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STUDENT HEARING OFFICE
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DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

PETITIONER, on behalf of
[CHILD],[1]

Petitioner,

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: May 15, 2011

Hearing Officer: Peter B. Vaden

Case No:

Hearing Date: May 2, 2011

Student Hearing Office, Room 2004
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENT (the "Parent"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, Parent alleges that District of Columbia Public Schools ("DCPS") denied Child a free appropriate public education ("FAPE") by failing to provide, consistently, a dedicated aide and behavior support

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[1] Personal identification information is provided in Appendix A.

services, as specified in Child's IEP, and by failing to provide an appropriate placement. Parent seeks an award of compensatory education.

The student, an AGE child, is a resident of the District of Columbia. She is eligible for special education services under the primary disability Other Health Impairment. The Parent's Due Process Complaint, filed on March 23, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on March 24, 2011. The parties agreed to waive resolution on April 12, 2011. On April 18, 2011, a prehearing telephone conference was held with the Hearing Officer and counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on May 2, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Parent was represented by counsel and testified by telephone. Respondent DCPS was represented by counsel.

At the beginning of the hearing, counsel for Parent advised that the Parent would not seek a change in the Child's placement because Parent intended to move Child's residence to another jurisdiction at the end of the school year. Counsel for DCPS objected that Parent's decision not to seek a change in placement was an unauthorized amendment to her due process complaint. I overruled DCPS's objection, holding that the Parent's election not to seek a change in placement was a choice of remedy, which did constitute an amendment to her due process complaint.

The Parent testified herself, and called EDUCATIONAL ADVOCATE as witness. DCPS called as witnesses SOCIAL WORKER, SPED TEACHER, and SPED COORDINATOR. Parent's Exhibits P-1 through P-26 were admitted into evidence without objection. DCPS's Exhibits R-1 through R-8 were admitted without objection.

At the conclusion of the Parent's case, DCPS made a motion for a directed finding against the Parent on the grounds (1) that Parent had not established the extent to which Child was not provided the dedicated aide services and behavioral support counseling specified in her IEP and (2) Parent's evidence failed to establish that Child's placement was inappropriate. I denied the motion because reasonable inference could be drawn from Parent's evidence that the Child had not received the services specified in her IEP. *See, e.g., Poirier v. Plymouth*, 374 Mass. 206, 212 (Mass. 1978) (Whether anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.)

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

1. Whether DCPS denied Child a FAPE by failing to provide, consistently, a full-time dedicated aide for the 2010-2011 school year;

2. Whether DCPS denied Child a FAPE by failing to provide 1.5 hours per week of Behavioral Support Services during the 2010-2011 school year; and

3. Whether Child's 2010-2011 ELEMENTARY SCHOOL placement was not appropriate to provide FAPE.

Parent's requested relief is that DCPS be ordered to provide compensatory education for the alleged denial of FAPE.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Child is an age resident of the District of Columbia. Testimony of Mother

2. Child has been enrolled in Elementary School since kindergarten. For the 2010-2011 school year she is enrolled in GRADE. Testimony of Parent

3. When the Child started kindergarten at her neighborhood school, she showed hyperactive and aggressive behaviors. Child was referred for special education evaluations and, on November 25, 2008, was determined eligible under the primary disability, Emotional Disturbance ("ED"). Exhibits P-1, P-10

4. The neighborhood school staff informed Parent that the school was unable to accommodate Child and DCPS proposed several alternative placements. After visiting Elementary School, Parent decided it would be the best fit for Child. DCPS transferred Child to Elementary School after the first quarter of her kindergarten year. Testimony of Parent

5. Following a February 4, 2009 eligibility redetermination, Child's primary disability was classified as Developmental Delay. Exhibit R-1 In her most recent IEP, dated February 25, 2011, Child's primary disability is identified as Other Health Impairment ("OHI"). Exhibit R-4

6. Child's January 25, 2010 IEP provided that Child would receive "full-time" special education and related services outside of the General Education setting. She was to receive 25 hours per week of Specialized Instruction, 1.5 hours per week of Behavioral Support Services and 1 hour per week of Occupational Therapy. In addition, the IEP states that Child would be provided the support of a full-time dedicated aide. Exhibit R-1

7. The IEP Team had determined that Child needed regular behavioral support services to address her difficulties in transitions from task to task, her social behavior patterns and "social environmental concerns." Exhibit P-2

8. During the second half of the 2009-2010 school year, Child thrived under the January 25, 2010 IEP. Her problem behaviors decreased greatly. Testimony of Mother

9. At the beginning of the 2010-2011 school year, Child was placed in a different classroom from the year before with a new group of students. Testimony of Mother The current setting is a full-time self contained classroom with a total of 8 students. Testimony of SPED Teacher

