

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on November 7, 2011, and concluded on November 8, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Rooms 2009 and 2008 respectively.²

BACKGROUND AND PROCEDURAL HISTORY:

Student or "the student" is age in grade and has been determined eligible as a child with a disability under IDEA with a disability classification of other health impairment ("OHI"). The student attends a District of Columbia public school hereinafter referred to as "School A." The student has attended School A since pre-kindergarten. The student was first determined eligible at age three. His most recent individualized educational program ("IEP") was developed October 17, 2011, and prescribes that he be provided 12.5 hours per week of specialized instruction and related services of speech language and behavioral support.

Petitioner filed an initial complaint on July 15, 2011, alleging, inter alia, that DCPS failed to implement the student's IEP by not providing all the student's related services and alleging DCPS failed make a determination of whether the student required extended school year ("ESY") services for school year ("SY") 2010-2011. A resolution meeting was held on this complaint on August 5, 2011, and the matter was not resolved. The Hearing Officer convened a pre-hearing conference on the complaint on August 18, 2011.³ During that conference Petitioner's counsel stated his intention to file a second due process complaint asserting an additional claim and desired that all claims be adjudicated in the same hearing. The Hearing Officer stated that the pre-hearing conference would be reconvened after the new complaint was filed.

On August 29, 2011, Petitioner counsel filed the second complaint alleging DCPS failed to conduct a requested psychological evaluation. On August 30, 2011, the Hearing Officer convened a pre-hearing conference and a pre-hearing order was issued September 2, 2011. On September 6, 2011, Petitioner filed a motion to amend the complaint filed on August 29, 2011, to incorporate all the issues and prayers for relief in the complaint filed on July 15, 2011. A resolution meeting was convened on the second complaint on September 16, 2011, and the matter was not resolved. The parties agreed for the resolution period to continue for the full 30 days and thus the 45-day timeline ends November 12, 2011.

² At the outset of the second day of hearing the hearing began in room 2009, however, because of telephone difficulties the room was changed to room 2008 after approximately 20 minutes on the record.

³ The pre-hearing conference was convened on the first date the parties were mutually available following the resolution meeting.

A third pre-hearing conference was convened on September 21, 2011, and a pre-hearing order was issued on September 26, 2011. On September 28, 2011, the Hearing Officer issued an order granting Petitioner's motion to amend and dismissing the case that was assigned to the July 15, 2011, complaint (2011- 0741).

Petitioner seeks as relief: 1) a MDT meeting to determine whether ESY services were warranted for SY 2010-2011 and SY 2011-2012 and (2) compensatory education in the form of tutoring for the student's alleged missed services.⁴

DCPS filed a written response to the first complaint on July 15, 2011, and to the second complaint on September 1, 2011. DCPS asserted the student was not in need of a psychological evaluation and that the determination was made that the student was not in need of ESY services for Summer 2010 and Summer 2011.

ISSUES: ⁵

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to implement the student's October 2010 IEP by failing to provide the student all of his speech/language and behavior support services.⁶
2. Whether DCPS denied the student a FAPE by failing to determine the student's ESY eligibility for Summer 2010 and Summer 2011.⁷

⁴ Although Petitioner disclosed the compensatory education plan of requested hours of compensatory education Petitioner did not provide any other evidence as to what compensatory services would be appropriate.

⁵ The alleged violations and/or issues listed in the complaint may not directly correspond to the issues outlined here. However, the parties agreed at the hearing that the issues listed here are the issues to be adjudicated. At the hearing the parties agreed that the issue regarding DCPS' alleged failure to conduct a psychological evaluation would be settled and the parties agreed to terms that would be included in the order section of the HOD directing DCPS to conduct the evaluation by a date certain or provide Petitioner authorization to obtain an independent evaluation.

⁶ At the PHC Petitioner could not state the total number of service hours that were missed but proffered that after review of service logs he would provide an exact number. Petitioner disclosed an exhibit with the total number of service hours allegedly missed.

⁷ Petitioner is not alleging the student was due ESY services but that the determination of whether he was eligible for services was never made.

