

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

OSSE
Student Hearing Office
June 27, 2013

[Parent], on behalf of
[Student],¹

Date Issued: June 26, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

[Local Education Agency],

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on April 17, 2013. A Hearing Officer Determination was issued in a prior dispute between the parties on January 19, 2011, and is not related to the present complaint. The Petitioner and Respondent are both represented by counsel.

A response to the complaint was filed on April 26, 2013. A prehearing conference was convened on April 29, 2013 and a prehearing order was issued on that date. A resolution meeting was held on April 30, 2013, and resulted in no agreements.

The Petitioner filed a motion to permit telephone testimony for one of her witnesses on June 4, 2013. The Respondent filed a motion to dismiss on June 5, 2013. Both parties exchanged disclosures and filed pre-hearing briefs on June 5, 2013. On June 11, 2013, an order was issued granting the Petitioner's motion.

¹ All names have been removed in accordance with Student Hearing Office policy and are referenced in Appendix C which is to be removed prior to public dissemination.

The hearing was convened at 9:00 a.m. on Wednesday, June 12, 2013, in room 2009 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The Respondent's motion to dismiss, based on an argument that the case was moot because the Respondent had offered to increase the Student's specialized instruction by two and a half hours, was denied at the hearing because the Petitioner was seeking an increase of seven and a half hours as well as compensatory education, none of which had been offered or provided and agreed to.

The hearing closed at 3:40 p.m. on June 12, 2013. The due date for this Hearing Officer's Determination (HOD) is July 1, 2013. This HOD is issued on June 26, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is:

Whether the Respondent denied the Student a free appropriate public education (FAPE) when it did not propose or provide an individualized education program (IEP) reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum and meet the Student's needs that result from her disability because the IEP proposed January 16, 2013: a) lacks sufficient specialized instruction outside of the general education setting, in light of her lack of educational progress and behavioral escalations; and b) lacks counseling services or any type of behavioral support?

The Petitioner is seeking an additional seven and one half hours of specialized instruction outside of the general education setting per week in the areas of reading, writing and math, for the Student. She is also seeking 20 to 30 hours of individual tutoring for the Student in the areas

of reading, writing, and math, in order to close the educational gap between where the Student is and should be performing.

The Respondent denied the Student a FAPE because the IEP revised on January 16, 2013, was not reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum when the amount of specialized instruction provided outside of the general education setting was reduced despite her lack of academic growth and progress on her IEP goals.

IV. EVIDENCE

Seven witnesses testified at the hearing, four for the Petitioner and three for the Respondent.

The Petitioner's witnesses were:

1. The Petitioner, (P).
2. Advocate, (M.L.).
3. Family Member, (M.M.).
4. Psychologist, (N.N.).

The Respondent's witnesses were:

1. Special Education Teacher, (Teacher A).
2. Regular Education Teacher, (Teacher B).
3. Social Worker.

All of the witnesses testified credibly but for Teacher A. Teacher A's testimony is given little weight because of at least two inconsistencies. First, he recorded in the IEP progress reports (R 4), consistently over the course of the 2012-2013 school year, that the Student was making unspecified progress toward goals. However, when the IEP was annually revised in January 2013

(P 2), many goals were reduced to a less difficult task or remained the same. Second, Teacher A testified that he thought the case was resolved at the resolution meeting he attended in May 2013. However, the meeting notes (R 3) clearly show no settlement was offered and that the Petitioner was no longer participating at the conclusion of the meeting and her attorney wanted to keep the resolution period open in order to speak with the Petitioner. These written contradictions cast doubt on the veracity of all of Teacher A's testimony, not otherwise corroborated.

The Petitioner moved for N.N.'s opinions, as to why the IEP team should have considered the most recent evaluation data and what a student with disabilities like the Student's looks like in the classroom environment, to be treated as expert opinions. The motion was denied because N.N. had only reviewed the Student's evaluation, had never met the Student, and lacked sufficient first-hand knowledge of the Student and her disabilities. The witness was permitted to testify, however, and her testimony, including opinions, are given the weight of any other professional in this matter.

All of the Petitioner's 23 disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. All of the Respondent's nine disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. 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:

1. Student is an year old child with a disability who was in the grade at one of the Respondent's elementary schools during the 2012-2013 school year.²
2. Student was determined eligible for special education and related services by the Respondent under the definition of specific learning disability.³ The Student's disability has resulted in her currently being two years behind her same-aged peers in mathematics, reading, and writing.⁴ She requires small group specialized instruction to help her build her calculation and problem solving skills in math because she struggles to understand many 5th grade level math concepts and calculation.⁵ She can only read at 55 words per minute, as opposed to the proficient level of 120 words per minute.⁶ Her reading level is at "I" as opposed to the proficient level of "W."⁷ The Student's reading disability results in her needing extra practice to increase oral reading fluency and a reduction in her comprehension skills.⁸ She requires extra specialized instruction and supports to access grade level texts independently.⁹ She has Mixed Receptive-Expressive Language Disorder that is exacerbated by memory deficits and visual perception issues.¹⁰ She requires visual cueing to help her with her weakness in visual learning and memory/retention.¹¹

² Testimony (T) of P, P 1/ R 1.

