

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
October 6, 2014

STUDENT, ¹)	
through the PARENT,)	
<i>Petitioner,</i>)	Hearing Officer: NaKeisha Sylver Blount
)	
v.)	
)	
District of Columbia Public Schools,)	
<i>Respondent.</i>)	Date Issued: October 4, 2014

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SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“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 (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a Due Process Complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed on July 21, 2014 by Petitioner (Student’s parent), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On July 30, 2014, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The undersigned IHO held a Pre-hearing Conference (“PHC”) by telephone on August 11, 2014, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by September 2, 2014, and that the due process hearing (“DPH”) would be held on September 9, 2014. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued August 11, 2014.

The DPH was held at the Office of Dispute Resolution, Petitioner elected for the hearing to be closed.

¹ Personal identification information is provided in Appendix A.

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Petitioner's and Respondent's disclosures were timely filed. At the DPH, Petitioner's exhibits P-1 through P-29 were admitted without objection. Respondent's exhibits R-1 through R-12 were admitted without objection.

The following witnesses testified on behalf of Petitioner at the DPH:

- (a) Mother (Petitioner)
- (b) Psychologist-Parent (Qualified as an expert in clinical psychology as it relates to children with special needs)
- (c) Parent's Educational Advocate #1
- (d) Parent's Educational Advocate #2

The following witnesses testified on behalf of Respondent at the DPH:

- (a) Psychologist-DCPS (Qualified as an expert in school psychology, specifically as it relates to conducting, reviewing and interpreting evaluations and making educational recommendations for students)
- (b) Special Education Coordinator, District Middle School

The parties gave oral closing arguments.

ISSUE

As discussed at the PHC and reflected in the PHO, the following issue was presented for determination at the DPH.

- (a) Whether DCPS denied the student a free appropriate public education ("FAPE") by failing to provide the student with Extended School Year services for 2014 summer and/or by failing to include said services in the student's May 20, 2014 IEP.

RELIEF REQUESTED

Petitioner requested the following relief:

- (a) a finding that DCPS denied the student a FAPE as to the issue described above;
- (b) an Order that DCPS provide the student with compensatory education in the form of:
 - Math support (26 hours and 40 minutes to be delivered 40 minutes 1 time weekly for 10 months)
 - Reading support (26 hours and 40 minutes to be delivered 40 minutes 1 time weekly for a period of 10 months)
 - Writing support (26 hours and 40 mins. to be delivered 40 minutes 1 time weekly for a period of 10 months)
 - Occupational therapy support (3 hours to be delivered 30 minutes weekly for a period of 6 weeks)
 - Behavioral support (2 hours to be delivered 30 minutes weekly over a period of 4 weeks).

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FINDINGS OF FACT

Background

1. Student resides with her parent (Petitioner) in Washington, D.C.²

2. Student is currently in the second grade and attends Public Charter School. During the 2013-2014 school year, Student was in the first grade and attended District Elementary School.³

3. Student, who has Attention Deficit Hyperactivity Disorder, has been determined eligible for special education and related services under the classification “Other Health Impairment.”⁴ As a function of her disability, Student has deficits in working memory.⁵

4. Student demonstrated academic regression upon returning to school after the summer break of 2013; however, at least to some extent her low scores may have been impacted by a lack of a full understanding of the instructions as she tested.⁶

5. Student began receiving academic support/interventions through the Student Support Team Process in October 2013.⁷

6. Student was initially determined eligible for special education and related services on January 27, 2014.⁸

7. An individualized education program (“IEP”) was developed and implemented for Student on February 18, 2014. This was Student’s initial IEP, and it provided Student 4 hours per week of reading support outside the general education setting, 4 hours per week of mathematics support outside the general education, and 2 hours per week of support in the area of written expression, outside the general education setting, as well as the related service of occupational therapy at 60 minutes per month.⁹ Student’s IEP was updated to increase her related services on May 20, 2014.¹⁰

8. On June 27, 2014, Pediatrician issued a letter outlining a protocol for “best practice for treatment of [Student’s] ADHD.” In the letter, Pediatrician indicated that Student would “benefit from accommodations and support during the summer.”¹¹ Student’s IEP team did not have this letter at the May 2014 IEP team meeting.

² Testimony of Parent.

³ Testimony of Parent.

⁴ Testimony of Parent; P-22; R-5.

⁵ Testimony of Psychologist-Parent; Testimony of Psychologist-DCPS.

⁶ Testimony of Mother; P-12-1; Testimony of Psychologist-DCPS.

⁷ P-12-1 and P-12-2.

⁸ P-22; R-5.

⁹ P-7.

¹⁰ P-2-1.

¹¹ P-4-1.

