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

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	)))))))))))	**Case No.** **Bruce Ryan, Hearing Officer** **Issued: June 21, 2011**

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HEARING OFFICER DETERMINATION

I. INTRODUCTION AND 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.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed April 7, 2011, on behalf of a year old student (the "Student") who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student currently attends a DCPS elementary school (the "School") and resides in D.C. with Petitioner, who is the Student's mother.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") by (a) failing to conduct triennial re-evaluations of the Student; (b) failing to include Extended School Year ("ESY") services in the Student's individualized education program ("IEP") for the 2011 summer; and (c) failing to include sufficient baseline data and/or present levels of performance ("PLOP") information in the Student's 03/29/2011 IEP.

DCPS filed its Response on April 20, 2011, which asserts that the Student has not been denied a FAPE. DCPS asserts that it "commenced the re-evaluation process on March 29, 2011,"

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

and admits that ESY services were removed from the Student's IEP on 03/29/2011 because the team determined that he no longer met the criteria for such services.

A resolution session was also held on April 26 2011, which did not resolve the Complaint, and the statutory 30-day resolution period ended as of May 7, 2011. A Prehearing Conference ("PHC") was then held on May 23, 2011; the parties filed five-day disclosures on June 6, 2011; and the Due Process Hearing was held on June 13, 2011. Petitioner elected for the hearing to be closed. Petitioner required the assistance of a Spanish-language interpreter.

At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1; P-5 through P-10; P-12 through P-17. [2]

Respondent's Exhibits: R-1 through R-7.

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witnesses: (1) Parent-Petitioner; (2) the Student's independent tutor; and (3) Educational Advocate ("EA").

Respondent's Witness: DCPS presented no witnesses and rested on the record.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*. The statutory HOD deadline is June 21, 2011.

III. ISSUES AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioner resulted in the following issues being presented for determination at hearing:

[2] Exhibits P-2, P-3, P-4, and P-11 of the five-day disclosures were withdrawn at the due process hearing.

(1) **Triennial Reevaluations.** — Did DCPS deny the Student a FAPE by failing to conduct timely triennial re-evaluation(s) of the Student as of January 2011?

(2) **Inappropriate IEP.** — Did DCPS deny the Student a FAPE by failing to provide an appropriate IEP at the March 29, 2011 MDT meeting, in that: (a) the IEP failed to include ESY services for summer 2011; and (b) the IEP failed to include sufficient baseline data and/or PLOP information to monitor progress and measure goals?

Petitioner requests that the Hearing Officer: (a) find in Petitioner's favor on the above issues; (b) order DCPS to fund comprehensive re-evaluations and reconvene an MDT meeting to update the IEP; and (c) order DCPS to provide ESY services for the 2011 summer. Petitioner also originally requested compensatory education in the form of tutoring and counseling by an outside provider, but that item of relief was withdrawn at hearing.[3]

IV. FINDINGS OF FACT

1. The Student is a year old student who has been determined to be eligible for special education and related services under the IDEA as a child with a disability. His primary disability is Intellectual Disability ("ID"). *P-1.*
2. The Student was last evaluated in 2008, when an occupational therapy ("OT") evaluation, a speech/language evaluation, and a psycho-educational evaluation were completed.
3. Since March 2010, the Student has attended the School. *See Parent Test.*
4. On or about March 29, 2011, DCPS convened a meeting of the Student's MDT/IEP Team. At this meeting, Petitioner requested that DCPS fund independent evaluations of the Student, but DCPS declined to agree. *See Parent Test.*
5. At the March 29, 2011, MDT meeting, DCPS also discontinued Extended School Year ("ESY") services for the Student and eliminated such services from the IEP. Petitioner disagreed with this change in IEP services. The Student has received ESY services every year since he was initially identified in December 2006. *See Parent Test.*
6. The Student's IEP developed at the March 29, 2011 meeting provides for 26 hours per week of specialized instruction in an Outside General Education setting, plus related