³ P 1/ R 1.

⁴ P 1/ R 1, P 20, T of Teacher B.

⁵ P 1/ R 1.

⁶ P 1/ R 1.

⁷ P 1/ R 1.

⁸ P 1/ R 1.

⁹ P 1/ R 1.

¹⁰ P 19/R 8, P 20.

¹¹ P 20.

3. On March 6, 2012, the Student's IEP team met and revised her IEP.¹² The IEP included four math goals and four reading and writing goals.¹³ The math goals dealt with the following skills: 1) adding and subtracting up to five-digit whole numbers with regrouping; 2) recalling multiplication and related division facts by memory, up to 12 x 12; 3) identifying the value of US coins and bills; and 4) organizing, classifying, and representing data using tallies, charts, tables, and bar graphs.¹⁴ The reading and writing goals dealt with the following skills: 1) increasing oral reading fluency on grade level text, from 42 to 85 words per minute; 2) answering literal and inferential questions about a text in writing; 3) demonstrating an understanding of conventions for writing complete and effective sentences including treatment of subject and verb, punctuation, and capitalization; and 4) identifying main idea and supporting details of a text heard or read.¹⁵
4. The March 6, 2012, IEP included the following services to meet the goals: 15 hours of specialized instruction per week, outside of the general education setting; being read math, science, and composition test questions; simplification of oral directions; small group testing; and extended time on subtests.¹⁶
5. Reported progress on the March 6, 2012, IEP goals, recorded by Teacher A, did not include any data about the progress, other than a statement that the Student was "progressing."¹⁷
6. The Student's IEP team met on January 16, 2013, to review and revised the IEP.¹⁸ The IEP now included three math goals and four reading and writing goals.¹⁹ The math goals dealt with the following skills to be achieved by January 2014: 1) adding and subtracting up to

¹² P 3.

¹³ P 3.

¹⁴ P 3.

¹⁵ P 3.

¹⁶ P 3.

¹⁷ R 4.

¹⁸ P 2.

¹⁹ P 2.

three-digit whole numbers with regrouping; 2) recalling multiplication and related division facts by memory, up to 10 x 10; and 3) identifying the value of US coins and bills.²⁰ The reading and writing goals dealt with the following skills to be achieved by January 2014: 1) increasing oral reading fluency on grade level text, which was at 57 words per minute, and spell and define 10 grade level words; 2) writing at least a four sentence summary of a leveled text; 3) demonstrating an understanding of conventions for writing complete and effective sentences including treatment of subject and verb, punctuation, and capitalization; and 4) identifying main idea and supporting details of a text heard or read.²¹

7. The January 16, 2013, IEP included the following services to meet the goals: 7.5 hours of specialized instruction per week, in the general education setting; 7.5 hours of specialized instruction per week, outside of the general education setting; reading of math, science, and composition test questions to the Student; simplification of oral directions; small group testing; and extended time on subtests.²² The Respondent changed the services because Teacher A thought the Student would do better in the general education setting with peers.²³
8. The Student has been in at least two fights at school and caused one classroom disruption during the 2012-2013 school year.²⁴ The fights occurred in September, March, and another may have occurred in April.²⁵ The class disruption occurred in October.²⁶ The March fight resulted from the Student exchanging insults with another child and resulted in the Student being suspended for two days.²⁷

²⁰ P 2.

²¹ P 2.

²² P 2.

²³ T of P, T of Teacher A.

²⁴ P 12.

²⁵ P 12, T of P.

²⁶ P 12.

²⁷ P 13.

9. In May, 2013, the parties agreed to increase the Student’s specialized instruction outside of the general education setting to 10 hours per week and to add two hours per month of behavioral support services.²⁸
10. The Petitioner’s Advocate wrote a “Compensatory Education Plan” dated June 4, 2013, which lists documents the Advocate reviewed, a description of what compensatory education is for and a conclusory statement that the Respondent denied the Student a FAPE by failing to develop an appropriate IEP on January 16, 2013.²⁹ The plan also includes a statement that the harm the Student suffered was that she is still performing behind her peers in reading and math, is at basic levels in all her classes, and that she did not master her prior IEP goals.³⁰ The plan recites a report M.L. received from Teacher A, notes the time period of January 16, 2013 to April 17, 2013, and requests 45 minute tutoring sessions, twice weekly, on basic reading and math skills for three months.³¹ Finally, the plan notes that but for the denials of FAPE, the Student would have at least mastered her IEP goals from the 2012 IEP and previous IEPs, without any explanation how or why.³²

VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. “Based solely upon the evidence presented at the hearing, an impartial hearing officer shall

²⁸ P 1/ R 1, T of P.

²⁹ P 18.

³⁰ P 18.

³¹ P 18.