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9. Student's Dibels standardized test scores reflect that after the winter holiday break and the spring break during the 2013-2014 school year, Student met, approached or exceeded the testing goal in most categories.¹²

10. Student made progress on her IEP goals in the final reporting period of the school year.¹³

11. Student received a psychological evaluation from Psychologist-DCPS containing twenty three specific recommendations on December 10, 2013, and an independent psychological evaluation from Psychologist-Parent containing eleven specific recommendations on April 13, 2014. Neither psychological evaluation recommended Extended School Year ("ESY") services for Student.¹⁴

12. ESY services are educational services provided to a student in accordance to the student's IEP during summer or other school breaks.¹⁵

13. Student's IEP team did not determine that Student required ESY to access her education, noting that there "is no evidence that a break in services would cause a significant regression in [Student's] critical skills." Student's general education teacher told Parent that Student would benefit from ESY.¹⁶

14. Student's IEP team felt Student would benefit from attending summer school.¹⁷

15. DCPS has a summer school program available to all DCPS students.¹⁸

16. Student was not enrolled in summer school.¹⁹

CONCLUSIONS OF LAW

"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. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

¹²R-9; Testimony of Special Education Coordinator.

¹³R-8.

¹⁴P-5; P-11; R-10.

¹⁵P-26.

¹⁶Testimony of Mother; P-1; R-3.

¹⁷Testimony of Special Education Coordinator.

¹⁸Testimony of Parent.

¹⁹Testimony of Parent.

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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).

I. Whether DCPS denied the student a free appropriate public education ("FAPE") by failing to provide the student with Extended School Year services for 2014 summer and/or by failing to include said services in the student's May 20, 2014 IEP.

Johnson v. District of Columbia, 2012 WL 3758240, 3-4 (D.D.C.2012) sets out the standard for when ESY services must be offered to a student, stating that school "ESY services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *Id.*, quoting *MM v. School District of Greenville County*, 303 F.3d 523, 537-38 (4th Cir.2002). The March 10, 2011 Office of State Superintendent of Education ("OSSE") Extended School Year Services Policy Memorandum included in the DPH record as P-26 likewise lists three criteria for a student's IEP team to apply when making a determination of whether the student should receive ESY services: (1) whether the break will jeopardize one or more critical skills, (2) the degree of potential regression (noting that most students experience some natural regression during breaks in service), (3) the time required for recoupment of critical skills.

In this case, Parent was concerned about the regression in Student's scores upon returning to school after the 2013 summer. Parent requested ESY in May 2014 as a buffer against potential regression during the 2014 summer, and while Student's general education teacher told Parent Student would benefit from ESY, the IEP team as a whole did not conclude that Student met the OSSE criteria for ESY. Psychologist-Parent also testified that Student would benefit from ESY. Yet, even to the extent that Student may have benefitted from ESY, a denial of FAPE is only present under IDEA when the IEP fails to "at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Where, as in this case, no procedural violations of IDEA are alleged, the IEP meets the standard of providing a FAPE where it is "reasonably calculated to enable the student to receive educational benefits." *N.T. v. District of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003).

Here, the IEP team's decision about ESY can be said to have been "reasonably calculated to enable the student to receive educational benefit." While the hearing officer considered the sharp decline in Student's test scores at the start of the 2013-2014 school year (post-summer) the contemporaneous observation made by the SST that Student may not have fully understood the instructions when she was testing also had to be considered. This observation is included in the SST notes from October 2013, prior to Student's eligibility determination and prior to ESY

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having been raised as an issue by any party. Further, while Pediatrician provided a note recommending that Student would benefit from accommodations and support during the summer, Pediatrician's note was written after the May 2014 IEP meeting and the team did not have the note when it made its determination. It also not possible for the hearing officer to conclude from the note whether the structure offered by summer school, which Student's IEP team recommended, could have also addressed Pediatrician's concerns.

After the regression Student demonstrated post summer 2013, Student began receiving significant academic supports at school – first through the SST process, and then by way of her IEP. Student made progress with these supports, and did not demonstrate regression after the winter or spring breaks. Student received two psychological evaluations during the 2013-2014 school year. One was through a DCPS psychologist and one was through an independent psychologist, and neither recommended ESY. While Parent testified that she has noted regression in Student during the 2014 summer, the IEP team's decision was based on the information it had at the time. Additionally, Student's IEP team had recommended summer school for Student; however, Student did not attend, which may have been a factor in her regression.

The hearing officer credits the testimony that Student would have benefitted from either ESY and/or summer school. However, based on the OSSE criteria, the caselaw and the relevant facts, the hearing officer does not Student's IEP team's determination that Student did not meet the criteria for ESY to be a denial of FAPE. Therefore, Petitioner did not meet her burden of proof on this issue.

Accordingly, all relief Petitioner requested in the complaint is **DENIED**.

This complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

Date: October 4, 2014

/s/ NaKeisha Sylvester Blount
Hearing Officer

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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).