[3] Petitioner's counsel stated at the hearing that she was not prepared to present evidence regarding compensatory evidence even assuming that the Hearing Officer found a denial of FAPE in this case, noting that it was "not ripe for consideration."

services in an Outside General Education setting consisting of one hour per week of speech/language pathology services and two hours per month of behavioral support services. *P-1, p. 6; R-6.*

7. At the resolution meeting held in this case on or about April 26, 2011, Petitioner executed written consent for re-evaluation of the Student. *P-10; R-5.* The consent was provided to allow DCPS to complete psychological, speech/language, and OT evaluations of the Student. *See P-12; R-4* (resolution meeting notes).

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Summary

The Hearing Officer concludes that Petitioner has failed to prove by a preponderance of the evidence that DCPS denied the Student a FAPE by (a) failing to complete triennial re-evaluations in a timely manner, or (b) failing to develop an IEP that was reasonably calculated to confer educational benefit on the Student.

B. Burden of Proof

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). This burden applies to any challenged action and/or inaction, including failures to evaluate and failures to develop an appropriate IEP. 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-E3030.3. The recognized standard is preponderance of the evidence. *See, e.g., 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); 20 U.S.C. §1415(i)(2)(C)(iii).

C. Issues/Alleged Denials of FAPE

Petitioner claims that DCPS denied the Student a FAPE by (1) failing to conduct timely re-evaluations of the Student; and (2) failing to develop an appropriate IEP at the March 29, 2011 team meeting. The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

> [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school

education in the State involved; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on Issue 1, but has met her burden of proof in part on Issue 2.

1. Triennial Re-Evaluations

The IDEA and its implementing regulations provide that a public agency "must ensure that a reevaluation of each child with a disability is conducted" if either (1) the public agency determines that the educational or related services needs ... of the child warrant a reevaluation" or (2) "the child's parent or teacher requests a reevaluation." 34 C.F.R. §300.303 (a). The regulations further provide (as a "Limitation") that such a reevaluation: "(1) ***may occur*** not more than once a year, unless the parent and the public agency agree otherwise; and (2) ***must occur*** at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary." *Id.* §300.303 (b). Moreover, the reevaluation must be conducted in accordance with §§300.304 through 300.311, which includes the requirement that the evaluation be "sufficiently comprehensive to identify all of the child's special education and related services needs...." §300.304(c) (6); *see, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions); *Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation "must be a complete evaluation of the child in all areas of the child's suspected disability....").

"IDEA and its implementing regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student's parent." *Smith v. District of Columbia,* Civ. Action No. 08-2216 (RWR) (D.D.C. Nov. 30, 2010), slip op. at 6. In light of the lack of statutory guidance, *Herbin* concluded that "[r]e-evaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." 362 F. Supp. 2d at 259 (quoting *Saperstone,* 21 IDELR 1127, 1129 (OSEP 1995)).

In this case, Petitioner claims that the Student's re-evaluations were due in January 2011, based on the dates of the Student's last completed evaluations in January 2008. *See Complaint, pp. 3, 5.* DCPS agrees that the Student's re-evaluations are due in 2011, and states that it

"commenced the re-evaluation process on March 29, 2011." *R-1, p. 2.* DCPS asserts leeway to complete the re-evaluations within a reasonable period of time following the 03/29/2011 MDT meeting.

The Hearing Officer concludes that Petitioner has not established by a preponderance of the evidence that DCPS should have conducted a re-evaluation of the Student by January 2011. DCPS should be allowed a reasonable period of time to complete a triennial re-evaluation, *see Herbin,* and the Hearing Officer concludes that DCPS has not violated that parameter here.