10. Academically, this school year, Child is progressing very well in all subjects. Testimony of SPED Teacher

11. For the 2010-2011 school year, the Behavioral Support Services specified in Child's IEP are provided by School Social Worker in the form of individual and group counseling. DCPS Service Tracker logs show that from September 2, 2010 through October 14, 2010, Student received counseling services from Social Worker for up to 60 minutes per week. Beginning the week of October 18, 2010 through the end of the Winter Break, Student did not receive behavioral support services because Social Worker was on medical leave. Exhibit R-6, Testimony of Sped Teacher

12. When Social Worker returned to work after the Winter Break, she increased the frequency of her services to Child. Testimony of Social Worker According to DCPS's Service Tracker logs, Child received 195 minutes of counseling services in January 2011, 330 minutes of services in February 2011 and 300 minutes of services in March 2011. Exhibit R-6

13. Around November 19, 2010, the dedicated aide assigned to Child asked to be reassigned after Child injured her. Testimony of SPED Coordinator There was a process to go through for DCPS to identify a replacement aide and that took some time. Testimony of SPED Coordinator Child now has a replacement dedicated aide, who started in early February 2011.

Testimony of SPED Coordinator Approximately one month before the current aide was assigned, Child has been assigned a male aide. Parent requested that he be replaced with a female aide. Testimony of Mother

14. During the period that Child did not have a dedicated aide, SPED Teacher worked closely with Child herself. Testimony of SPED Teacher There was also another full time aide assigned to the classroom, and other service providers assisted from time to time. Testimony of SPED Coordinator

15. Child's in-school behaviors deteriorated during the current school year. In December 2010, SPED Teacher reported to School Psychologist that Child tends to fight or get easily annoyed with her same-aged classmates. She often shouts or screams to be heard or get her way. She is easily frustrated, annoyed or angered. She kicks and hits adults who try to get her to do things she does not want to do. She refuses to listen to music and attend events where there are crowds, many students and noise. She does not go to the library, drama class, the cafeteria or outside to recess. Exhibit R-8

16. Child's most recent IEP was developed on February 25, 2011. The IEP Team reported that Child's social skills deficits inhibit her ability to interact with peers. Overall, her social emotional functioning currently affects her ability to progress in the general curriculum, as she needs constant instruction in social skills. The IEP Team decided that Child continues to require full time Specialized Instruction outside General Education, 1.5 hours per week of behavioral support services and 1 hour per week of Occupational Therapy. Child also continues to require the full time support of a dedicated aide. Exhibit R-4

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the argument and legal memoranda of counsel, as

well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

DISCUSSION

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Parent in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

1. DID DCPS DENY CHILD A FAPE BY TAKING TOO LONG TO REPLACE HER DEDICATED AIDE?

Child's January 25, 2010 IEP provided that she required the full-time support of a dedicated aide in the classroom. Child's aide for the 2010-2011 school year was reassigned, at the aide's request, after Child injured her around November 19, 2010. A replacement aide, a male, was assigned in January 2011, but Parent requested that he be replaced because she preferred a female aide. DCPS was not able to assign a qualified replacement aide until February 2011. From around November 19, 2010 until early February 2011, except for a short time in January 2011, Child did not have the services of a dedicated aide. Parent contends this was a failure by DCPS to implement Child's IEP.

The IDEA requires states receiving federal funds for education to provide disabled school children with a "free appropriate public education." 20 U.S.C. § 1412(a)(1)(A). A FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Board of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982) (internal quotation marks omitted). Although the IDEA requires an appropriate education, it "does not require a perfect education." *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 328 (4th Cir.

2009). Instead, the child's program must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 525 (D.C. Cir.2005).

The failure to perfectly execute an IEP does not necessarily amount to the denial of FAPE. However, the IDEA is violated when a school district deviates materially from a student's IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."); *accord S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F.Supp.2d 73, 75 (D.D.C.2007). *Ison v. Dist. of Columbia.*, Civil Action 09-02424 (D.D.C. Mar. 18, 2011). The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail on a failure-to-implement claim. Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. *Ison, supra.*

With regard to the approximately eight school weeks interval when Child did not have a dedicated aide, I find there was not a material failure to implement Child's IEP. DCPS did provide a dedicated aide from the time the January 25, 2010 IEP was adopted until the Child's aide was injured in November 2011. After that aide asked to be transferred, DCPS did not delay replacing the aide, but rather the process to identify a qualified aide able to work with Child took some time. When DCPS assigned a male dedicated aide in January 2011, Parent requested that he be replaced by a female and that also lengthened the process. During this entire period, Child

was placed in a full time special education classroom with only seven other students. When there was no dedicated aide available, SPED Teacher worked closely with the Child herself and she was assisted by another full time classroom aide. Under these circumstances, the time it took DCPS to identify a qualified individual to replace Child's dedicated aide was not a material failure to implement Child's IEP. DCPS prevails on this issue.

