

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

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

OSSE
Student Hearing Office
May 12, 2014

Petitioner

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**¹

Student attends a DCPS middle school. On February 25, 2014, Petitioner filed a Complaint against Respondent District of Columbia Public School (“DCPS”). On March 7, 2014, DCPS filed its Response to the Complaint.

The parties concluded the Resolution Meeting process by participating in a resolution session meeting on March 25, 2014. No agreement was reached, but the parties agreed not to prematurely shorten the 30-day resolution period. The 45-day timeline began on March 28, 2014 and will end on May 11, 2014, which is the HOD deadline.

On March 31, 2014, the hearing officer conducted a prehearing conference and determined, that the claims to be adjudicated, defenses asserted, and relief requested were as follows:

Petitioner’s Claims: (i) Alleged denial of FAPE by failing to provide Student with speech/language and counseling services during the 2012-2013 school year. (ii) Alleged denial of FAPE by failing to develop an appropriate Individualized Educational Program (IEP) on or about November 18, 2013.²

Respondent’s Defenses: (i) DCPS denies all allegations alleged in the Complaint. (ii) Student’s speech and language sessions were extended by fifteen to twenty minutes each in Spring 2013 to make up for services missed due to Student’s previous speech and pathologist being out on leave in Fall 2012. Student also received more behavioral support services in Fall 2012 than required by Student’s IEP, so the services roughly added up to those required under

¹ This section sets forth only the basic procedural history. Other events, including motions practice, may have taken place that are not listed here.

² Petitioner withdrew Issue #2 at the prehearing conference based on the parties’ July 2014 settlement agreement. That issue concerned evaluations and an IEE for a psychoeducational that was provided on February 24, 2014.

the IEP. Any deviations from Student's IEP were *de minimis* and not substantial enough to constitute a failure to provide Student a FAPE. (iii) Student's teachers state Student is performing well and receiving passing grades in Student's general education courses. Petitioner and Student's IEP team are awaiting the completion of an IEE; thus, Petitioner's request for DCPS to revise Student's IEP is premature. (iv) The IEP is reasonably calculated to provide educational benefit. Also, Student was in a full time ID program at Johnson last year, but wasn't supposed to be there. A complaint was filed and settled and DCPS pulled Student out of the program, then the team developed the current IEP. (v) The current IEP provides 45 minutes per day of inclusion services for each of the following areas: reading, math, and writing. Moreover, the RSM team added three hours per week of pullout to the IEP.

Relief Requested: (i) A finding that Student has been denied a FAPE. (ii) DCPS to revise Student's IEP to provide for 5 hours of pull-out in reading, 5 hours of pull-out in writing, and 5 hours of pull-out in math, as well as goals in speech and writing to address defining words, syntax, and paragraph formation, and push-in services in other core academic classes such as science and history. (iii) Compensatory education.

By their respective letters dated March 31, 2014, Petitioner disclosed twenty-six documents (Petitioner's Exhibits 1-26), and DCPS disclosed fifteen documents (Respondent's Exhibits 1-15).

The hearing officer convened the due process hearing on April 7, 2014, as scheduled.³ All disclosed documents were admitted without objection. Thereafter, the hearing officer received opening statements from both parties. Upon consideration of the case chronology set forth in DCPS's opening statement, as well as information regarding possibility prematurity of Petitioner's claims included in the Prehearing Order, the hearing officer initiated a discussion with counsel to determine whether Petitioner's claims are premature.

Both counsel confirmed the following chronology: Petitioner filed a Complaint during summer 2013, which the parties settled. Pursuant to the settlement agreement, DCPS conducted an IEP meeting for Student in November 2013. Petitioner disagreed with the number of hours of service provided, asserting that 15 hours of pullout should be provided as well, and Petitioner discussed the need for additional goals. Petitioner also objected to the data review DCPS had conducted. In December 2013, DCPS conducted a psychological assessment of Student. Petitioner asserted that the assessment was not comprehensive enough. Petitioner received the final draft of the IEP on February 19, 2014. On February 24, 2013, DCPS awarded Petitioner an independent comprehensive psychological evaluation. Later that afternoon, the educational advocate sent DCPS an email asking for specific additional goals for Student. On February 25, 2014, the very next day, Petitioner filed the instant Complaint. Later that evening, DCPS responded to the advocate's email of the previous day by indicating that DCPS would add the requested goals to Student's IEP and add an additional 3 hours per week of pullout to the IEP as well. Petitioner and/or her representatives never responded to this email. At the March 25, 2014 resolution session, DCPS added the requested goals and 3 hours per week of pullout services to Student's IEP. At the due process hearing, Petitioner represented that the independent comprehensive psychological assessment had not yet been completed but Petitioner wished to present testimony from the psychologist who was conducting the evaluation.

³ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

Based on this chronology, the hearing officer opined that Petitioner’s claims of an inappropriate IEP and of an alleged failure to provide all counseling services were prematurely filed, because the evaluation data needed to determine the merit of the claims, any educational harm Student may have suffered, and the services required to compensate Student for any denial of FAPE would not be available until the completion of the pending independent comprehensive psychological assessment. The hearing officer also noted that the appropriate course of action in a case like this would be for Petitioner to obtain the independent assessment report, take the report to the table for consideration by DCPS at an MDT meeting, and then file a Complaint if DCPS failed to take what Petitioner deemed to be appropriate action based on the assessment report. However, in light of the October 2013 speech and language assessment that contains the data necessary to determine Petitioner’s claim for missed speech and language services, the hearing officer determined it would be appropriate to move forward with the hearing on that claim.

After reaching the conclusions and determinations set forth above, the hearing officer received Petitioner’s testimonial evidence, DCPS rested on the record, and the parties presented closing statements. Thereafter, the hearing officer concluded the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

ISSUE(S)

1. Did DCPS deny Student a FAPE by failing to provide Student with speech/language services during the 2012-2013 school year?

FINDINGS OF FACT^{4,5}

2. On August 26, 2010, Student received an independent speech-language evaluation. At the time, Student was ten years old and attending elementary school. Student did not appear to present with any articulation errors, as her speech was intelligible and appeared to be within functional limits. Student’s voice and fluency skills, and her pragmatic/social language skills were also within functional limits. However, this

⁴ To the extent that the hearing officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer’s determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁵ When citing an exhibit that has been submitted by both parties, the hearing officer may only cite to one party’s exhibit.

assessment revealed that Student presented with a severe communication disorder characterized by below average receptive and expressive language skills and vocabulary skills. Student's severe deficits were characterized by her inability to interpret spoken directions of increasing length and complexity, interpret spoken sentences of increasing length and complexity, formulate sentences, define words, apply referential meaning, and understand relationships between words. The evaluator recommended speech and language services in the following form and amount: two sessions per week at 45 minutes each session.⁷

3. Student's April 5, 2012 IEP required Student to receive 240 minutes per month of speech-language pathology services. This IEP indicates that Student's speech-language deficits can impede her ability to follow the flow and content of what is transpiring in class, and result in Student having difficulty following teacher directives and retaining information presented in class.⁸
4. Student received the following amounts of speech-language services during SY 2012/13: September 2012 – 90 minutes; October 2012 – no services; November 2012 – records not provided; December 2012 – no services; January 2013 – 250 minutes; February 2013 – 255 minutes; March 2013 – 210 minutes; April 2013 – 60 minutes; and May 2013 – 180 minutes.

In September 2012, Student was absent for one 60 minutes session, and school was closed for Labor Day when one 60 minute session should have been provided. However, thirty minutes of services were missed due to the provider's unavailability, as the provider went on leave in September 2012. The provider remained on leave in the following months, and DCPS was unable to provide Student with another provider until January 2013.

The new speech-language service provider's written notes indicate that as early as January 2013, Student was beginning to make progress toward her speech/language goals.⁹

5. Despite Student's missed speech and language services during the first half of SY 2012/13, on February 27, 2013, DCPS developed a revised IEP that reduced the amount of Student's speech language services to 120 minutes per month. Nevertheless, four of the five annual speech and language goals in Student's April 5, 2012 IEP were repeated in Student's February 27, 2013 IEP.¹⁰
6. On October 1, 2013, DCPS administered a speech and language evaluation to Student to determine whether Student continued to have depressed speech and language skills and a need for special education services in the area of communication. The evaluator determined that Student presented with language skills in the moderately below average to significantly below average range. Areas of weakness included formulating complete sentences, recalling sentences with increased length and complexity, and understanding

⁷ Petitioner's Exhibit 12.

