovac, Ph. D; and Sharon Lennon, Ed. D., of Newlan Educational Services. Testifying on behalf of DCPS were the Academic Director, Special Education Compliance Specialist, and Special Education Teacher at the Charter School.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*").

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[2] A prior complaint was filed on behalf of the Student on or about July 8, 2009, based on the same 6/24/09 MDT meeting. *See Case No. 2009-1001.* The prior complaint alleged that DCPS had denied a FAPE to the Student by failing to take certain actions in connection with such meeting, including development of a compensatory education plan for missed ESY services during Summer 2007. DCPS subsequently agreed in resolution that the Student should receive three hours per week of one-on-one tutoring for seven months as compensatory education for those missed ESY services, to be completed by February 23, 2010. *See* ·7 & *DCPS-4* (7/23/09 Compensatory Education Plan). Petitioner then withdrew the prior complaint, and the tutoring services have since been provided to the Student.

II. ISSUE AND REQUESTED RELIEF

At the PHC, the Hearing Officer and the parties discussed the pleadings and above allegations, and determined that the following one issue would be presented for determination at hearing:

Did DCPS Deny a FAPE to the Student by Failing to Provide ESY Services for the 2009 Summer?

Petitioner seeks the following relief : (1) that "DCPS shall fund independent tutoring for the student through the end of the current school year to compensate the student for missed ESY services;" (2) that "should DCPS be unable to provide the student with a suitable placement for ESY during the 2010 summer, DCPS shall continue to fund independent tutoring through the 2010 summer;"[3] (3) that DCPS agree to reasonable attorney fees and related costs; and (4) that all meetings shall be scheduled through counsel for the parent. *-2,* pp. 5-6; *DCPS-1,* pp. 5-6.

Petitioner's counsel was reminded at the PHC that any compensatory education relief must be demonstrated in accordance with the requirements of *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). *See Prehearing Order* (Jan. 31, 2010), ¶ 5.

III. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia and has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student's primary disability under his current IEP is Other Health Impairment ("OHI"). *See -2; -8.*

2. The Student currently attends the grade at the Charter School for the 2009-2010 school year. *See -2; Parent Testimony.*

3. On or about June 24, 2009, DCPS convened an MDT/IEP Team meeting. The meeting was held at the Parent's request and to develop and review a student evaluation plan

[3] The Hearing Officer indicated at the PHC and at the opening of the due process hearing that he believed any relief with respect to the 2010 Summer would be premature and speculative at this point, given that the MDT has not yet considered that subject and the only issue presented in the complaint concerns a failure to provide ESY services for the 2009 Summer. *Cf. Reinholdson v. School Board of Independent School District No. 11,* 187 F. App. 672 (8th Cir. 2006) (school district does not violate procedural requirements of the IDEA by abstaining from ESY decisions until shortly before the end of the school year).

("SEP"). *See* -5; *DCPS-6.* As part of the SEP, the team agreed to conduct a neuropsychological evaluation (to include cognitive and achievement testing), a functional behavioral assessment ("FBA"), and ADHD screening. *Id.*

4. At the June 24, 2009 MDT/IEP Team meeting, the Parent and educational advocate expressed concerns regarding the Student's memory and ability to retain information, as well as previous recoupment issues. *See* -5 (6/24/09 MDT meeting notes); *Parent Testimony.* In light of these concerns, the Parent requested that the team address the issue of ESY services for Summer 2009 at this meeting. *Id.; see also* -4 (6/24/09 correspondence).