2. DID DCPS DENY CHILD A FAPE BY FAILING TO PROVIDE 1.5 HOURS PER WEEK OF BEHAVIORAL SUPPORT SERVICES?

Child's January 25, 2010 IEP provided that she would receive 1.5 hours per week of behavioral support services to address her social emotional functioning in the classroom. This was based upon a need reported by the IEP Team that Child's social emotional functioning affected her ability to progress in the general curriculum because she needs constant instruction in social skills. Exhibit R-1, p.4 For the 2010-2011 school year, Child's behavioral support services were furnished by Social Worker, who provided group and individual counseling. Social Worker never provided the 1.5 hours weekly of counseling specified in Child's IEP. During the first weeks of the school year, Social Worker provided, at most, one hour per week of services to Child. From October 18, 2010 through the end of DCPS's Winter Break, Social Worker was on medical leave and Child received no behavioral support services. After the Winter Break, Social Worker provided Child 195 minutes of services in January 2011, 330 minutes of services in February 2011 and 300 minutes of services in March 2011. During the 30 weeks of school from the beginning of the 2010-2011 school year through the end of March, it appears that Child received less than 20 of the 45 hours of counseling prescribed in her IEP.

During this period when DCPS failed to provide the counseling services specified in the IEP, Child's social emotional functioning declined from the previous school year. She showed increased aggression, hitting herself and other students, would refuse to enter the classroom, had

poor class participation, would not attend "Specials" classes and outdoor recess and refused to eat with her peers in the cafeteria. Considering both the proportion of behavioral support services mandated in Child's IEP to those actually provided, and the goal and import, as articulated in the IEP, of those services to Child, I find that DCPS's failure to provide the behavioral support services specified in Child's IEP was a material failure to implement the IEP and, therefore, a denial of FAPE. Parent prevails on this issue.

3. WAS CHILD DENIED A FAPE BY AN INAPPROPRIATE PLACEMENT AT ELEMENTARY SCHOOL?

At the beginning of the 2010-2011 school year, Child was placed in a different classroom from the year before with a new group of students. Like the year before, this was a self-contained classroom, outside the general education setting, with a total of 8 students. However, Parent contends that this was not an appropriate placement for Child because, in Parent's opinion, the other students in this class are more severely disabled than Child. Parent concluded that this setting was "not a good fit" for Child.

The question of whether a public school placement is appropriate rests on "'(1) whether DCPS has complied with IDEA's administrative procedures and (2) whether or not the IEP. . . was reasonably calculated to provide some educational benefit to the student.'" "'A school district must comply with the procedural requirements and safeguards listed in 20 U.S.C. § 1415.'" *JN v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010), *quoting Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C. 2004). In this case, there is no allegation that DCPS committed any procedural violations when it developed the January 25, 2010 IEP or that the IEP was not reasonably calculated to provide the Student education benefit. Once an IEP is developed, the LEA must also ensure that the student is provided an appropriate placement "based on the child's IEP." 34 C.F.R. § 300.116. Here Child was placed in a small

group "full-time therapeutic environment" as specified in the IEP. While Parent's preference for classmates with strengths and abilities similar to those of her child is understandable, the IDEA "guarantees a free appropriate education, [but] it does not . . . provide that this education will be designed according to the parent's desires." *Anderson v. District of Columbia*, 606 F.Supp.2d 86, 93 (D.D.C. 2009) (citations omitted.) Nor is there any requirement for a state to provide services to maximize each child's potential. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 45 (D.D.C. 2006). Here, Parent fails to provide any evidence—other than her own unsubstantiated opinion—that Child's current placement at Elementary School is inappropriate. DCPS prevails on this issue.

REMEDY

In Section 2 above, I found that DCPS violated the IDEA and denied Child a FAPE during the 2010-2011 school year by providing less than half of the behavioral support services specified in Child's January 25, 2010 IEP. The Child is therefore entitled to an award of compensatory education. *Henry v. District of Columbia*, Civil Action No. 09-1626, (D.D.C. November 12, 2010). The D.C. Circuit Court of Appeals set out the standards for an award of compensatory education in *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005): "Under the theory of 'compensatory education,' courts and hearing officers may award 'educational services . . . to be provided prospectively to compensate for a past deficient program.'" *Id.* at 522 (citations omitted). Remedying the deprivation of FAPE "carries a qualitative rather than quantitative focus." *Id.* at 524. "[A]wards compensating past violations [must] rely on individualized assessments." *Id.* "In every case . . ., the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special

education services the school district should have supplied in the first place." *Id.* In addition, "whereas ordinary [IEP's] need only provide 'some benefit,' compensatory awards must do more — they must compensate." *Id.* at 535. When a parent seeks an award of compensatory education for denial of FAPE, the parties must have some opportunity to present evidence regarding the Child's specific educational deficits resulting from her loss of FAPE and the specific compensatory measures needed to best correct those deficits. *Gill v. District of Columbia,* Civil Action No. 09-1608 (D.D.C. March 16, 2011) (citations omitted.)[2]

