

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

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

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Student Hearing Office
June 16, 2014

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| STUDENT, ¹ |) | |
| through the Parent, |) | |
| |) | Date Issued: June 15, 2014 |
| Petitioner, |) | |
| |) | Hearing Officer: Virginia Dietrich |
| v. |) | |
| |) | |
| District of Columbia Public Schools |) | |
| |) | |
| Respondent. |) | |
| |) | |

HEARING OFFICER DETERMINATION

Background

Student is a child with a disability who attended School A during the 2012/13 school year (“SY”) and the 2013/2014 SY. Petitioner, the mother of Student, filed a complaint on March 4, 2014 alleging that District of Columbia Public Schools (“DCPS”) had denied Student a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”). Petitioner specifically alleged that Student’s October 2013 individualized education program (“IEP”) and March 2014 IEP, each of which contained 10 hours/week of specialized instruction outside of general education, did not contain sufficient services to allow Student to make any academic gains. Petitioner pointed to course failures and lack of progress in achieving IEP goals as proof that Student was not making any academic gains with the IEPs that were in place. Petitioner sought relief in the form of an IEP with 100% specialized instruction and placement at a nonpublic school that serviced only special education students.

DCPS contended that Student’s IEPs were appropriate in that the amount of specialized instruction was appropriately based on a review of current evaluations, IEP progress reports, teacher and psychologist observations, and the fact that Student was making progress on his IEP goals. DCPS argued that a full-time IEP and placement in a special education school without access to nondisabled peers was inappropriate for Student who achieved high grades in his general education classes of art, music and physical education and who was well integrated into the social activities of DCPS School A. School A serviced both disabled and nondisabled

¹ Personal identification information is provided in Appendix A.

Hearing Officer Determination

students. Alternatively, DCPS argued that if more specialized instruction was warranted, it should be provided in a setting that allowed Student access to typically developing peers.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the 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; and 38 D.C. Code 2561.03(a).

Procedural History

The due process complaint was filed on 03/04/14. DCPS timely filed a response to the complaint on 03/11/14.

A hearing officer was assigned to the case on 03/06/14. The case was reassigned to the undersigned Hearing Officer on 05/22/14.

During the prehearing conference that occurred on 04/14/14, DCPS did not object to Petitioner filing an amended complaint. A Prehearing Conference Summary and Order was issued on 04/17/14.

An amended complaint was filed by Petitioner on 04/15/14 and on the same day, DCPS timely filed an amended response to the amended complaint. The first assigned hearing officer issued an Order on 04/17/14 that granted the amendment to the complaint. The Order restarted the timeline for the 30-day resolution period and the subsequent 45-day time period to issue a final decision. See 34 C.F.R. 300.508(d)(4). The 30-day resolution period ended on 05/18/14 and the final decision was due on 07/01/14.

Neither Petitioner nor DCPS waived the resolution meeting. A single resolution meeting took place on 04/04/14, at which time parties did not agree to end the resolution period.

The due process hearing was a closed hearing that took place on 06/02/14.

Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person.

Petitioner’s disclosures, dated 05/23/14, consisted of a witness list and documents P-1 through P-7. Petitioner’s disclosures were admitted into evidence without objection.

DCPS’ Disclosure Statement (corrected and re-filed on 06/02/14), consisted of a witness list and documents R-1 through R-7. DCPS’ Disclosure Statement (corrected) was admitted into evidence without objection.

Hearing Officer Determination

Petitioner presented the following three (3) witnesses in her case in chief: (1) Petitioner; (2) Expert in special education programming (“special education programming expert”) (who qualified as an expert over objection); and (3) Associate Head of School at School B. Petitioner did not present any rebuttal evidence.

DCPS presented the following three (3) witnesses: (1) Special education teacher/special education coordinator at School A (DCPS SEC); (2) Student’s special education teacher at School A (“School A special education teacher”); and (3) DCPS school psychology expert (“DCPS school psychology expert”) (who qualified as an expert without objection).

The sole issue to be determined in this Hearing Officer Determination is whether DCPS denied Student a FAPE by failing to include an appropriate amount of special education service hours in Student’s October 2013 IEP and March 2014 IEP.