⁸ Petitioner's Exhibit 6.

⁹ See Petitioner's Exhibit 1; DCPS-14.

¹⁰ See Petitioner's Exhibits 5 and 6.

spoken paragraphs. Expressive vocabulary skills were significantly below average, and interpreting semantic relationships and receptive vocabulary skills were below average, although receptive vocabulary skills were an area of strength. No misarticulations were noted, voice and fluency were within normal limits, and hearing did not appear to be an area of concern.¹¹

7. A comparison of Student’s scores from her 2010 and 2013 speech language evaluations follows:¹²

	<u>2010</u>	<u>2013</u>
Receptive Vocabulary	73	71
Expressive Vocabulary	66	64
Core Language Index	44	52
Receptive Language Index	52	45
Expressive Language Index	53	53

8. Petitioner has requested 28 hours of speech and language services, to be provided at the rate 1 hour per week for 28 weeks outside of the school setting with an independent speech/language pathologist, to make up for the missed speech and language services that Student did not receive during SY 2012/13. Goals for Student during these independent sessions would include improving her expressive and receptive language skills by establishing relationship between words, formulating grammatically and syntactically complete sentences, and increasing her vocabulary.¹³

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 burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner’s claim.

“[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP’s, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.” *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007) (quoting *Houston Independent School District v. Bobby R.*, 200 F.3d 341 at 349 (5th Cir. 2000)).

¹¹ Petitioner’s Exhibit 10 at 6.

¹² Compare Petitioner’s Exhibits 10 and 12.

¹³ Petitioner’s Exhibit 23-5; testimony of compensatory education witness.

In the instant case, Petitioner contends that DCPS's failure to provide Student with the full amount of speech and language services required under Student's IEP during SY 2012/13 constituted a material failure to implement Student's IEP that resulted in a denial of FAPE. DCPS disagrees that there has been a denial of FAPE and argues that the failure to implement Student's IEP with respect to speech and language services did not constitute a material failure to implement.

A review of the administrative record in this case reveals that Student received only approximately one-third of the speech and language services she was entitled to receive in September 2013, and she did not receive any more speech and language services for the remainder of the first semester of SY 2012/13 because the service provider at her school was on leave. Then, shortly after a new service provider came on board and resumed providing Student with her services in January 2013, in February 2013 – the very next month, DCPS reduced the amount of speech and language services Student was to receive by half to 120 minutes per month.

The record also reveals that Student made no appreciable progress in her speech and language skills between August 2010 and October 2013, and indeed, Student may have slightly regressed in certain areas although the difference between the two sets of scores is less than one standard deviation in every instance. Moreover, Student never mastered the speech and language goals in her April 2012 IEP, and as a result, four of the goals in that IEP were carried over to her February 2013 IEP. Finally, although DCPS argues that Student was provided with additional speech and language services during the second semester of SY 2012/13, this argument is less than persuasive in light of the fact that DCPS decreased the amount of speech/language services Student was to receive shortly after the second semester began despite the fact that Student had not received her required speech and language services during the first semester.

Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing in a material manner to implement that portion of Student's April 2012 IEP that required her to receive 240 minutes per month of speech and language services, and that Student suffered educational harm as a result.

To remedy this denial of FAPE, the hearing officer will award Petitioner 240 minutes per week of independent speech and language services during the months of June, July, and August 2014, as well as 60 minutes per week of independent speech and language services for the duration of SY 2014/15. With this award of compensatory education, it is the hearing officer's intention to provide Student with a concentrated and intensive amount of speech and language services during summer 2014 to allow her an opportunity to make as much progress in the area of communication as possible, and then to provide Student with ongoing additional speech and language support during SY 2014/15 outside of the school setting to cement and build upon that progress.

ORDER

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

1. Petitioner's claims alleging that DCPS denied Student a FAPE by failing to develop an appropriate IEP on or about November 18, 2013 and by failing to provide Student with all counseling services required under Student's IEP for SY 2012/13 are **DISMISSED WITHOUT PREJUDICE as PREMATURE.**
2. Petitioner is hereby awarded 240 minutes per week of independent speech and language services for Student during the months of June, July, and August 2014, as well as 60 minutes per week of independent speech and language services for each and every week of SY 2014/15.

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: 5/11/14

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer