

**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
May 08, 2015

STUDENT, ¹)	
through her Parent,)	Date Issued: 5/7/15
Petitioner,)	
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	
("DCPS"),)	
Respondent.)	
)	
)	
)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s mother, filed a due process complaint on 2/27/15, 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 chose not to implement Student’s Individualized Education Program (“IEP”) over a period of six months, despite telling Petitioner that they would do so whenever the issue was raised. DCPS responded that it did what was best for Student because her IEP was not appropriate for her, and while it was slow in getting Student’s IEP adjusted, she made good progress and suffered no educational harm.

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.

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Procedural History

Following the filing of the due process complaint on 2/27/15, this Hearing Officer was assigned to the case on 3/2/15. DCPS's timely response to the complaint was filed on 3/4/15. The response did not challenge jurisdiction.

The resolution meeting took place on 3/16/15, at which time the parties did not resolve the case or end the resolution period. The 30-day resolution period ended on 3/29/14. 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 5/13/15.

The due process hearing, which was closed to the public, took place on 4/23/15.

Counsel discussed settlement without success at the beginning of the hearing. Petitioner was present for the entire hearing, except for closing arguments.

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

Petitioner's Disclosure statement, submitted on 4/10/15, consisted of a witness list of five witnesses and documents P1 through P32. Petitioner's Disclosure statement and documents were admitted into evidence without objection. Petitioner also submitted a Supplemental Disclosure statement on 4/16/15 containing one document, which was not admitted into evidence, as Respondent objected to it being submitted after the deadline for Disclosures.

Respondent's Disclosure statement, submitted on 4/15/15, consisted of a witness list of four witnesses and documents R1 through R20. Respondent's Disclosure statement and documents were admitted into evidence without objection.

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

1. Parent
2. Psychologist – qualified without objection as an expert in Clinical Psychology, with a Focus on Evaluations
3. Tutor
4. Student

Respondent's counsel presented two witnesses in Respondent's case (*see* Appendix A):

1. Special Education Teacher in Math

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2. Special Education Teacher in Humanities

Petitioner presented no rebuttal witnesses.

Respondent's Motion re Disclosure of Financial Interest Is Denied: During the cross-examination of Tutor, Respondent moved to strike her testimony in its entirety or, in the alternative, for an order preventing the service provider through which tutor works from being eligible for any compensatory education awarded in this case due to an alleged failure of Petitioner's counsel to disclose a "financial interest" of which counsel was aware "in a non-public provider or service that may be at issue in the due process hearing." 5-E D.C.M.R. § 3029.5; Prehearing Order (3/19/15) at 5. Respondent's oral motion was taken under advisement during the hearing and is hereby DENIED. Petitioner did disclose in her Disclosure statement that Tutor is an independent tutor providing weekly tutoring sessions to Student, which was sufficient to put Respondent on notice of Tutor's financial interest. Indeed, Respondent proposed a stipulation (which was not agreed to by Petitioner) on the amount of tutoring remaining for Student from a previous case, and even entered into evidence as exhibit R9 a check paying Tutor's service provider.

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

Issue: Whether DCPS denied Student a FAPE by failing to provide any hours of specialized instruction out of general education from about 9/15/14 until 3/16/15, even though Student's 8/7/14 IEP required 20 hours per week out of general education and Parent repeatedly objected to DCPS moving Student to an inclusion setting.

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE by DCPS.
2. DCPS shall provide or fund compensatory education² for failing to provide 20 hours per week of specialized instruction outside general education, from about 9/15/14 through 3/16/15.

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

² Petitioner's counsel was put on notice during the Prehearing Conference that Petitioner 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 also encouraged 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.

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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. Petitioner is Student's mother ("Parent").⁴ Student is _____ at Public School, where she began at the beginning of 2014/15.⁵ Student was at Public Charter School in 2013/14.⁶

2. Student is highly-regarded by her teachers at Public School; she is a "model student," who is "driven, well-mannered . . . [and] a pleasure to have in class."⁷ Student is very motivated to do well, and very much wants to learn and improve her deficits.⁸

3. Student has been classified as having a Specific Learning Disability, which was confirmed in a 5/15/14 Comprehensive Psychological Evaluation.⁹ This has resulted in numerous IEPs and HODs since 2011, with extensive attention to the issue of how much specialized instruction she should receive outside general education.¹⁰

4. Student first received an IEP requiring 20 hours per week of specialized instruction outside general education through an HOD dated 6/26/13.¹¹ Public Charter School later sought to eliminate the hours outside general education, which resulted in a due process complaint that was resolved by Public Charter School agreeing to a Consent Decree on 7/18/14 returning Student to 20 hours per week, which was incorporated into the amended IEP dated 8/7/14 which is at issue in this case.¹²

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.