The Parent's evidence in this case shows that during the current school year, Child suffered from DCPS's persistent failure to provide the hours of behavioral support services specified in her IEP. Child's January 25, 2010 IEP Team had determined that she needed regular behavioral support services to address Child's difficulties in transitions from task to task, her social behavior patterns and "social environmental concerns." DCPS's records show that Child received less than half of the approximately 45 hours of counseling services she should have received through March 31, 2011. For an extended period, from October 18, 2010 through the end of the Winter Break, Child received no counseling services at all. By the end of the 2009-2010 school year, Child had thrived and made good progress under her IEP. This school year, however, Child has regressed socially and behaviorally. She has exhibited increased aggression toward staff, classmates and her dedicated aide. She dislikes being in large groups and dislikes attending "specials" (music, art and media) classes. She refuses to eat with classmates in the school cafeteria or to go outside for recess. These were the types of behaviors that the Child's

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[2] In the Prehearing Order in this case, the parties were put on notice that to establish a basis for a compensatory education award, the Petitioner must be prepared at the hearing to document with exhibits and/or testimony "the correct amount or form of compensatory education necessary to create educational benefit" to enable the hearing officer to project the progress Student might have made, but for the alleged denial of FAPE, and further quantitatively defining an appropriate compensatory education award.

IEP team intended to address with the behavioral support services specified in the January 25, 2010 IEP.

The Parent's evidence of specific compensatory measures needed to correct the deficit of behavioral support services is more problematical. Educational Advocate proposed that Child receive a range of summer services including "sensory integration therapy" conducted by an Occupational Therapist, funding for a summer day camp, and funding for a therapeutic horseback riding program. I discount these recommendations, not only because Educational Advocate was not offered as an expert witness, but also because there was no evidence that these after school services, however valuable they may be, would be reasonably calculated to provide the educational benefits that likely would have accrued if DCPS had provided all of the counseling services specified in Child's IEP. More relevant to the loss of FAPE in this case is a recommendation from DCPS SCHOOL PSYCHOLOGIST in her January 7, 2011 Confidential Psychological Re-Evaluation Addendum. School Psychologist recommends specific small group social activities for Child:

> [Child] continues to benefit from Behavior Support Services to address her social skills development and the frequency of on task behavior. Engage her in social activities with a small number of peers for no longer than 30 minutes due to attentional difficulties. This will allow her to build new social skills and better relationships.

Exhibit P-20, p. 15 I find that supplemental group therapy in this format would be an appropriate compensatory measure to best correct those deficits resulting from DCPS's failure to provide the behavioral support services specified in Child's IEP.

It appears from DCPS's Service Tracker time sheets that this school year, DCPS has provided less than one-half of the 1.5 hours per week of the behavioral support services specified in Child's January 25, 2010 IEP – a shortage of more than 20 hours. In *Reid, supra*, the D.C. Circuit rejected a "mechanical hour-per-hour calculation" for compensatory services. *Id.*, 401

F.3d at 518. When Child's IEP is fully implemented, she should be receiving 1.5 hours per week of individual and group counseling. I find that an appropriate measure to compensate Child for DCPS's denial of FAPE this school year would be for DCPS to provide the child two additional 30 minutes sessions per week of group therapy, in the small group format recommended by School Psychologist. These additional services shall be provided for the remainder of this school year and during Child's 2011 Extended School Year ("ESY") program. DCPS may provide these services using its own staff or a qualified contract service provider.

SUMMARY

In summary, I find that this school year, DCPS denied the Child a FAPE when it provided less than one-half of the behavioral support services specified in the Child's IEP and that Child is entitled to a compensatory education remedy. The gap in dedicated aide services provided to Child was not a material failure to implement Child's IEP. Parent did not meet her burden of proof to establish that Child's placement at Elementary School was not appropriate.

ORDER

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

DCPS is ordered to provide, for the remainder of this school year and during Child's 2011 ESY program, 30 minutes of group therapy, two times per week, as set forth in this determination. These services must be started within 10 school days of the date of this order and shall be provided in addition to the 1.5 hours per week of behavioral support services specified in Child's IEP. All other relief requested by the Parent in her Due Process Complaint is denied.

Date: May 15, 2011

s/ Peter B. Vaden
Peter B. Vaden, 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 U.S.C. §1415(I).