

**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
December 15, 2014

STUDENT, ¹)	Date Issued: 12/14/14
through his Parents,)	
Petitioners,)	
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	
("DCPS"),)	
Respondent.)	
)	
)	
)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioners, parents of Student, filed a due process complaint on 10/6/14 (after a timeline adjustment), alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because DCPS did not fully implement his Individualized Education Program ("IEP"), as there was no special education teacher for Student for Reading and Written Expression for three months and his required accommodations were not provided for an even longer period. DCPS responded that Student was not denied a FAPE as Student made progress and any failure to implement his IEP was *de minimis*.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.") and 38 D.C. Code 2561.02.

¹ Personally identifiable information is provided in Appendix A.

Hearing Officer Determination

Procedural History

Following the initial filing of the due process complaint on 10/3/14, this Hearing Officer was assigned to the case on 10/6/14. Due to delay in receipt of the fax transmission to DCPS, the effective filing date for the complaint was changed to 10/6/14 by an Order on Timeline Change issued on 10/24/14. DCPS filed a timely response to the complaint on 10/14/14 and made no challenge to jurisdiction.

A resolution meeting took place on 10/22/14, but the parties did not settle the case nor agree to end the resolution period early, so the standard 30-day resolution period concluded on 11/5/14. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 12/20/14. A prehearing conference was held on 10/24/14 and a Prehearing Order issued on 10/27/14.

The due process hearing, which was closed to the public, took place on 11/18/14, Counsel declined to discuss settlement at the beginning of the hearing. Father was present for the entire hearing; Mother was present for a majority of the hearing.

Neither party objected to the testimony of witnesses by telephone. The parties made no admissions and agreed on no stipulations.

Petitioner’s Supplemental Disclosure Statement, filed on 11/10/14, consisted of a witness list of 3 witnesses and documents P-1 through P-12. Petitioner’s Supplemental Disclosure Statement and documents were admitted into evidence without objection.

Respondent’s Disclosure statement, filed on 11/5/14, consisted of a witness list of 1 witness and documents R-1 through R-8. Respondent’s Disclosure statement and documents were admitted into evidence without objection.

Petitioner’s counsel presented 3 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. Educational Advocate – qualified over objection as an expert in Specialized Instruction and Services
2. Mother
3. Father

Respondent’s counsel presented 1 witness in its case (*see* Appendix A): Special Education Teacher at Public School (“Teacher”)

Petitioner’s counsel did not present any rebuttal witnesses.

Hearing Officer Determination

The issue to be determined in this Hearing Officer Determination is:

Issue: Whether DCPS denied Student a FAPE by failing to fully implement Student's 11/6/13 IEP when it did not provide Student (a) specialized instruction in reading and writing between April and June 2014, and/or (b) accommodations between November 2013 and June 2014.

Petitioner seeks the following relief:

1. A finding that DCPS denied Student a FAPE;
2. DCPS shall fund compensatory education² for denial of FAPE by failing to fully implement Student's 11/6/13 IEP between November 2013 and June 2014; and
3. Any other just and reasonable relief.

Oral closing arguments were given by counsel for both parties at the end of the due process hearing.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact³ are as follows:

1. Student is a resident of the District of Columbia. Petitioners are Student's parents ("Parents" and individually "Mother" and "Father").⁴

² With regard to the request for compensatory education, Petitioners' counsel was put on notice at the prehearing conference that Petitioners must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was put on notice to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

³ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

Hearing Officer Determination

2. Student is a child with a disability in 7th grade at Public School; he is classified as Other Health Impairment (“OHI”) due to an Attention Deficit Hyperactivity Disorder (“ADHD”).⁵

3. Student’s IEP dated 11/6/13 required special education services within general education of 5 hours/week of Reading, 2.5 hours/week of Written Expression and 5 hours/week of Math.⁶ Student’s IEP also required specified classroom accommodations and testing accommodations, including interpretation of oral directions; markers to maintain place; repetition of directions; and simplification of oral instructions.⁷

4. Student’s cognitive ability is in the Average range, according to his Psychological evaluation in October 2012.⁸ Student’s fluency with academic tasks and his ability to apply academic skills are both within the average range, according to his Educational evaluation in September 2012.⁹

5. Student’s annual goal for Reading was virtually the same in his 11/6/13 and 10/31/14 IEPs.¹⁰ Student’s annual goal for Written Expression was identical in his 11/6/13 and 10/31/14 IEPs, except that the accuracy level in 2014 had been reduced from 80% to 75%.¹¹ While Student was “Progressing” on his annual goals in Reading and Written Expression during the 2013/14 school year (“SY”), he had not “Mastered” any of them, although he did master annual goals in Mathematics.¹²

6. Student has progressed dramatically in written comprehension from 9/17/13 to 9/9/14, although he started from a very low base and remains well below grade level.¹³ Student’s most recent score (on 9/9/14) indicates that his reading comprehension is at a 3rd grade level compared to peers nationwide.¹⁴ Student’s 11/6/13 IEP confirms that Student “is over 3 grade levels of reading behind.”¹⁵

7. Student had a special education teacher for Reading and Written Expression until April 2014, but lacked a special education teacher in Reading and Written Expression from

⁴ Mother.

⁵ P2-1; P3-14; Mother.

⁶ P2-7; Educational Advocate.

⁷ P2-9; Educational Advocate.

⁸ P3-14.

⁹ P4-1.

¹⁰ R1-6; P2-5.

¹¹ R1-7; P2-6.

¹² R2.

¹³ R6-1; Teacher.

¹⁴ R6-2.

¹⁵ P2-4.

Hearing Officer Determination

April to June 2014.¹⁶ Parents did not know that the special education teacher had left until this school year.¹⁷

8. Some of Student's teachers in the 2013/14 SY did not know that he had an IEP, much less what accommodations he was to receive.¹⁸ The science teacher threatened to put Student out of class when he was acting up; the teacher told Father that he didn't know that Student had an IEP or that there were accommodations in his IEP.¹⁹

9. Petitioners are very involved in their son's education; Father is able to stop by Student's school every day or two to check on him and make sure everything is fine.²⁰ Parents hired and personally paid a tutor for Student who worked with him 3 times a week for an hour each time.²¹ Student was doing poorly and feeling bad about himself last school year, with low self-esteem, but this year he is excited about school and is more alert and more focused.²²

10. At the end of the 2013/14 SY Student was going to be retained in 6th grade, but ultimately was allowed to advance to 7th grade as long as he improved academically.²³ Parents were unaware that Student was doing so poorly, so the school's plan to retain him in 6th grade came as a great shock to Parents during the summer of 2014, when they were preparing to enroll him in 7th grade.²⁴ Father had specifically checked with Student's teachers near the end of the 2013/14 SY, to see if Student was doing well enough for Parents to allow him to play football, and was told by his teachers that he was doing fine.²⁵ Parents trusted the school to do what it should and to implement Student's IEP.²⁶

11. Petitioners did not realize until a meeting with the school on 9/28/14 that at least part of the problem may have been that Student was not receiving all of the special education services and accommodations required under his IEP.²⁷

12. The Compensatory Education Proposal submitted by Petitioner calculated that Student missed 107 hours of services.²⁸ That conclusion did not take into account DC-CAS

¹⁶ Educational Advocate; P10-3; P1-1.

¹⁷ Mother.

¹⁸ Educational Advocate.

¹⁹ Father.

²⁰ Mother; Father.

²¹ Mother.

²² *Id.*

²³ Educational Advocate.

²⁴ Mother.

²⁵ Father.

²⁶ *Id.*

²⁷ Mother; Father; Educational Advocate.

²⁸ P10-4; Educational Advocate.

Hearing Officer Determination

testing and Spring Break, when services would not have been delivered to Student, which thus results in some 41 days of missed services in April, May and June 2014.²⁹ Weighing various factors, the Compensatory Education Proposal determined that Student needed about 84% of his missed hours to compensate for the services he did not receive.³⁰

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

"The IEP is the 'centerpiece' of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (3d Cir. 2010), quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and is the primary vehicle for providing a FAPE. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

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). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

²⁹ P8; Teacher.

³⁰ Educational Advocate.

Hearing Officer Determination

“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-E D.C.M.R. § 3030.3. The burden of proof is on the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005).

Issue: *Whether DCPS denied Student a FAPE by failing to fully implement Student’s 11/6/13 IEP when it did not provide Student (a) specialized instruction in reading and writing between April and June 2014, and/or (b) accommodations between November 2013 and June 2014.*

Petitioners met their burden of proof on the single issue in this case. DCPS did not seriously dispute the claim that Student did not receive special education services for Reading and Written Expression as required by his IEP, along with specified accommodations. 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 deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student’s] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013) quoting *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts applying this standard look at the “goal and import” of what was not implemented in the student’s IEP. *Johnson*, 962 F. Supp. 2d at 268, quoting *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). *See also S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 40-41 (D.D.C.2013).

Here, Student did not receive more than half of his special education services for several months, missing 7.5 hours per week while receiving only 5 hours, from April through June 2014. In addition, the uncontroverted evidence is that Student did not receive the accommodations set forth in his IEP from November 2013 through June 2014. Based on applicable case law, *supra*, this Hearing Officer concludes that this clearly amounts to a material deviation from Student’s IEP and a denial of FAPE.

DCPS attempted to justify not fully implementing Student’s IEP by emphasizing how much progress Student made in reading comprehension. This argument has no merit in law or fact. Harm need not be shown to establish a violation of IDEA for failure to implement a student’s IEP. As the court clearly explained in *Turner*, 952 F. Supp. 2d at 40, “a plaintiff does not have to prove a resulting harm caused by the failure to implement” quoting *Wilson*, 770 F. Supp. 2d at 275 (“the materiality standard *does not require that the child suffer demonstrable educational harm* in order to prevail’ on a failure-to-implement claim. *Van Duyn*, 502 F.3d at 822 (emphasis added)).

In any case, it is clear here that there was harm to Student. While it is great that Student is making good progress in reading comprehension, he is still well below grade level and there are other aspects of Reading, including decoding and fluency, in which he may not be progressing rapidly, and he also missed services in Written Expression.

Hearing Officer Determination

Student's IEP annual goals were virtually the same in Reading and Written Expression in his 2013 and 2014 IEPs. Student did better in Mathematics, where he received his special education services and "Mastered" annual goals, than in Reading and Written Expression, where he did not receive services and merely "Progressed" toward his annual goals. Moreover, he was nearly retained in 6th grade, much to the shock of Parents with whom Public School had not adequately been communicating, despite Parents' efforts. Student is doing much better this school year and feeling much better about himself than last year when he was missing services.

Compensatory Education Request

In cases in which a compensatory education award is sought, "the hearing officer first determines whether there is sufficient evidence of an IDEA violation that entitles the student to a compensatory education." *Banks ex rel. D.B. v. Dist. of Columbia*, 720 F. Supp. 2d 83, 90 (D.D.C. 2010) (citation omitted). "If the hearing officer determines there was such a violation, then the hearing officer applies the *Reid* [*ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005)] standard to craft an award." *Id.* Here, Petitioners have established that there has been an IDEA violation that entitles Student to compensatory education.

Compensatory education is designed to place disabled children in the same position they would have occupied but for the violation of IDEA. The proper amount of compensatory education depends on how much more progress a student might have shown if he had received the required special education services, and the type and amount of services that would place the student in the same position he would have occupied but for the LEA's violations of the IDEA. *See Walker v. Dist. of Columbia*, 786 F. Supp. 2d 232, 238-239 (D.D.C. 2011), *citing Reid*, 401 F.3d 516.

The challenge is determining what additional benefits would have accrued if DCPS had provided all required special education services and accommodations to Student. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Here, the Compensatory Education Proposal submitted by Petitioner did not accurately calculate the hours of services missed, as it asserted that Student missed 107 hours of services, failing to take into account DC-CAS testing and Spring Break when services would not have been delivered to Student. But a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Adjusting the Proposal to account for testing and Spring Break results in a total of 41 days of missed services in April, May and June 2014, which at 1.5 hours of missed services per day (7.5 hours per week divided by 5 weekdays), results in 61.5 hours of missed services. Compensatory education should not be mechanically applied hour for hour. Here, this Hearing Officer concludes that the Proposal, adjusted for the actual time Student missed, appears reasonably calculated to provide the educational benefits that likely would

Hearing Officer Determination

have accrued from the special education services and accommodations that DCPS should have provided to Student in the first place. *See Reid*, 401 F.3d at 524; *Gill v. District of Columbia*, 770 F. Supp. 2d 112 at 116-117 (D.D.C. 2011).. Extrapolating from the Proposal's judgment of the proportion of hours that Student needed to make up his missed services and accommodations, which is about 84% (90/107), this Hearing Officer concludes that it is appropriate to award 50 hours to make up for the 61.5 hours of missed services. Those compensatory education hours will be provided through independent tutoring in Reading and Written Expression at a pace to be determined by Parents, with the tutoring to be completed by the end of the school year.

ORDER

Petitioners have met their burden of proof in this case, as set forth above. Accordingly, **it is hereby ordered that** DCPS shall provide a letter of funding within 10 school days for 50 hours of independent tutoring in Reading and Written Expression to be used by the end of the 2014/15 SY in August 2015.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
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).