DC Office of the State Superintendent of Education
Office of Review & Compliance
Student Hearing Office
1150 5th Street, SE
Washington, D.C. 20003
CONFIDENTIAL

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STUDENT HEARING OFFICE

[Parent] [1], on behalf of [Student], Petitioner, v. District of Columbia Public Schools, Respondent.	Case HEARING OFFICER'S DETERMINATION August 12, 2009 Representatives: John Straus, Petitioner Tanya Chor, Respondent Independent Hearing Officer: Jim Mortenson

I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 12:30 p.m. on August 5, 2009, and continued at 1:00 p.m. on August 7, 2009. The hearing concluded and the record closed on August 7, 2009. The due date for the Hearing Officer's Determination (HOD) is August 14, 2009. This HOD is issued on August 12, 2009.

The hearing in this matter was conducted and this decision is written pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30.

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

Present at the due process hearing were: Petitioner's Counsel, John Straus, Esq.; The Petitioner (Day 1); Educational Advocate, Carolyn Miskel (Day 1); and Respondent's Counsel, Tanya Chor, Esq.

Six witnesses testified at the hearing:

Petitioner, the Student's Mother (P)

Carolyn Miskel, Educational Advocate (C.M.)

Angela Bonham, Speech and Langauge Pathologist (A.B.)

Dr. Ida Jean Holman, Special Education Expert (I.H.)

Special Education Coordinator

Clyde Parmely, Dedicated Aide (C.P.)

Prior HODs concerning this Student were issued on January 15, 2009 and May 6, 2009. The January 15, 2009, HOD memorialized a settlement between the parties and the IHO was not provided a copy of the May 6, 2009 HOD. Neither HOD was dispositive regarding the issues in this complaint.

The complaint in this matter was filed on June 22, 2009. The resolution period was waived on June 30, 2009. A response to the Complaint was filed by the Respondent on June 29, 2009, which did not address the issues in the complaint. A supplementary response was filed on July 7, 2009, which addressed Issue #1. A prehearing conference was held on July 9, 2009, and a prehearing order was issued on that date.

Ten documents were disclosed by the Petitioner on July 29, 2009. (P 1 – P 10) P 1 through P3, and P 6 through P 9 were admitted into the record. The exhibits are:

P 1 - Administrative Due Process Complaint Notice, June 19, 2009
P 2 - Prehearing Order, July 9, 2009
P 3 - DCPS's Supplementary Response, July 6, 2009
P 6 - Observation Report, First Draft, Ida Jean Holman, November 25, 2008

P 7 - Educational Evaluation, December 4, 2008
P 8 - Individual Education Program (IEP) and meeting notes, February 3, 2009
P 9 - Meeting notes, June 10, 2009

The documents not admitted were:

P 4 - Clinical Developmental Evaluation, April 3, 2006
P 5 - Child Development Program Developmental Evaluation, June 30, 2006
P 10 - Resume, Dr. Ida Jean Holman

Six documents were disclosed by the Respondent on July 29, 2009. (R 1 – R 7)[2] All were admitted into evidence as exhibits. The exhibits are:

R 1 - IEP with Eligibility Meeting Report, February 3, 2009
R 2 - Prior Notice, February 3, 2009
R 3 - Letter of Invitation, January 30, 2009
R 4 - Progress Report, July 9, 2009
R 5 - Provider Notes, Summer 2009
R 7 - HOD, January 15, 2009

Five joint exhibits were offered and admitted into evidence. 1 – 5). The exhibits are:

J 1 - Audiological Evaluation, May 24, 2006
J 2 - Speech and Language Evaluation, December 22, 2008
J 3 - Psychological Evaluation, January 26, 2009
J 4 - Psychiatric Evaluation, January 29, 2008
J 5 - Occupational Therapy Reassessment, January 30, 3009

II. ISSUES

1) Whether the Respondent denied the Petitioner's right to due process when it made a determination about where to provide the Student's extended school year (ESY) services for the summer of 2009 without her involvement?

[2] The Respondent referred to R 6 as the joint exhibits.

2) Whether the Respondent is not providing related services in conformity with the Student's individualized education program (IEP) for the summer of 2009?

III. FINDINGS OF FACT

1. The Student is a year old learner enrolled at The Student has been identified as requiring special education and related services under the definition of autism.[4] The Student has been diagnosed with Asperger's Syndrome.[5] The Student is "high functioning" and is average cognitively and academically.[6] The Student's autistic behaviors are impacting his ability to access the general education curriculum, however.[7] He has a moderate-severe language disorder affecting his communication skills.[8] He also has a visual perceptual processing impairment which impacts his ability to write with his hands.[9]

2. An IEP team convened on February 3, 2009, to review and revise the Student's IEP, consistent with an HOD issued January 15, 2009.[10] The resulting IEP lacks statements of present levels of academic achievement and functional performance

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[3] P 8/R 1.