Petitioner requested the following relief:²

- (1) A finding of a denial of a FAPE on the issue presented;
- (2) DCPS to convene a Multidisciplinary Team meeting to revise Student’s IEP to include full-time (100%) specialized instruction outside of general education; and
- (3) Funding for Student to attend School B for the remainder of the 2013/14 school year, for the 2014 Extended School Year, and for the 2014/15 school year; as an appropriate prospective placement and as compensatory education for the denials of a FAPE.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer’s Findings of Fact are as follows:³

- #1. Student is a resident of the District of Columbia. Petitioner is Student’s mother.⁴
- #2. During the 2012/13 SY and 2013/14 SY, Student attended School A as a child with a disability who required special education services in order to access the general education curriculum.⁵
- #3. During the course of both school years at School A, Student had three IEPs, dated 11/15/12, 10/16/13 and 03/27/14. All three IEPs classified Student with a Specific Learning Disability and provided for 10 hours/week of specialized instruction outside of general education, with 3.5 hours/week in reading, 1.5 hours/week in written expression, and 5

² At the due process hearing, Petitioner withdrew her request for tutoring as compensatory education.

³ Footnotes hereinafter in Findings of Fact refer to the testimony of a witness or a document admitted into evidence.

⁴ Petitioner.

⁵ P-1, P-2, P-3.

Hearing Officer Determination

hours/week in mathematics; however, the IEP goals in all three IEPs were not identical.⁶ Student received the majority of his total academic instruction within the general education setting.⁷

#4. An IEP meeting occurred on 10/16/13, at which time Petitioner expressed concerns about Student's lack of academic progress and the ability of the IEP to meet Student's educational needs.⁸ Everyone at the meeting was aware that Student was failing some of his core academic subjects.⁹ At that time, the school psychologist and educators were unfamiliar with Student, as it was close to the beginning of the school year; therefore, a decision on additional or appropriate special education services was deferred until the completion of a comprehensive psychological evaluation.¹⁰

#5. A comprehensive psychological reevaluation was completed by DCPS on 11/22/13. Student was in the 6th grade at the time.¹¹ The comprehensive psychological reevaluation indicated that Student continued to perform significantly below grade level. Overall, Student demonstrated limited proficiency in written expression, reading comprehension, writing fluency, math calculation and reading fluency, and negligible proficiency in word reading and math problem solving.¹² Due to Student's Specific Learning Disability, Student was expected to perform below grade level.¹³ Student had great difficulty understanding concepts in reading, writing and mathematics. The strategy for addressing Student's deficits is direct, one-to-one instruction.¹⁴

#6. Student's progress on his IEP goals during the 2013/14 SY was minimal, although he was doing better than in the past.¹⁵

#7. For the 1st term and 2nd term of the 6th grade during the 2013/14 school year, Student's grades were respectively: "C" in English for both terms; "D" and "F" in Science; "F" and "D" in Mathematics, "F" and "D" in US History and Geography, "B" and "A" in Art, "C" and "B" in Music; an "A" in Health and Physical Education for both terms, and an "F" in Latin for the first term.¹⁶

#8. Behaviorally, Student excelled in the general education environment. No behavioral interventions were necessary. Student had an affable personality, was well liked by staff and students, enjoyed interaction with his nondisabled peers, and excelled socially to the extent that he was to participate as the MC in an upcoming school talent show.¹⁷ Interaction with

⁶ P-1, P-2, P-3, DCPS school psychology expert.

⁷ Petitioner, DCPS SEC, DCPS school psychology expert.

⁸ P-4, Petitioner, DCPS school psychology expert.

⁹ Petitioner.

¹⁰ Petitioner, DCPS SEC, DCPS school psychology expert, School A special education teacher.

¹¹ P-4.

¹² P-4-11, DCPS school psychology expert.

¹³ DCPS school psychology expert.

¹⁴ R-4-3.

¹⁵ P-4-8, R-2, R-3-3, R-6, DCPS SEC, School A special education teacher.

¹⁶ P-4-8, P-5.

¹⁷ P-3-5, Petitioner, School A special education teacher.

