

DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
State Enforcement and Investigation Unit
Office of Review and Compliance

STUDENT HEARING OFFICE
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CONFIDENTIAL

In the Matter of:

STUDENT,

Petitioner,

v.

LOCAL EDUCATIONAL
AGENCY,

Respondent.

Case No.

**HEARING OFFICER
DECISION**

OSSE
STUDENT HEARING OFFICE
2009 JUN 30 PM 12: 04

I. PROCEDURAL BACKGROUND

Petitioner, by and through her parent, filed a due-process complaint on April 22, 2009. Petitioner waived the resolution session. On May 5, 2009, Respondent answered the complaint.

Petitioner moved for a continuance, which was unopposed. I granted continued the due-process hearing from June 6, 2009, to June 23, 2009.

On that day, I held a due-process hearing under the applicable sections of the Individuals with Disabilities Education Improvement Act of 2004 (*see* 34 C.F.R. §§ 300.1-300.718) and of the District of Columbia municipal regulations (*see* 5 DCMR §§ 2500-3033). At the hearing, both parties were represented by counsel. Petitioner entered into evidence, without objection, 13 documents marked P-1 to P-13. One witness testified on Petitioner's behalf. Respondent entered into evidence, without objection, six documents marked R-1 to R-6. One witness testified on its behalf.

II. ISSUES RAISED AND RELIEF SOUGHT

In the due-process complaint, Petitioner alleged Respondent denied her a free and appropriate education ("FAPE") by failing to properly implement her individualized educational program ("IEP"). For this lapse, Petitioner requests an award of compensatory education.

III. FINDINGS OF FACT

Based on the witnesses' testimony, the documentary evidence presented by the parties, the arguments made by counsel, and my own observations at the due-process hearing, I find:

1. Petitioner is a year old, special-education student who attends School A.
2. Her IEP at the time the complaint was filed, which took effect November 14, 2008, entitled her to 7.5 hours per week of specialized instruction in a general-education setting.
3. Her current IEP, which took effect on March 29, 2009, changed that entitlement to seven hours per week of specialized instruction in a general-education setting, three hours per week of specialized, pull-out instruction, and a half hour per week of behavioral support services.
4. Neither IEP provides for consultation services. They also provide for the exact same goals.
5. Witness Two, Petitioner's special education teacher, admitted under oath that he provided her with specialized instruction in reading and math for only five to five and half hours each week. He stated that the remaining two to two and half hours of specialized instruction she was entitled to be provided by consulting with her general-education teacher. He testified that he did not know because he never asked whether Petitioner's general-education teacher was certified to provide specialized instruction and that he did not monitor whether that teacher implemented the consultative advice he gave.

6. Witness Two further testified that he believed Petitioner was progressing adequately under the IEP, but not mastering the goals provided in it. That is why, he explained, the multidisciplinary team had not changed the goals from Petitioner's previous IEP for her current IEP. He believed that for some unexplained reason in March of 2009, he stopped observing progress by Petitioner.

7. Witness One, Petitioner's educational advocate, testified that during the period the November 14, 2008 IEP controlled, Petitioner missed about 47 hours of specialized instruction because her special-education teacher only provided five to five and half hours of such instruction each week. To compensate for that loss, Witness One recommended thirty hours of one-on-one tutoring.

IV. CONCLUSIONS OF LAW

Petitioner shoulders the burden of proof in this due-process proceeding, *see* 5 DCMR § 3030.3, and must carry it by a preponderance of the evidence. *See* 20 U.S.C. § 1415 (i)(2)(c).

The essential facts are not in dispute. Petitioner's IEP for the majority of this half of the school year called for 7.5 hours of specialized instruction in a general-education setting. Her special-education teacher, Witness Two, admitted that he personally only administered five to five and a half hours of such instruction to her, the rest he provided her by "consulting" with her general-education teacher.

Petitioner's IEP does not provide for such consultation. Respondent did not call to testify Petitioner's general-education teacher to testify about Witness Two's consultation and how she implemented his advice. In addition, Witness Two admitted that he did not know whether the general-education teacher was certified to provide specialized instruction or whether she had implemented the advice he gave her regarding Petitioner. Thus, Respondent failed to rebut

Petitioner's allegation and Witness One's testimony that Petitioner did not receive the 7.5 hours of specialized instruction called for in the November 14, 2008 IEP. I therefore find that Respondent denied Petitioner a FAPE by failing to properly implement her IEP.

The harm to Petitioner can only be divined circumstantially because Petitioner admitted at the hearing that it had no direct evidence. She points to three pieces of circumstantial evidence: (1) the multidisciplinary team increased her total number of weekly specialized instruction from 7.5 hours to 10 hours within four months; (2) the goals listed in the November 2008 and March 2009 IEPs are identical, suggesting that she did not progress during that period of time; and (3) because she did not receive all the specialized instruction the multidisciplinary team felt she needed, she logically could not have progressed.

This evidence more than substantiates a finding that Petitioner was denied educational benefit and must be compensated. Evidently, the multidisciplinary team made a determination that Petitioner needed more special assistance, so it increased her instruction by 2.5 hours and made those two additional hours more intense by administering it in a pull-out setting. Likewise, the repetition of goals from one IEP to another necessarily shows a lack of progress. If Petitioner were progressing as expected, she would have completed the goals and the team would have established new ones. That did not happen. Finally, her special-education teacher admitted that he was not providing the services she needed to meet the goals he drafted. If the team thought she only needed five to five and a half hours of specialized instruction to meet the IEP goals, it could have provided that. Instead, it provided significantly more. It is, thus, not surprising, illogical, or speculative to conclude that, because the team has her repeating the same goals under a more intense IEP, Petitioner probably did not make appropriate progress.

By Witness One's estimation, Petitioner missed 47 hours of specialized instruction and recommends one-on-one tutoring. Because Witness One assumed without substantiation the maximum number of hours of special-education teacher's absence (five and half as opposed to five hours), because one-on-one tutoring would be more intense than the hours Petitioner missed in a full classroom setting, and because Petitioner's current IEP calls for more pull-out instruction, I find that she probably will need half the amount of missed services (23.5 hours) of tutoring in math and reading to compensate her. *See Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (a compensatory-education award must be fact-specific and reasonably calculated to provide the educational benefits that the student likely would have accrued but for the denial of FAPE).

Petitioner prevails on all issues raised in the due-process complaint.

V. **ORDER**

It is this 30th day of June 2009--

ORDERED that Respondent shall pay for 23.5 hours of one-on-one tutoring in math and reading, and it is further

ORDERED that this shall be a FINAL DECISION from which the parties have ninety days from today to file an appeal in a court of competent jurisdiction, and it is further

ORDERED that this matter is closed for all purposes.



Hearing Officer Latif Doman

Copies to: Counsel for the Parties
Student Hearing Office