[4] Id.

[5] Testimony (T) of C.M., T of I.H., P 6. J 4.

[6] T of I.H., J 3.

3.

2.

5.

[10] T of C.M., T of P, P 8/R 1, R 2, R 3, R 7.

describing how the Student's disability affects his involvement and progress in the general education curriculum.[11] The IEP includes: four annual goals to address math skills, which do not consistently include descriptions of how progress toward the goals will be measured; three annual goals to address reading, which do not consistently include descriptions of how progress toward the goals will be measured; eleven annual goals to address communication/speech and language, which do not include descriptions of how progress toward the goals will be measured; five annual goals to address emotional, social, and behavioral development, which do include descriptions of how progress toward the goals will be measured; and five annual goals to address motor skills/physical development, which also include descriptions of how progress toward the goals will be measured.[12] The IEP includes the provision of: specialized instruction outside the general education setting for 180 minutes per week, with no indication of what the specialized instruction is for (which goals it will be used to address); occupational therapy for 60 minutes per week outside of the general education setting; speech and language pathology for 90 minutes per week outside of the general education setting; behavioral support services for 30 minutes per week outside of the general

[11] R 1/P 8 at 2-4. (For example, the statement concerning math indicates the Student is not consistent with his math skills and describes some of the things he can do, such as count to 100 and tell time to the nearest half-hour. However, the statement does not indicate how the Student's autism, speech and language disorder, or visual perceptual processing disorder is impacting his math skills. Assuming one of those conditions is impacting the Student academically, the statements should state such. Reading is the Student's strong suit, according to a recent assessment report 3). Yet the present level statement indicates the Student is struggling to comprehend what he reads and includes goals for reading skills. Again, based on the assessment data in the record, the Student is not deficient in reading skills, per se, but rather in some of the functional skills (oral language) necessary to attend to reading and comprehending material. The present level statement does not connect the Student's disabilities to reading skills, and likely cannot, based on assessment data.

[12] R 1/P 8 at 2-5.

education setting; full time support from a dedicated aide who has knowledge of autism and the interventions required for a high achieving autistic child; and ESY services because the Student will regress with social skills and peer relations.[13] The ESY services are to address five of the Student's communication goals and four academic goals (one math and three reading).[14] The IEP only includes an explanation of the extent the Student will not participate with nondisabled children with regard speech and language pathology, but not for the other specialized instruction or related services.[15] The projected date for the beginning of the services, and the anticipated frequency, location, and duration of services, except for ESY services, is included in the IEP.[16]

3. A written notice was provided to the Parents, dated February 3, 2009, which included the following information[17]:

   a) In addition to identifying information about the Student, a statement that he would be in a "Combination Regular Education/Resource Setting."

   b) A statement that the Student is eligible or continues to be eligible for special education services as a child with autism.

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[13] Id. at 5,6.

[14] Id. at 7.

[15] Id. at 6.

[16] Id. at 5 – 7.

[17] R 2/P 8.

c) A "Description and Explanation of agency action proposed or refused" that stated: "Proposed action by DCPS: Proposed placement will be

DCPS feels that this setting can meet the Student's needs."

d) A "Description of Other Options Considered and reasons for rejection of each option" that stated: "Other options considered: Regular Education classroom/Out of Regular Education setting rejected because of continued school failure and time away from Regular Ed peers."

e) A list of the team members, by title.

f) A statement of who to contact if questions and the name and number of the special education coordinator.

g) A statement that there were protections under the Procedural Safeguards which were enclosed.

h) A statement that the Parents and their advocate did not agree with the placement.

4. On June 10, 2009, an IEP team meeting was convened to discuss ESY services.[18] There was concern about regression expressed, as was documented in the IEP.[19] The district staff raised the half-day program at for ESY

[18] T of C.M., T of J.B., P 9.

[19] R 1/P 8, P 9, T of J.B., T of P, T of C.M.

services.[20] The Parents advised the rest of the team that the half-day program the prior summer did not work for the Student and their Advocate requested the he be provided the full-day ESY program at The Respondent advised the Petitioner that the Student would receive ESY services at via a letter provided at the IEP team meeting.[22] The decision presented to the team was made by district administration not the local school.[23] All students from who require ESY services receive them at The duration of ESY services was also made by district administration based on ESY goals submitted to district administration.[25]

5. The District staff informed the team that the purpose for ESY is to prevent regression, an opinion shared by the Parent's advocates.[26]

6. During the summer of 2009, the Student received 45 minutes per week of speech and language services for four weeks.[27] ESY services were provided for four weeks, from June 29, 2009 through July 24, 2009.[28] The Student had a dedicated

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[20] P 9 at 4.

[21] Id. at 4,5.

[22] T of J.B.

[23] Id.