⁴ Parent.

⁵ *Id.*

⁶ Parent; P8; P9.

⁷ R3-9; Special Education Teacher in Math; Special Education Teacher in Humanities.

⁸ Psychologist; Tutor.

⁹ R3; P4.

¹⁰ P1 (6/26/13 HOD); P5 (3/6/12 IEP); P6 (1/16/13 IEP); P7 (5/9/13 Amended IEP); P8 (7/25/13 Amended IEP); P9 (9/27/13 Amended IEP); P10 (5/28/14 IEP); P11 (8/7/14 Amended IEP); P15 (3/24/15 IEP), among others.

¹¹ P1-13.

¹² P10; R7; P11.

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5. Student began Public School with her 8/7/14 IEP requiring 20 hours per week outside general education, which resulted in Student being placed in a self-contained classroom.¹³ Although Student performs at a 3rd grade level in both Math and Reading, she was much more advanced than the other students in the self-contained classroom.¹⁴ Moreover, many in the self-contained classroom have serious behavior problems, which made it an undesirable setting for Student, who does not have serious behavioral problems.¹⁵

6. In the first few weeks of school, it became clear to Student's teacher in the self-contained classroom that Student would do much better in an inclusion setting.¹⁶ This determination was based on observations of Student, talking with Student, and Student's test scores.¹⁷ Without much – if any – consultation with Parent, Student was transferred from her self-contained classroom to an inclusion class some three weeks into the school year, in mid-September 2014.¹⁸ Inclusion was a better fit for Student, and she was reasonably successful and challenged there.¹⁹

7. Despite how far below grade level she is, Student was in the top half of her █ grade inclusion class, due to the low class average.²⁰ When children were pulled out of the inclusion class for specialized instruction, the special education teachers did not feel that Student needed to be pulled out, notwithstanding the requirements of her IEP, as she was generally keeping up with her peers in the inclusion class.²¹ When Student asked to be pulled out of class in mid-January 2015, Special Education Teacher in Math began pulling her out of the inclusion class about once a week, although Student was more successful when not being pulled out.²² Student was receiving special education support inside the inclusion classroom as well.²³

8. Student's 8/7/14 IEP (requiring 20 hours per week outside general education) remained in effect until her new IEP took effect on 3/24/15, which reduced specialized instruction outside general education to five hours per week.²⁴ Parent agreed to this reduction during the RSM on 3/16/15, when it was agreed that Student would be in a self-

¹³ P11; Special Education Teacher in Humanities; Parent.

¹⁴ Special Education Teacher in Humanities.

¹⁵ Special Education Teacher in Humanities; Student.

¹⁶ Special Education Teacher in Humanities.

¹⁷ *Id.*

¹⁸ P20-4,5; Special Education Teacher in Humanities; Parent.

¹⁹ Special Education Teacher in Humanities.

²⁰ R11-1; Special Education Teacher in Math; Psychologist.

²¹ P20-2 (“Teacher feels she is above the students in pull out and doesn’t want to hold her back.”); Special Education Teacher in Math; Special Education Teacher in Humanities.

²² Special Education Teacher in Math; R11-1; P22-1.

²³ Special Education Teacher in Math.

²⁴ R3-1,11 (see “Document Created on” date of 3/24/15; although the “Meeting Date” is listed as 2/19/15, the IEP was modified in the RSM meeting on 3/16/15 and edits subsequently incorporated); R2; P19-22.