RELEVANT EVIDENCE CONSIDERED:⁸

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-55 and DCPS Exhibit 1-6) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁹

1. The student is age _____ in _____ grade and has been determined eligible as a child with a disability under IDEA with a disability classification of OHI. The student was first determined eligible at age three. The student attends a District of Columbia public school, School A, where he has attended since pre-kindergarten. (Parent's testimony, Petitioner's Exhibit 9-1)
2. The student's most recent IEP was developed October 17, 2011, and prescribes that he be provided 12.5 hours per week of specialized instruction and related services of speech language (4 hours per month) and behavioral support (3 hours per month). The student's prior IEP dated October 13, 2010, prescribed the same services. (Petitioner's Exhibits 9-11, 10-7)
3. The student's IEP was reviewed at a meeting held October 17, 2011. The parent's educational advocate attended the meeting and the parent participated by telephone. The IEP team also reviewed the student's recent speech/language evaluation. The speech pathologist noted the student needs improvement in understanding word associations and he has difficulty answering analytical questions. The educational advocate inquired whether an ESY checklist had been done for the student at the end of the prior school year. The DCPS special education coordinator was not certain. There was no review of an ESY checklist conducted during the October 17, 2011, meeting. However, when the educational advocate later received a copy of the IEP that was produced at the meeting the IEP stated that the student does not require ESY services. _____ testimony, Petitioner's Exhibit 15-3, 9-14, DCPS Exhibit 6-3)
4. In the student's IEP dated April 24, 2009, in response to the question whether ESY services are required for the student the box "Don't know yet" is checked. (Petitioner's Exhibit 13-8)
5. In the student's IEP dated September 9, 2009, in response to the question whether ESY services are required for the student the box "Don't know yet" is checked. (Petitioner's Exhibit 12-11)

⁸ Although not evidence, the Hearing Officer also considered the written closing arguments submitted by counsel on November 9, 2011.

⁹ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

6. In the student's IEP dated March 26, 2010, in response to the question whether ESY services are required for the student the box "Don't know yet" is checked. (Petitioner's Exhibit 11-11)
7. The student's IEP dated October 13, 2010, in response to the question whether ESY services are required for the student the box "Don't know yet" is checked. (Petitioner's Exhibit 10-10)
8. The student missed a total of 6 hours of behavioral support services during SY 2010-2011 according to the student's service tracker logs. testimony, Petitioner's Exhibits 17, 29 through 47)
9. During the SY 2010-2011 the student missed a total of 28.5 hours of speech and language services because either the provider was not available or because the student was not allowed to participate in services. The speech language provider noted in the service tracker log some occasions the student was not made available for services because he was held in the classroom by his teacher to complete tasks in the classroom. (Ms. Howell's testimony, Petitioner's Exhibits 12, 16, 17, 18, 19, 20, 21, 22-1, 23, 24, 25, 27, 28)
10. During the October 17, 2011, IEP meeting the student's teacher reviewed recent informal academic assessments that had been conducted of the student in math and language. The student got less than half of the answers correct. The teacher stated that the student's reading skills had been assessed as being at 4th grade level. The teachers noted the student was easily distracted in class but was also easily redirected. (Ms. Howell's testimony, Petitioner's Exhibit 15-1)
11. The parent was not aware the student missed any speech language service prior to her being shown the student's service tracker logs at the due process hearing. The parent believes the student has not made much if any progress with speech language services because he continues to have difficulty sounding out words. If the parent was aware that the student had missed services she would have asked for DCPS to make up for the missed services and she believes not knowing he missed services caused her to less effectively advocate for the student. (Parent's testimony)
12. During the current school year the student has begun to make more academic progress and can explain himself far more than he could last school year. His current special education teacher is working more closely with the student to ensure he makes academic progress. During a recent parent teacher conference the student's teachers indicated the student has been making progress. (Parent's testimony)
13. At the outset of the due process hearing the parties agreed that the issue regarding DCPS' alleged failure to conduct a psychological evaluation would be settled and the parties requested that the terms of their agreement be included in the order section of the HOD directing DCPS to conduct the evaluation by a date certain or provide Petitioner authorization to obtain an independent evaluation. (Stipulation)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.¹⁰ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Pursuant to 34 C.F.R. § 300.17: A free appropriate public education or FAPE means 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 Sec. 300.320 through 300.324

ISSUE 1: Whether DCPS denied the student a FAPE by failing to implement the student's October 2010 IEP by failing to provide the student all of his speech/language and behavior support services.

Conclusion: DCPS did not provide the student all related services required by his IEP during SY 2010-2011 and denied the student a FAPE. Petitioner sustained the burden of proof by a preponderance of the evidence.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982)

20 U.S.C. 1414(a)(i) defines Individualized Education Program as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section

¹⁰ The burden of proof shall be the responsibility of the party seeking relief. 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 of proof.

and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

Petitioner presented undisputed and credible testimony from _____ that the student did not receive all of his speech language and behavioral support services. Her testimony was bolstered by the student's related service tracker logs that reflect that many of the services were not provided because the service providers were not available or the student was held in the classroom and not allowed to attend the related services sessions. In total the evidence demonstrates the student missed 28.5 hours of speech language services and 6 hours of behavioral support services during SY 2010-2011.