5. In response to the Parent's concerns, the IEP Team discussed whether ESY services would be appropriate for the Student for Summer 2009. ESY services were available at the Student's neighborhood DCPS School, but were not offered at the Charter School. *See Academic Director Testimony.* The Parent was not "comfortable" with the DCPS School where ESY would be provided, and believed that the Student "would not do well" there. *Compliance Specialist Testimony; Parent Testimony;* -5, p. 2. In addition, the Student needed to retake grade math and science courses in summer school (at the Charter School) in order to earn sufficient credits to advance to the 10th grade, which the Parent wanted him to do. *Id.;* -6, p. 7. The Student could not participate in both summer school at the Charter School and the ESY program at the DCPS School due to scheduling overlaps. *See Academic Director Testimony; Teacher Testimony.*

6. As a result, the IEP Team – including the Parent and the Charter School professional staff [4] – agreed that it would be appropriate for the Student to attend summer school at the Charter School, instead of receiving ESY services at the DCPS School. *See* -5 -6; *Compliance Specialist Test.; Parent Test.* Given the Parent's concerns with memory and recoupment, the team also recommended at the 6/24/09 meeting that a neuropsychological evaluation be conducted "to ensure that all possible areas of concern have been looked at" going forward. -5, p. 3; *see also Compliance Specialist Test.* In addition, the team agreed to conduct an FBA to "look at organization/homework completion/turning in work." -5, p. 3.

[4] The Special Education Teacher indicated at the 6/24/09 meeting that the Student "is motivated to move to the tenth grade and knows he needs to work in summer school to do so." -5, p. 2. She also noted that the Student "did show retention of material from the beginning of the school year as he was studying for his exams." *Id. See also Teacher Testimony* (describing benefit to Student from continued academic instruction during summer within Charter School's "supportive environment").

7. The Student received educational benefit from the summer school program at the Charter School, which he would not have been able to receive had he attended the ESY program at the DCPS School. At the same time, Petitioner has not shown that the Student suffered any specific educational harm or deficits from not receiving ESY services during Summer 2009. [5]

IV. DISCUSSION AND CONCLUSIONS OF LAW

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; see *Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3; *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). In this case, Petitioner has the burden of proof on the issue whether DCPS denied a FAPE to the Student by failing to provide ESY services for the 2009 Summer. *See Prehearing Order,* ¶¶ 5, 10.

2. Under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson v. District of Columbia,* 109 LRP 18615 (D.D.C. 2009), slip op. at 6, *quoting Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). *See also Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School,* 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit."). The issue of whether an IEP is appropriate is a question of fact. *See, e.g., S.H. v. State-Operated School Dist. of Newark,* 336 F. 3d 260, 271 (3d Cir. 2003). Moreover, whether an IEP is appropriate "can only be determined as of the time it is offered for the student, and not at some later date." *Fuhrmann v. East Hanover Bd. of Educ.,*993 F. 2d 1031, 1040 (3d Cir. 1993). An appropriate IEP does not guarantee results.

3. Extended School Year ("ESY") services are "special education and related services that ... are provided to a child with a disability "(i) beyond the normal school year; (ii)

[5] *See, e.g., Parent Testimony* (stating that the Student made progress in the summer program at the Charter School and stating only that he was "possibly" harmed as a result of not receiving ESY services); -6 (9/3/09 MDT meeting notes), p. 7 (noting that Parent chose to have the Student attend the summer school program at the Charter School , rather than ESY at his neighborhood school, in order to be promoted).

in accordance with the child's IEP; and (iii) at no cost to the parents of the child." 34 C.F.R. §300.106 (b). ESY services "must be provided ***only*** if a child's IEP Team determines, on an individual basis...that the services are necessary for the provision of FAPE to the child." 34 CFR 300.106(a)(2) (emphasis added); *see* DCMR 5-3017.2. The U.S. Department of Education has stated that "[t]he inclusion of the word 'only' is intended to be limiting." 71 *Fed. Reg.* 46,582 (Aug. 14, 2006). Thus, "[t]he regulations give the IEP Team the flexibility to determine when ESY services are appropriate, depending on the circumstances of the individual child." *Id.*

4. The Hearing Officer concludes that, in this case, the MDT/IEP Team properly exercised its "considerable flexibility" in this area. 71 *Fed. Reg.* 46,582. Based on the circumstances of the individual child (including the Parent's desire to have the child progress to the next grade level), the team decided that ESY services were not necessary for the provision of FAPE to the child. In the team's overall judgment, significant retention problems had not been adequately demonstrated, and the Student would receive greater benefit from attending summer school at the Charter School to gain credit for the two classes he failed in grade.