Hearing Officer Determination

nondisabled peers in the school environment is beneficial to Student in that it helps Student keep up his self-concept and self-esteem.¹⁸

#9. Increasing Student's hours of specialized instruction outside of general education is appropriate to help Student access the general education curriculum,¹⁹ but removing him totally from access to nondisabled peers would not be appropriate as the Least Restrictive Environment because Student is able to excel socially with his nondisabled peers and receive good grades in the general education setting in his specials classes of Art, Music and Health and Physical Education.²⁰ Student enjoyed being at School A and was happy there.²¹ School A can provide up to 20 hours/week of specialized instruction outside of general education.²²

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 are as follows:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005). 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.

Free appropriate public education or FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate school and are provided in conformity with the IEP. 34 C.F.R. 300.17.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

¹⁸ School A special education teacher.

¹⁹ Petitioner, DCPS SEC, DCPS school psychology expert.

²⁰ School A special education teacher, DCSP school psychology expert.

²¹ School A special education teacher, DCSP school psychology expert.

²² DCPS SEC.

Hearing Officer Determination

The sole issue to be determined in this Hearing Officer Determination is whether DCPS denied Student a FAPE by failing to include an appropriate amount of special education service hours in Student's October 2013 IEP and March 2014 IEP.

Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disability, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. 34 C.F.R. 300.6(b)(10).

Core academic subjects means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, art, history and geography. 34 C.F.R. 300.10.

Although DCPS does not guarantee achievement of the goals of the IEP (D.C.M.R. E-3009.2), and although it was to be expected that Student would not be functioning on grade level due to his Specific Learning Disability, it was reasonable to expect that Student would make more than the minimal amount of academic progress on his IEP goals that he was making with the 10 hours/week of specialized instruction outside of general education in his October 2013 IEP and March 2014 IEP, even though the IEP goals were not identical from IEP to IEP. It also was reasonable to expect that if the services in the IEPs were adequate, Student would be getting better grades since most of his instruction was in the general education setting.

IEP means a written statement for a child with a disability that must include a statement of the special education and related services and supplementary aids and services to be provided to the child to enable the child to advance appropriately toward attaining annual goals and to be involved in and make progress in the general education curriculum. 34 C.F.R. 300.320(a)(4).

For an IEP to be appropriate, it must be "reasonably calculated to enable the child to receive educational benefits." *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176, 206-207, 102 S.Ct. 3034 (1982). To accomplish this, an IEP must only "be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential." *Chambers v. Sch. Dist. of Philadelphia Bd. of Educ.*, F.3d 176, 182 (3d Cir. 2009) (quoting *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004)).

Petitioner met her burden of proof by a preponderance of the evidence. The Hearing Officer determines that the amount of special education services in Student's October 2013 IEP and March 2014 IEP was insufficient to enable Student to meaningfully access the general education curriculum and derive educational benefit in light of Student's potential. Student's progress on IEP goals was minimal and his grades in core academic subjects during the 6th grade were quite poor. In contrast, Student was able to receive high grades in his specials classes of Art, Music and Health and Physical Education when receiving only general education instruction.

Hearing Officer Determination

It was evident that Student required more direct, 1:1 specialized instruction in order to access the general education curriculum. The credible testimony of the DCPS SEC and the DCPS school psychology expert, educators who were the most familiar with Student in the school environment, was that increasing Student's hours of specialized instruction outside the general education setting was appropriate to help Student access the general education curriculum.

DCPS' rationale for keeping Student's IEP services the same at 10 hours/week outside of special education, i.e., that Student was making some progress on achieving his IEP goals, was inappropriate when Student had great difficulty in grasping concepts in reading, writing and mathematics and his grades which reflected his progress in the general education curriculum, were quite poor.

DCPS must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled; and special classes, separate schooling, or other removal of the child with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114, 5 D.C.M.R. E-3011.1. In selecting the Least Restrictive Environment, consideration shall be given to any potential harmful effect on the child or on the quality of services that the child needs. 5 D.C.M.R. E-3013.3.

The Hearing Officer concludes that Student's Least Restrictive Environment is not an IEP with 100% specialized instruction outside of general education with placement in a special education nonpublic school, as was requested by Petitioner. It is possible that Student can achieve academic success and receive meaningful educational benefit with more specialized instruction in core academic subjects at School A. School A can provide up to 20 hours/week of specialized instruction outside of general education. Student already achieves academic success in specials classes at School A with general education instruction. Student loves attending School A and he is well integrated into the social fabric of the school. Schooling with nondisabled peers is necessary for Student to keep up his self-esteem and self-concept.

DCPS is responsible for the placement and funding of a student with a disability in a nonpublic special education school or program only when DCPS cannot implement the student's IEP or provide an appropriate placement in conformity with DCPS rules, the IDEA, and any other applicable laws or regulations. 38 D.C. Code 2561.03(a). School A, a DCPS school, can provide up to 20 hours/week of specialized instruction.

The Hearing Officer concludes that Student should have had more specialized instruction in his October 2013 IEP and March 2014 IEP than 10 hours/week outside of general education. Student's Least Restrictive Environment is an IEP that provides for up to 20 hours/week of specialized instruction outside of general education in core academic subjects only and no specialized instruction for specials classes, lunch and homeroom.

The testimony of Petitioner's special education programming expert was not given any where near the weight of the testimony of the educators who had observed Student in school and

Hearing Officer Determination

evaluated Student through record review and observation in the school setting. Although Petitioner's special education programming expert reviewed all available documentation and spoke with Petitioner, Petitioner's expert had not conducted any observations of Student in school or talked with any school educators about Student. The Hearing Officer disagreed with the expert's opinion that the severity of Student's disability was such that he could not meet the demands of *any* general education setting.

Student was denied a FAPE in that Student was deprived of an educational benefit due to insufficient specialized instruction in his October 2013 and March 2014 IEP. The insufficiency of the services significantly impeded Student's ability to access the general education curriculum and receive meaningful benefit from the IEP.

When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place. *Reid v. District of Columbia*, 43 IDELR 32 (2005). The qualitative standard for determining compensatory education is that "compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid v. District of Columbia*, 43 IDELR 32 (2005).

In every case, however, 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 v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005) 401 F. 3d at 524; see also *Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "qualitative, fact-intensive inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award." *Stanton v. District of Columbia*, 680 F. Supp. 201 (D.D.C. 2011). Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant a compensatory education award. *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010).

Although Petitioner withdrew her request for compensatory education in the form of tutoring at the beginning of the due process hearing, tutoring is appropriate in this case. Student had insufficient specialized instruction outside of general education in his IEP for about seven months, from October 16, 2013 through the time of the hearing on June 2, 2014. Although there was no specific evidence in the record of what was necessary in the form of tutoring to bring Student to where he would have been but for the denial of a FAPE due to insufficient specialized instruction in the IEP, this Hearing Officer determines that 40 hours of 1:1 tutoring by a special education teacher will go a long way towards remedying the harm from the lack of sufficient special education services.

Hearing Officer Determination

ORDER

(1) No later than July 16, 2014, DCPS shall convene an IEP Team that includes Petitioner and revise Student's IEP to provide Student with (A) an appropriate²³ increase in specialized instruction outside of general education in all core academic subjects, not to exceed 20 hours/week, and (B) classroom instruction in specials such as Art, Music, Health and Physical Education shall be provided within the general education setting with nondisabled peers, and (C) homeroom and lunch shall be provided within the general education setting, as applicable; and

(2) No later than 10 business days from the date of this Order, DCPS shall provide Petitioner with a letter of funding for 40 hours of independent tutoring by a certified special education teacher, for tutoring in the areas of reading, writing and mathematics.²⁴ The tutoring must be completed within 10 months of the date of the letter of funding, or else Petitioner forfeits the right to any tutoring hours not used; and

(3) Any delay caused by Petitioner or Petitioner's representatives shall extend any deadlines for DCPS' performance stated herein, day for day; and

(4) All other relief is denied.

IT IS SO ORDERED.

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).

Date: June 15, 2014

/s/ Virginia A. Dietrich
Hearing Officer

²³ The IEP Team shall determine what is the appropriate amount of specialized instruction for Student, but it shall be more than 10 hours/week and not more than 20 hours/week.

²⁴ At the due process hearing, Petitioner withdrew her request for tutoring as compensatory education on the premise that placement at nonpublic School B with full-time special education services would be sufficient to quickly bring Student to where he would have been but for the denial of a FAPE. Since placement at nonpublic School B will not be awarded by the Hearing Officer, compensatory education in the form of tutoring is appropriate to compensate Student for insufficient special education services in his IEP since October 2013.