The student's parent credibly¹² testified that the student still has difficulty sounding words and the IEP notes from the October 17, 2011, IEP meeting reflect the student is experiencing difficulty with word associations and answering analytical questions. The meeting notes also make reference to the student's distractibility in the classroom. This evidence, absent any contrary evidence presented by DCPS, demonstrates DCPS' failure to provide a significant portion of the related services during SY 2010-2011 that the student's IEP prescribed. The services withheld were clearly material to the student's IEP and his educational program and the student was thus denied a free and appropriate public education. See *Wilson v D.C.*, 770 F. Supp. 2d 270, 274 (D.D.C. 2011);

ISSUE 2: Whether DCPS denied the student a FAPE by failing to determine the student's ESY eligibility for Summer 2010 and Summer 2011?

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. §Sec. 300.106

- (a) (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
- (2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with Sec. Sec. 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.
- (3) In implementing the requirements of this section, a public agency may not--
 - (i) Limit extended school year services to particular categories of disability; or
 - (ii) Unilaterally limit the type, amount, or duration of those services.
- (b) Definition. As used in this section, the term extended school year services means

¹¹ The Hearing Officer judged the witness credible based on her demeanor and her familiarity with the student's educational records.

¹² The Hearing Officer judged the witness credible based on her demeanor.

special education and related services that--

(1) Are provided to a child with a disability--

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP; and

(iii) At no cost to the parents of the child; and (2) Meet the standards of the SEA.3017

DCMR §5-E3017 provides:

3017.1 The LEA shall ensure that extended school year services are available as necessary to provide FAPE to a child with a disability.

3017.2 Extended school year services must be provided only if a child's IEP team determines, on an individual basis (in accordance with § 3007, Individualized Education Program (IEP) Development), that the child needs those services in order to receive FAPE.

3017.3 In implementing the requirements of this section, the LEA shall not:

(a) Limit extended school year services to particular categories of disability; or

(b) Unilaterally limit the type, amount or duration of these services.

Although the student's IEP currently states that no ESY services are needed and there was credible testimony from _____ that no ESY check list was reviewed during the October 17, 2011, IEP meeting, because there is sufficient time for DCPS to make such a review before the end of SY 2011-2012, the Hearing Officer cannot conclude there is yet a violation by DCPS in this regard. There is no evidence that DCPS conducted a review to determine if the student was in need of ESY services at the end of SY 2010-2011. Despite the fact that there is no evidence that such a review was made Petitioner did not put forth any evidence to demonstrate that the student was in need of ESY services or that the student was harmed by no such determination being made.¹³ A violation must negatively affect a student's substantive rights. See *Lesesne v. District of Columbia* 447 F. 3d 828 (D.C. Cir. 2006). Based the factors discussed above, the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student was denied a FAPE by DCPS not making the ESY determination for SY 2010-2011.

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*, 401

¹³ Extended school year services are only necessary to a FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he/she is not provided with an educational program during the summer months. (See *M.M. School District of Greenville County* 37 IDELR 183 (United States Court of Appeals 4th Circuit (2002))

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.

Despite that a material failure to implement IEP requirements was shown, Petitioner failed to present evidence of how any proposed award would be reasonably calculated to provide the educational benefits that likely would have accrued if there had been no interruption in services. The testimony and documents offered by Petitioner with regard to compensatory education did not specifically address the alleged lack of services. However, when a denial of FAPE has been proven it is inequitable for the student to be provided nothing. Consequently, the Hearing Officer will order, based on equitable considerations, and as compensatory education, that DCPS provide the student a nominal amount of speech and language services as compensation.

ORDER:

1. DCPS shall by November 30, 2011, conduct and complete a clinical psychological evaluation of the student and by that date provide Petitioner with a copy of the evaluation report. The parent shall fully cooperate with DCPS' efforts to conduct the evaluation. If DCPS does not conduct and complete the evaluation and provide the evaluation report by the above date DCPS shall then immediately provide Petitioner authorization to obtain an independent clinical with DCPS funding.
2. DCPS shall within thirty (30) calendar days of completion of the student's clinical psychological evaluation or receipt of the independent clinical psychological evaluation convene an IEP meeting to review the student's evaluation and review and/or revise the student's as appropriate and review the student's education placement as is appropriate.
3. DCPS shall provide the student ten (10) hours of additional of speech and language services beyond what his IEP currently prescribes as compensatory education. The ten hours of services are to be provided to the student by the end of SY 2010-2011.¹⁴

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process

¹⁴ The parties may agree that these services will provided to the student by an independent provider with DCPS funding.

hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

A handwritten signature in cursive script, appearing to read "Coles B. Ruff".

Coles B. Ruff, Esq.

Hearing Officer

Date: November 12, 2011