5. Petitioner has failed to demonstrate the inappropriateness of this 6/24/09 decision. Petitioner did not establish – through the use of sufficiently particularized, expert testimony or otherwise – that ESY services were necessary for the provision of FAPE to the Student.[6] Nor is the Student's IEP required to "maximize" his potential or offer the "best possible education" by including such services. *See, e.g., Kenton County School District v. Hunt,* 384 F.3d 269 (6th Cir. 2004) (noting "high burden" imposed on those proposing an ESY for inclusion in the child's IEP). The IEP, absent ESY services for the 2009 Summer, was still reasonably calculated to confer a meaningful educational benefit.

[6] The purpose of ESY services is generally to prevent substantial regression of critical skills over the summer break and to facilitate the student's ability to recoup previously acquired skills. *20* (DCPS ESY Guidelines, Feb. 2008), p. 4. *See, e.g., S.S. v. Howard Road Academy,* 585 F. Supp. 2d 56 (D.D.C. 2008) (IEP team acknowledged prior instances of "serious regression" during school closings, establishing need for ESY). In this case, Petitioner failed to demonstrate the need for ESY services on such basis, much less that the MDT decided this issue inappropriately as of June 24, 2009, based on the individual circumstances of the Student. *See Psychologist Testimony* (noting current memory/retention weaknesses, but indicating no knowledge of Student in June 2009 or of math goals in IEP); *Lennon Testimony* (testifying to experiences with Student based on math tutoring that did not begin until mid-September 2009); *see also* *9* (10/15/09 neuropsychological evaluation, not available to MDT in June 2009), discussing working memory and verbal-auditory memory scores within Average and Below Average ranges, compared with Below Average cognitive functioning.

6. In any event, even if ESY services were found warranted for the 2009 Summer, the Parent chose not to accept an offer of ESY services at the DCPS School where they could have been provided. *See* *·6* (9/3/09 MDT meeting notes), p. 7 (noting that Parent chose to have the Student attend the summer school program at the Charter School , rather than ESY at his neighborhood school, in order to be promoted)*; DCPS-5* (7/22/09 resolution meeting notes), p. 3; *Parent Testimony.* Where DCPS offers such services and the Parent chooses not to accept them, DCPS does not deny a FAPE to the Student.

7. Petitioner also has not shown that the Student suffered any specific educational harm from not receiving ESY services during Summer 2009. The Parent testified at hearing only that the Student was "possibly" harmed as a result of not receiving ESY services, and that he made progress in the summer program at the Charter School. *Parent Testimony.* Moreover, the Student received educational benefit from the summer school program at the Charter School (including promotion to 10th grade), which he would not have been able to receive had he attended the ESY program at the DCPS School.

6. It appears from the record that Petitioner seeks compensatory education for the 2009 Summer ESY primarily to continue the one-on-one tutoring services that were set to expire on February 23, 2010, under the terms of the prior compensatory education plan (*see* note 2, *supra*). However, while these tutoring services may well have provided additional educational benefit to the Student, such services can only be ordered as a remedy for a denial of FAPE. As Petitioner has failed to prove any denial of FAPE, there is no basis to grant any of the relief requested or to fashion any other equitable relief. [7]

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[7] Finally, even assuming *arguendo* that DCPS had improperly denied ESY services, Petitioner has failed to present evidence sufficient to entitle the Student to the compensatory education relief requested (independent tutoring), consistent with the requirements of *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). Petitioner has not offered any individually-tailored assessment of the Student's "specific educational deficits resulting from his loss of FAPE [*i.e.*, ESY during the 2009 Summer] and the specific compensatory measures needed to best correct those deficits." *S.S. v. Howard Road Academy,* 585 F. Supp. 2d 56 (D.D.C. 2008), *quoting Reid,* 401 F.3d at 526.

V. ORDER

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

1. Petitioner's requests for relief shall be, and hereby are, **DENIED;**
2. Petitioner's Due Process Complaint filed December 17, 2009 shall be, and hereby is, **DISMISSED, With Prejudice;** and
3. This case shall be, and hereby is, **CLOSED.**

Dated: March 4, 2010

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 U.S.C. §1415(i)(2).