Even assuming *arguendo* that DCPS has failed to act in a reasonably timely manner, this would not entitle Petitioner to relief. *See Smith v. District of Columbia,* slip op. at 8. "A failure to timely reevaluate is at base a procedural violation of IDEA." *Id.* (citing *Lesesne v. D.C.,* 2005 WL 3276205 (D.D.C. 2005), and distinguishing *Harris v. DC,* 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008)). Procedural delays generally give rise to viable IDEA claims only where such delays affect the student's substantive rights. *See Lesesne v. District of Columbia,* 447 F. 3d 828 (D.C. Cir. 2006); 34 C.F.R. 300.513 (a) (2). In this case, Petitioner has not carried her burden of proof because she has not shown that the Student's educational program would have been different but for the delay; nor has she shown that DCPS denied her right to participate meaningfully in the development of the Student's IEP. *Smith, supra,* slip op. at 10-12. Moreover, the Student is already in a full-time, special education placement where his IEP is being implemented. *See Lesesne v. District of Columbia,* 2005 WL 3276205, *7 ("In cases where a student is seeking a reevaluation, but is already in a placement, a court may not find delay substantially harmed the child."). Thus, Petitioner cannot prove substantive harm.

Accordingly, the Hearing Officer concludes that DCPS prevails on Issue 1.

2. Failure to Provide an Appropriate IEP

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia,* 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe,* 484 U.S. 305, 311-12 (1988)). An IEP is a comprehensive written plan that must include, among other things: (1) "a statement of the child's present levels of academic achievement and functional performance, including ... how the child's disability affects the child's improvement and progress in the general education curriculum"; (2) "a

statement of measurable annual goals, including academic and functional goals, designed to ... meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum...and meet each of the child's other education needs that result from the child's disability"; (3) "a description of how the child's progress toward meeting the annual goals...will be measured"; (4) "a statement of the special education and related services and supplementary aids and services ...and a statement of the program modifications or supports for school personnel that will be provided for the child"; and (5) an explanation of the extent, if any, to which the child will not participate with non-disabled children in any regular classes. 20 U.S.C. 1414(d)(1)(A)(i). *See also* 34 C.F.R. 300.320; DCMR 5-E3009.1.

To be sufficient to provide FAPE 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).[4] Judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'"[5] Moreover, the issue of whether an IEP is appropriate is a question of fact for hearing. *See, e.g., S.H.* v. *State-Operated School Dist. of Newark,* 336 F. 3d 260, 271 (3d Cir. 2003). "Ultimately, the question ...is whether or not [the] defects in the ...IEP are so significant that [DCPS] failed to offer [the Student] a FAPE." *N.S. v. District of Columbia,* 2010 WL 1767214, Civ. Action No. 09-621 (CKK) (D.D.C. May 4, 2010), p. 20).

In this case, Petitioner claims that the Student's March 29, 2011 IEP (a) fails to include ESY services for summer 2011; and (b) fails to include sufficient baseline data and/or PLOP information to monitor progress and measure goals. As discussed below, however, Petitioner has

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[4] *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. ").

[5] *Schaffer* v. *Weast,* 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley,* 458 U.S. at 207); *see also Fuhrmann* v. *East Hanover Bd. of Educ.,* 993 F.2d 1031, 1040 (3d Cir. 1993) (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").

failed to prove by a preponderance of the evidence that the 03/29/2011 IEP was not "reasonably calculated" to confer educational benefits on the Student at the time it was created, and that it denied the Student a FAPE.

(a) ***ESY Services***

Individualized determinations about ESY services are made through the IEP process. 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 also* DCMR 5-E3017.2; 71 *Fed. Reg.* 46,582 (Aug. 14, 2006). ESY services typically are provided during the summer months (*id.*), over a four-week period in July in D.C. The purpose of ESY services is generally to prevent severe or substantial regression of skills that would jeopardize the benefits gained over the school year, such that a student would fail to recoup those lost skills within a reasonable period of time. *See, e.g., Alamo Heights Independent School Dist. v. State Board of Education,* 790 F. 2d 1153, 1158 (5th Cir. 1986); *J.P. ex rel. Popson v. West Clark Community Schools,* 230 F. Supp. 2d 910, 940 (S.D. Ind. 2002). "The regulations give the IEP Team the flexibility to determine when ESY services are appropriate, depending on the circumstances of the individual child." 71 Fed. Reg. 46, 582 (Aug. 14, 2006). Moreover, States have "considerable flexibility in determining eligibility for ESY services and establishing State standards for making ESY determinations." *Id.*