[24] Id.

[25] Id.

[26] Id. at 5, T of C.M., T of I.H., T of J.B. (Witnesses who made this statement at hearing were questioned as to where this idea came from. The responses were, generally, that it was based on experience.)

[27] T of A.B.

[28] T of P, T of A.B.

aide with him during the four weeks of ESY services.[29] The Student worked on math and played with other students during ESY services.[30]

7. The Student's Advocate, I.H., believes the Student should get as much ESY services as possible, and minimally six to eight weeks because it could take two and a half to five months for recoupment of lost skills if more than a two week break in services permitted.[31] This was based on I.H.'s experience with Student's with special needs.[32] I.H. did not know the Student's current levels of functional or academic performance, and opined that the Student should be compensated hour for hour with services missed.[33]

8. The only evidence of the Student's academic or functional progress from the ESY services are anecdotal and are general reports that the Student "made progress."[34]

IV. CONCLUSIONS OF LAW

1. Extended school year services are "special education and related services that:"

   (a) Are provided to a child with a disability beyond the normal LEA school year, in accordance with the IEP, at no cost to the parents of the child; and
   (b) Meet the standards of the LEA.

   D.C. Mun. Regs. tit. 5, § 3001.1 (2003), *See also,* 34 C.F.R. § 300.106(b).

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[29] T of P, T of C.P.

[30] T of C.P.

[31] T of I.H.

[32] Id.

[33] Id.

[34] T of A.B., T of C.P., R 4, R 5.

2. There is no limitation in the regulations to providing ESY services only to prevent regression over breaks in programming. Rather, the Federal Regulations at 34 C.F.R. § 300.106(a) require that:

> (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 §§ 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.

See also, D.C. Mun. Regs. tit. 5, § 3017 (2003).

3. An IEP requires that special education and related services, supplementary aids and services, and program modifications or supports for school personnel necessary to enable the child to advance toward attaining the annual goals, to be involved in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and children without disabilities in all of these activities also include the projected date for the beginning of these services and modifications and the anticipated frequency, location, and duration of these services and modifications. 34 C.F.R. § 300.320(a)(4) & (7), D.C. Mun. Regs. tit. 5, § 3009.1(c) (2005).

4. Public agencies "must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." 34 C.F.R. § 300.327, *see also*: 34 C.F.R. § 300.501(c). "The Department's longstanding position is that placement refers to the provision of special education

and related services rather than a specific place, such as a specific classroom or specific school." Fed. Reg. Vol. 71, No. 156, Monday, Aug. 14, 2006, p. 46687.

5. Prior to a proposed or refused initiation or change to the provision of FAPE to a student an agency must provide the student's parents a written notice which must include:

> (1) A description of the action proposed or refused by the agency;
> (2) An explanation of why the agency proposes or refuses to take the action;
> (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
> (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
> (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
> (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
> (7) A description of other factors that are relevant to the agency's proposal or refusal.

34 C.F.R. § 300.503, D.C. Mun. Regs. tit. 5, §§ 3024 & 3025 (2003).

6. While the IEP team did discuss whether the ESY services would be provided at for a half day or for a full day, the determination had already been made by the Respondent, and by staff who were not part of or present at the IEP team meeting. The distinction between the two locations was not merely one of "site" but rather two different program options in a continuum. One being a half-day program and the other a full-day program. Further, the duration (four weeks) was unilaterally chosen by the Respondent as well. These determinations were the IEP team's to make, not the Respondent's unilaterally.

7. The notice requirements and documentation in the IEP for the ESY services were not completed. The Student's IEP does not include the anticipated start date, frequency, location, and duration of ESY services, which are a supplementary

service. The Petitioner also was not provided written notice of a description of the proposed ESY services, the explanation for the ESY services offered, a description of the data used as a basis for the determination for ESY services, a description of other options considered and why rejected, nor a description of other factors relevant to the ESY proposal. ESY services were partially documented in the IEP and it cannot be determined what exactly would be provided. The annual goals upon which there needed to be work done were listed, although the special education and related services to reach those goals were not all included. Additionally, even though the IEP said the Student would regress in social skills, no social skills goals were included for ESY. Only communication and academic goals were. Finally, no data on progress was collected and provided at hearing. The only evidence of progress during the summer were statements to the effect there was progress (see, e.g., R 4, checked box indicated the Student is making progress toward improving receptive and expressive language skills). No specific goal is specified and no data provided to show the basis for this conclusion (there is not documentation in the IEP about how progress toward all goals will be measured, as required by 34 C.F.R. § 300.320(a)(3)). Finally, because of the lack of any meaningful data, no clear evidence was presented showing the Student's current level of educational (academic or functional) performance. Thus, what services the Student requires to compensate for the denial of FAPE, if any, cannot be determined with any reasonable precision.