³² P 18.

determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.” D.C. Mun. Regs. 5-E3030.14. The recognized standard is a preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1). Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA’s purpose. *See*: 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. “[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State’s content standards.” 71 Fed. Reg. 46662 (2006). In the District of Columbia all available information must be considered when making a determination about whether an IEP is reasonably calculated to provide these education benefits. *Suggs v. District of Columbia*, 679 F. Supp. 2d 43, 51 (D.D.C.2010). “An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see Reid v. District of Columbia*, 401 F.3d [516,] 519-20 [(D.C.Cir. 2005)]; the nature and effects of the child's disability have not been adequately

monitored, *see Harris v. District of Columbia*, 561 F. Supp. 2d [63,] 68 [(D.D.C. 2008)]; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” *Suggs*, 679 F. Supp. 2d at 51-52. This line of reasoning is supported by the statute and regulations themselves. The IEP is a living document that, once initially created and consented to, is reviewed “periodically, but not less than annually, to determine whether the annual goals for the child are being achieved[.]” 34 C.F.R. § 300.324(b). The IEP must then be revised to address:

- (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
- (B) The results of any reevaluation conducted under § 300.303;
- (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
- (D) The child’s anticipated needs; or
- (E) Other matters.

34 C.F.R. § 300.324(b)(2)(ii). The IEP team must, for a “child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]” 34 C.F.R. § 300.324(a)(2)(i).

3. The Student’s IEP, when revised in January 2013, was not reasonably calculated to ensure the Student would be involved in and progress in the general education curriculum. The specialized instruction to be provided to the Student outside of the general education setting was reduced, despite the Student not achieving her annual goals. Of her eight academic goals, the Student was not on track to meet any of them by March, as evidenced by the reduction in skill level expected for some goals and the extension of time, by almost a year, to reach others. Of the four math goals, two were reduced in difficulty, one remained the same, and one was removed without any credible evidence it was achieved. Of the four reading and writing goals, while two were modified, the IEPs reflect they were not met, and

the other two remained the same. Teacher A was reporting that progress was being made on all goals, without any specifics. Thus, it may not have been clear to the Parent or Respondent that the Student was failing to progress adequately toward her goals until the January 2013 IEP team meeting. At that time, as the Student's present levels of academic achievement were discussed, it would have been appropriate to increase the level of special education and related services in some fashion in order to enable the Student to be involved in and make progress in the general education curriculum and meeting her goals, not reduce the specialized instruction outside of the general education setting. Because the Respondent did not ensure the Student had an appropriate IEP to enable the Student to be involved in and make progress in the general education curriculum when the IEP was revised in January 2013, it denied the Student a FAPE.

4. This hearing officer has broad discretion to grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). In order to ensure the Student is provided a FAPE, the Student's IEP will be revised consistent with the Order herein. The Student will be provided more hours of specialized instruction outside of the general education setting than requested because the amount requested was what was provided prior to the January 2013 revision which resulted in the Student not being on track to meet any of her goals and remaining approximately two years behind her peers.
5. Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid ex rel. Reid v. District of Columbia, 401 F.3rd 516, 523, (D.C. Cir. 2005), *citing* G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the

hearing officer's broad discretion, compensatory education is warranted, the "goal in awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, *citing Reid*, 401 F.3d at 518, and Carter at 15-16. "Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake 'a fact-specific exercise of discretion' designed to identify those services that will compensate the student for that denial." Id., *citing Reid*, 401 F.3d at 524; *see Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp. 2d 201, 207 (D.D.C. 2010); Phillips ex rel. T.P. v. District of Columbia, 736 F. Supp. 2d 240, 247 (D.D.C. 2010).

6. The Petitioner has failed to demonstrate what services are necessary to put the place in the place she would have been but for the denial of FAPE. The compensatory education plan presented by the Petitioner requests 18 hours of tutoring in reading and math. The plan and testimony of M.L. fail to explain how the deficient IEP resulted in specific educational harm. The harm referenced, that the Student was already behind academically and had not met her goals, is not conclusively attributed to the inappropriate IEP. The plan states the Student would have at least mastered her IEP goals from the 2012 IEP revision had the January revision had not reduced the level of special education services, but this is conclusory without any explanation and thus also fails to provide the qualitative inquiry required for a compensatory education award.
7. Counseling services have already been added to the IEP, even though the Student is not exhibiting particularly frequent behavior problems, and no further relief is required to ensure a FAPE.

VII. DECISION

The Respondent denied the Student a FAPE when it reduced the specialized instruction the Student received outside of the general education in January, 2013, because this change was not reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum, given her lack of progress toward IEP goals with more intensive specialized instruction (in special classes).

VIII. ORDER

1. The Student's IEP will be revised, no later than July 12, 2013, to reflect at least 20 hours of specialized instruction in the areas of reading, writing, and math, provided by a special education teacher, in a structured small group setting outside of the general education setting, with minimal distractions.
2. Visual cueing will be provided by all of her teachers, and reflected in her IEP.
3. Extended school year services for the summer of 2013 will be provided in order to help the Student learn the academic material she has not yet demonstrated proficiency on, below the 6th grade level. The services shall be provided at least from July 15, 2013, through August 16, 2013, and, if necessary, during other breaks in the school year, such as winter break, spring break, and the summer of 2014.

IT IS SO ORDERED.

Date: June 26, 2013



Independent Hearing Officer

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).