The OSSE has established specific criteria for IEP Teams to apply in determining a student's eligibility for ESY services. *See P-17* (OSSE memorandum dated March 10, 2011). "When an IEP Team makes a decision regarding ESY eligibility, it is determining whether the benefits gained during the regular school year would be significantly jeopardized if the student does not receive ESY services." *Id.,* p. 2. The basic criteria are as follows:

(1) ***Impact of Break in Service on Critical Skills.*** The IEP Team must assess the educational impact of the break in service on any identified "critical skill" (*i.e.*, a skill essential to overall educational performance) and support any identified concerns with student data. *Id.*

(2) ***Degree of Regression of Critical Skills.*** "Since most students experience some natural regression during breaks in service, the IEP Team should use student data to determine if there is a likelihood of significant regression (*i.e.*, the student would need to relearn the critical skill or skill set in its entirety, to the detriment of his/her overall educational progress)." *Id.,* p. 3.

(3) ***Time Required for Recoupment of Critical Skills.*** "The IEP Team must use student data to assess whether the time the student requires for critical skill recoupment is extraordinary." *Id.*

Petitioner essentially argues that ESY services should have been provided for summer 2011 because the Student has "always had" ESY services in prior summers and "nothing has changed" from the last summer. (Petitioner's counsel statements at hearing.) However, "eligibility for ESY services must be considered ***on an annual basis*** as part of the IEP process for every student with a disability."*P-17, p. 2* (emphasis added). In this case, the IEP Team decided that ESY services were not warranted for the Student this summer. This is an individualized decision that the team makes annually. Petitioner presented no convincing evidence at hearing concerning the factors identified in the 03/10/2011 OSSE memorandum. For example, Petitioner did not present any expert testimony to establish the need for ESY. Nor did the Student's independent tutor testify as to what critical skills a break in service would jeopardize, the likelihood of significant regression, or the amount of time needed for recoupment. It was Petitioner's burden to present such evidence to prove that ESY services are necessary for the provision of FAPE to the Student. *See Schaffer* v. *Weast,* 546 U.S. 49 (2005); DCMR 5-E3030.3. [6]

(b) ***Insufficient Baseline and PLOP Data***

Petitioner also claims that the PLOPs are merely copied verbatim from the 2010 IEP, since there was no new data to look at as a result of the delayed re-evaluations, and that the missing baseline data interferes with the ability to measure progress. However, assuming that the IEP is deficient in these respects, Petitioner fails to show how these deficiencies resulted in any educational harm to the Student in this instance. *See* 34 C.F.R. 300.513 (a). Petitioner may still challenge the outcome of the re-evaluation process – along with any resulting revisions (or failure to make revisions) in the IEP in these or other respects – once that process is completed.

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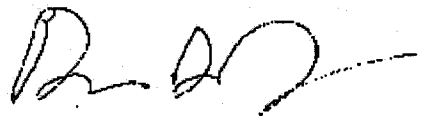
[6] *See also Kenton County Sch. Dist. v. Hunt.,*41 IDELR 259 (6th Cir. 2004) (finding testimony "inadequate to meet the high burden ... imposed on those who propose an ESY for inclusion in the child's IEP"); *MM v. Sch. Dist. of Greenville County,* 303 F.3d 523, 537-38 (4th Cir. 2002) ("ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.").

VI. 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 in her Due Process Complaint are **DENIED;**
2. The Complaint filed April 7, 2011, is **DISMISSED, With Prejudice;** and
3. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.



Dated: June 21, 2011

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).