8. The Petitioner's request for hour for hour make up, likewise, cannot be justified because it is not clear how much that would be. I.H.'s opinions about the amount

of ESY and compensatory education are suspect because: 1) she did not know the correct definition of ESY (that it is to ensure a FAPE, which may include the factor of regression and recoupment time, but not exclusively); 2) her opinion was based on a general idea of what "students with disabilities" or students on the autism spectrum require, not what this particular Student required; and 3) she did not know what the Student's current level of academic or functional performance was. Calculations based on stereotypes are prohibited by IDEA, whether the calculator is the public agency or the parent.

9. The only substantive remedy available for the Student in this case is a directive to the Respondent to correct the IEP with specific provisions to attempt to enable the Student to be involved in and progress in the general education curriculum so that he has the opportunity to meet the education standards of the District of Columbia, pursuant to 34 C.F.R. §§ 300.17 and 300.320.

V. DECISION

1. While the Respondent has the right to determine the school in which ESY services would be provided (had there been more than one equivalent program) it did not have the right to unilaterally limit the type, amount, and duration of ESY services. Furthermore, the Respondent violated the Petitioner's right to due process when it did not provide written notice, or document in the IEP, the projected start date, frequency, location, and duration of ESY services for the Student.

2. The Respondent could not provide ESY services in conformity with the IEP because the IEP was deficient in its documentation of what specifically would be provided, the beginning date, frequency, location, and duration of ESY services.

VI. ORDER

1. The Student's IEP must be corrected to include the following:

   a. A statement of the Student's present levels of academic achievement in reading, mathematics, and written expression, as determined by the most recent data available on his progress toward meeting the grade level standards for first grade, the most recent grade level completed by the Student.[35]

   b. A statement of the Student's present levels of functional performance, including the areas of communication, behavior, and visual perceptual processing.[36]

   c. A statement of measurable annual academic goals, if necessary,[37] and functional goals designed to meet his needs in the areas of communication, behavior, and visual perceptual processing.

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[35] It appears from the assessment reports in evidence (P 7, 1 – 5) that the Student has no academic needs resulting from his disability. If the statements required reflect this, then no academic goals will be required.

[36] If there are additional areas of concern, whether or not they are areas of deficit, they must be included as well. The three areas specified are identified in the assessment reports in the record.

[37] While the last IEP included academic goals, the assessment data entered into the record does not indicate the Student's disability directly impacts his academic skills, but rather functional deficits may cause academic problems. As such, this order does not require academic goals, but they may be included if the IEP team has a data-based rationale to do so.

d. A description of how the Student's progress toward meeting the annual goals will be measured and when periodic written reports on the Student's progress will be provided to the Student's parents.

e. A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided, which must include, at a minimum:

   i. To address communication goals: 120 minutes per week of speech and language therapy by a speech and language therapist, outside of the general education classroom, at least twice per week.

   ii. To address behavioral goals: 60 minutes per week of one to one counseling with a certified behavior analyst, outside of the general education classroom, one or two times per week; a dedicated one to one aide to attend to the Student in the general education setting; and training for teacher(s) working with the Student in the 2009-2010 by a certified behavior analyst for a minimum of 60 minutes, within 30 days of the date of this order, concerning the behaviors of the Student and how to respond appropriately and modify teaching appropriately.

   iii. To address motor skills and physical development (specifically visual perceptual processing): 60 minutes per week of occupational therapy, outside the general education setting, one or two times per week.

iv. To address regression of all the these skills and ensure progress toward meeting the annual goals: extended school year services during periods school is not in session more than two weeks, consisting of the speech and language therapy, one to one counseling with a certified behavior analyst, and occupational therapy.[38]

This IEP must begin no later than the first week of school and must continue through August 1, 2010, unless the parties agree to change it sooner based on data collected about the Student.

e. An explanation that the Student will be out of the general education setting at least four hours per week to receive specialized related services in the areas of communication, behavior, and motor skills/physical development specific to his needs and not necessary for or in conjunction with peers without disabilities.

f. A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the Student on State and districtwide assessments.

2. The IEP team must meet and revise the IEP, in accordance with this order no later than August 24, 2009. Three alternate times for an IEP team meeting must be provided to the Petitioner including the time the IEP team will meet if she does not respond or is unable to attend any of the proposed times.

[38] This amounts to at least four hours per week of ESY services.

3. Any disagreement over the IEP thus required may be resolved by filing a complaint with the SEA, pursuant to 34 C.F.R. §§ 300.151 – 300.153, or any other appropriate dispute resolution mechanism.

4. All other due process required under IDEA and DCMR must be followed in the completion of this order.

IT IS SO ORDERED.

Dated this 12th day of August, 2009.

Jim Mortenson, Esq.
Independent Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Independent Hearing Officer is final, except that any party aggrieved by the findings and decision of the Independent 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 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).