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: June 3, 2011

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: May 25, 2011 Room: 2003

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

The student is a -year old male currently attending the grade at The student has been found eligible for special education and related services with the disability classification of a Specific Learning Disability. (R-2) On April 25, 2011 counsel for petitioner filed a due process complaint alleging several violations of IDEA. On May 3, 2011 counsel for respondent filed a response denying the allegations. A resolution meeting was held on May 12, 2011 and the parties failed to reach an agreement. On May 4, 2011 a pre-hearing conference was held by telephone with counsel for petitioner Zachary Nahass and counsel for respondent DCPS Victoria Fetterman. A pre-hearing Order was issued on May 5, 2011. The Order stated that the issues to be addressed at the hearing are: 1. Did DCPS deny a Free Appropriate Public Education (FAPE) to the student in failing to fully implement the

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

student's IEP calling for 22.5 hours of specialized instruction outside of general education in the current school year? 2. Did DCPS deny a FAPE in failing to develop an appropriate IEP because the current IEP does not contain sufficient hours of specialized instruction to meet the student's needs? 3. Did DCPS deny a FAPE to the student by failing to provide an appropriate placement at

The due process hearing convened at 9 a.m. on May 25, 2011 in Room 2003 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Zachary Nahass represented the petitioner and Kendra Berner represented the respondent DCPS. The hearing was closed. At the outset of the hearing, both the petitioner's documents P-1-P-24 and the respondent's documents R-1-R-14 were admitted into evidence without objection. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses the educational advocate the student's guardian who both testified in person, and Associate Head of who testified by telephone. Counsel for respondent DCPS called as witnesses the special education coordinator and the reading teacher at who both testified by telephone.

JURISDICTION

The hearing was convened on May 25, 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 a -year old male currently attending the grade at The student has been found eligible for special education and related services with the disability classification of a Specific Learning Disability. (R-2) On April 25, 2011 counsel for petitioner filed a due process complaint alleging several violations of IDEA including not implementing the student's IEP this school year calling for 22.5 hours outside of general education, not providing sufficient hours and not providing an appropriate placement. Counsel for respondent concedes DCPS did not fully implement the student's IEP this school year, but denies that the IEP is inappropriate for not providing more hours and denies that is an inappropriate placement.

ISSUES AND RELIEF SOUGHT

The issues to be determined are as follows:

1. Did DCPS deny a Free Appropriate Public Education (FAPE) to the student in failing to fully implement the student's IEP calling for 22.5 hours of specialized instruction outside of general education in the current school year?

2. Did DCPS deny a FAPE in failing to develop an appropriate IEP because the current IEP does not contain sufficient hours of specialized instruction to meet the student's needs?

3. Did DCPS deny a FAPE to the student by failing to provide an appropriate placement at

The relief requested is placement at a non-public special education school and compensatory education.

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue one are as follows:

I.

1. The student is a -year old male currently attending the grade at The student has been found eligible for special education and related services with the disability classification of a Specific Learning Disability. (R-2)
2. The student's current IEP of March 1, 2011 calls for 22.5 hours of specialized instruction outside of general education per week. (P-17 at p.8, R-2 at p.8)
3. Counsel for respondent concedes that DCPS did not fully implement the above IEP for the current school year. DCPS offered 72 hours of compensatory education in the form of independent tutoring for the missed services.

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact on issue two are as follows:

II.

1. The student's current IEP calls for 22.5 hours of specialized instruction outside of general education and extended school year (ESY) services. (R-2) The student is taught by his special education teacher from 9 a.m. to 10:15 a.m. in reading with one other student- his twin brother. The student is taught by his special education teacher after that in math with no more than six students. He than has Spanish taught by a regular education Spanish teacher. He goes to lunch with his sixth

grade peers. From two to three-fifteen in the afternoon the student is with his reading teacher in the Wilson Reading program with no more than five other students. (Testimony of special education coordinator)

2. In the Wilson reading program, the student has shown growth academically in the phonics based program in the last four to five months. He has shown progress in accuracy in reading fluently and improved in reading more difficult words. On the first unit in the Wilson reading program which he finished a month ago, he has scored a 85 % with 80% being mastery and is scoring the highest of the five students in the class. He is now half way through the second unit and doing pretty well. The Wilson reading program starts at a K- first grade level. (Testimony of reading teacher)

3. The student's April 7, 2011 IEP Progress Report for the period from January 22, 2011 to March 25, 2011 prepared by his special education teacher shows the student progressing on meeting his IEP annual goals in mathematics, reading and written expression. He has mastered the goals in mathematics of adding, subtracting and multiplying fractions, with like denominators with 80% accuracy and adding and subtracting positive decimals when given a prompt. (R-14)

4. The student's final report card done on May 10, 2011 shows that for the fourth advisory he received the following grades: a C- in Language Arts, a C plus in middle school mathematics, a A- in the Wilson Reading Program and a B in science. (R-9)

5. A DCPS psychological evaluation of the student was conducted in November 2010 when the student was years one month of age. The evaluator found

that based on the WISC-IV the student performed with low average functioning. He earned a Verbal Comprehension standard score of 91 (Average); Perceptual Reasoning standard score of 84 (Low Average); Working Memory standard score of 83 (Low Average; and Processing Speed standard score of 83 (Low Average). On the Woodcock-Johnson III Tests of Achievement in Broad Reading he had a standard score of 59, grade equivalent (GE) 1.9 and age equivalent (AE)7-2; on Broad Written Language he had a standard score of 73, GE 2.8, AE 8-2; on Written Expression a standard score of 70, GE 2.5 and AE 7-11, Academic Skills a standard score of 69, GE 2.3 and AE 7-9. (R-7 at p.10) The evaluator found that his reading and written language deficits as noted in the WJ-III test protocol are related to his weakened vocabulary skills. The evaluator concluded the student has an information processing learning disability in visual perceptual areas. She stated in her report:"Poor information processing and visual perceptual deficits have impacted his ability to read and perform written assignments…". (R-7 at p.13)

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

III.

1. The student IEP calling for 22.5 hours of specialized instruction outside of general education is now being implemented at (Testimony of special education coordinator)

2. The student is making academic progress in his academic subjects and in the Wilson Reading Program as shown in the above Findings of Fact # II. 2-4 at

The student is receiving educational benefits at

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 finds the testimony of the reading teacher at very credible. She testified with in depth knowledge of the student who she works with on a daily basis. Her detailed testimony on the student's progress based on in-class tests, her teaching and observations in the Wilson Reading Program support her conclusions that the student is receiving educational benefits at She also was very forthright with the student's previous weaknesses and answered both counsels' questions in a precise and clear way.

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 on issue one failure to implement the student's IEP are as follows:

The legal standard that applies to whether an implementation failure amounts to a denial of a FAPE, as recently stated in *Wilson v. D.C.* (Civil Action 09-02424 March 18, 2011) by Judge Henry Kennedy, is whether the aspects of the IEP not followed were "substantial or significant" or whether the deviations from the IEP's stated requirements were "material". Judge

Kennedy relied on the above quoted language in the Fifth Circuit decision of *Houston Independent School District v. Bobby R.*, 200 F. 3d 341 at 349 (5th Cir. 2007). The Ninth Circuit Court of Appeals in *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5 J*, 502 F. 3d 811 at 822 ((9th Cir. 2007) stated: "[A] material failure to implement an IEP violates IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."; *accord S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008), *Catalan v. D.C.,* 478 F. Supp. 2d 73 (D.D.C. 2007). The student's educational progress, or lack of it, may be probative of whether there has been a significant shortfall. In *Catalan*, the district court found that missing a few speech and language sessions was not enough to constitute a substantial deviation from the IEP and a denial of a FAPE. In *Wilson*, the same federal judge who decided *Catalan*, held that the District's delay in arranging transportation services caused a nine-year-old boy to miss three weeks of his four week ESY program amounted to a material implementation failure resulting in a denial of a FAPE. Counsel for respondent DCPS concedes that DCPS failed to implement the student's IEP and is offering 72 hours of independent tutoring for the missed services in the current school year. By DCPS's own concession, the failure to implement the IEP was material.

This hearing officer finds that DCPS's failure to implement the student's IEP resulted in a denial of a FAPE. Compensatory education is an equitable remedy for the denial of a FAPE. In *Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005), this Circuit set out the standards for an award of 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. *Id.* at 522 Designing a compensatory education remedy requires " a fact-specific exercise of discretion by either the district court or a hearing officer."

Id. at 524 To assist the court or hearing officer's fact specific inquiry, " the parties must have some opportunity to present evidence regarding [the student's]specific education deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526 DCPS may be required to "offer proof that the placement compensated for prior FAPE denials in addition to providing some benefit going forward." *Id.* at 525

In this case, counsel for petitioner did not present a plan for compensatory education on the failure to implement the student's IEP. The parent has the burden of "propos[ing] a well-articulated plan that reflects [the student's] current education abilities and needs and is supported by the record." *Phillips v. District of Columbia,* 2010 WL 3563068, at *6, 55 IDELR 101 (D.D.C. Sept. 13, 2010) Neither party has requested an extension of time beyond the 45-day timeline to supplement the record. The hearing officer cannot unilaterally extend the 45-day timeline. *34 C.F.R. Section 300.515 (c).* "Choosing instead to award [the parent] nothing does not represent the 'qualitative focus' on [the child's] 'individual needs' that Reid requires." *Phillips* at *6 *quoting Nesbitt I*, 532 F. Supp. 2d at 125. The hearing officer can determine the amount of compensatory education that a student requires if the record provides him with sufficient "insight about the precise types of education services [the student] needs to progress." *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 130 (D.D.C. 2008) Findings to assist the hearing officer to tailor the compensatory education award to the student's unique needs should include the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services requested and the student's current educational abilities. *Branham v. District of Columbia*, 427 F. 3d 7 (D.C. Cir. 2005)

DCPS has offered 72 hours of independent tutoring as compensatory education for the missed services in the 2010-2011 School Year. Counsel for respondent DCPS has not provided evidence on how DCPS arrived at the above amount of compensatory education for missed services. The student has been classified as a student with a Specific Learning Disability and is several years below grade level in reading and written language. (See Findings of Fact #II. 5) The testimony of the reading teacher is that the student is making academic progress in reading in the last five months, however he is still several years below grade level.

is now providing intensive specialized instruction outside of general education, but the progress is slow. Compensatory education in the form of eighty hours of individual tutoring in reading and written language should enable the student to continue to make progress "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 F.3d at 524

The second issue to address is whether the IEP developed on March 1, 2011 is appropriate on the number of hours it provides for specialized instruction. Counsel for petitioner argues that the 22.5 hours per week of specialized instruction outside of general education is insufficient to meet the student's needs. 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). In *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) *cert denied*, 488 U.S. 1030 (1989), The Third Circuit held that appropriateness under *Rowley* as applied to a student with severe disabilities means more than trivial educational benefit. The Court held in *Polk* that "...using *Rowley*'s own terminology, we hold that Congress intended to afford children with

special needs an education that would confer meaningful benefit." *Polk* at p.184 Other Circuits have endorsed the *Polk* court's interpretation of educational benefit in *Doe v. Smith*, 441 IDELR 544 (6th Cir. 1989); *Fort Zumwalt School District v. Clynes,* 26 IDELR 172 (8th Cir. 1991); *Roland M. v. Concord School Comm'n,* 16 IDELR 1129 (1st Cir. 1991) and *Hall v. Vance County Board of Education*, 557 IDELR 155 (4th Cir. 1985) In *Ridgewood Bd. of Educ. v. N.E.*, 30 IDELR 41,44 (3d Cir. 1999) and *T.R. v. Kingwood Township Board of Education*, 32 IDELR 30 (3d Cir. 2000) the Third Circuit held that an IEP must provide "meaningful benefit." *See also A.I.ex rel. Iapalucci v. D.C.*, 402 F. Supp. 2d 152 (D.D.C. 2005) ("...the appropriate focus of the court's review should be on whether DCPS is providing A.I. with an IEP that is reasonably calculated to provide meaningful educational benefit." *Id.* at p.167)

The current IEP calls for 22.5 hours of specialized instruction per week outside of general education and extended school year (ESY) services. Findings of Fact # II. 2-4 show the student is receiving educational benefits with the current IEP. Even counsel for petitioner's own witness, the educational advocate, testified that the services now in place are too intensive for the student. Counsel for petitioner has failed to meet his burden of proof that the current IEP is not reasonably calculated to provide educational benefit to the student.

The third issue to address is whether the placement at is appropriate. The Supreme Court held in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 201 (1982) that IDEA was intended to provide a "basic floor of opportunity" and an individualized plan "designed to provide educational benefit to the handicapped child." *See Schoenbach v.District of Columbia*, 309 F. Supp. 2d 71, at 80 (D.D.C. 2004) This Circuit has held that a school has met its obligation to provide a FAPE if the school's program "confers some educational benefit." *Kerkam v. Superintendent, District of Columbia*

Public Schools, 931 F 2d 84 (D.C. Cir. 1991) The analysis of the appropriateness of a public school placement "is not comparative." *Jenkins. v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir. 1991) Although IDEA guarantees a FAPE, it "does not necessarily guarantee the child [with the disability] the best available education." *Holland v. District of Columbia*, 71 F.3d 417,419 (D.C.Cir. 1995). Nor does IDEA ensure that a FAPE will consist of the precise plan that the parent desires. *See Shaw v. District of Columbia*, 238 F.Supp. 2d 127,139 (D.D.C. 2002). 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." *Rowley* at 200, 207. , quoted in *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009) Academic success is an important factor "in determining whether an IEP is reasonably calculated to provide education benefits." *Roark ex rel. Roark v. D.C.*, 460 F. Supp. 2d 32, at 45 (D.D.C. 2006)

In this case, this hearing officer finds at Findings of Fact #III.-1 that

is implementing the student's current IEP. This hearing officer also finds at Findings of Fact #II.-2, 3 &4 that both the reading teacher in her testimony and report card and the special education teacher in her progress reports, who work with the student on a daily basis, see the student making academic progress. This hearing officer concludes that the student's current placement is conferring educational benefits to the student and is therefore appropriate. This Circuit has held in *Jenkins*, 935 F. 3d at 305 "[I]f there is an 'appropriate' public school program available...the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." The Supreme Court in *Burlington School Committee v. Department of Education,* 471 U.S. 359 (1985) and *Florence County School Dist. Four v. Carter*, 510 U.S. 7 at 15 (1993) has held that parents "are entitled to

reimbursement only if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." Since this hearing officer has answered the threshold question that there is no denial of a FAPE with the present placement at Truesdell, it is not necessary to do further analysis on the second prong of the Supreme Court test for reimbursement.

ORDER

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

On issue one the failure to fully implement the student's IEP this school year, this hearing officer finds a denial of a FAPE and awards eighty (80) hours of compensatory education to be provided in the form of individual tutoring in reading and written language by an independent provider of the parent's choice to be completed by September 30, 2011 at a rate not to exceed

Issue two on not providing sufficient hours of specialized instruction is DISMISSED.

Issue three on not being an appropriate placement is DISMISSED.

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: June 3, 2011

Seymour DuBow /s/
Hearing Officer