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contained (“BOOST”) math class instead of inclusion Math.²⁵ That schedule has been adopted, although Student is unhappy with it because it singles her out as different from other students in the inclusion class.²⁶

9. At the time Student was moved from self-contained to inclusion in mid-September 2014, her teacher thought it would just be a week or two until adjustments to Student’s IEP could be made at the 30-day review.²⁷ Public School proposed that the 30-day review with Parent and her representative be held on 9/24/14, 10/7/14, and 10/9/14, but the meeting did not occur until 10/24/15.²⁸ Public School explained the reasons Student’s teachers believed she would do much better in the inclusion classroom, but failed to gain consensus for an IEP change at the 10/24/14 meeting, so left the existing IEP in place; Public School also left Student in the inclusion setting.²⁹ However, Mother understood that the result of the 10/24/14 meeting was that Student would be returned to the self-contained classroom.³⁰

10. In mid-November 2014, Parent’s representative again notified Public School that Student was not being pulled out as required by her IEP, and asked if the IEP was changed despite Parent’s objection.³¹ No change had been made in the IEP and Public School responded on 11/21/14 that Student did not need a self-contained placement, but that her schedule would be changed, presumably back to self-contained.³² However, Public School requested that Parent or her advocate come to school by 12/4/14 to view the support Student received in the inclusion setting and the support Student would receive in the self-contained setting.³³ That visit apparently did not occur and Student’s schedule was not changed; there is no further record of contact for two months, until Parent’s counsel reinitiated contact on 1/26/15, noting that Student was still not being pulled out.³⁴ Parent became increasingly upset about the Public School teachers overriding Student’s IEP, not returning Student to the self-contained class as they said they would, and not helping Student by implementing her IEP.³⁵ Mother deeply feels that DCPS failed her daughter and that her child was being left behind.³⁶

11. A notable element in the case is that Student had received 250 hours of tutoring in the 7/18/14 Consent Decree, so during 2014/15 she has been receiving up to 10 hours of

²⁵ R11-2; R18-1.

²⁶ R18-1.

²⁷ Special Education Teacher in Humanities.

²⁸ R5; P19-5.

²⁹ R5-1; P19-5.

³⁰ Parent.

³¹ P19-6.

³² P19-8.

³³ *Id.*

³⁴ P19-11; Parent.

³⁵ Parent.

³⁶ *Id.*

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one-on-one tutoring each week.³⁷ As of mid-April 2015, there were only about 20 hours of tutoring remaining.³⁸ Parent is very concerned about how Student will do in her inclusion class once her existing tutoring ends.³⁹ Parent also feels it would be highly inequitable for DCPS to escape responsibility for not providing Student the specialized instruction required by her IEP on the basis that student has progressed due to tutoring she was awarded to make up for previous deficits in Student's education which resulted in her being years below grade level in the first place.⁴⁰

12. Student made some progress during 2014/15, between her inclusion class and her outside tutoring, although this Hearing Officer did not find credible all assertions by Public School of Student's progress.⁴¹ Student's grades dropped a little during 2014/15, but went from mostly As and Bs to Bs with a couple of Ds (in Advisory and Phys. Ed., which Student explained).⁴² Student's IEP Progress Reports reflect that she was progressing in all areas, both academic and Emotional, Social and Behavioral.⁴³

13. Student's frustrations are with Math and not Reading.⁴⁴ While she is behind in all areas, Student exhibits particular challenges in Math and "is far below grade level."⁴⁵ Student needed assistance in Math and was having to seek out the teacher to ask for assistance in class or after class.⁴⁶ Student was reluctant to raise her hand in Math and did so less than once a day in her inclusion class.⁴⁷

14. Student has three sets of i-Ready test scores for 2014/15, comparing her Math abilities to those of her peers:

- a. Test 1, on 9/4/14, placed Student on Level 5 overall; Level 1 on the Number and Operations Domain; and Level 7 on the Algebra and Algebraic Thinking Domain.⁴⁸
- b. Test 2, on 1/8/15, placed Student on Level 3 overall, but Special Education Teacher in Math explained that the entire class dropped on Test 2 for some

³⁷ R7; P19-19; Parent.

³⁸ Tutor.

³⁹ Parent; P19-19.

⁴⁰ Parent.

⁴¹ P20-5; R3-9; Special Education Teacher in Math; Special Education Teacher in Humanities.

⁴² R14; Student; P23; P24.

⁴³ R1; R16.

⁴⁴ Parent; Student.

⁴⁵ R3-3; R11-1.

⁴⁶ R6-8.

⁴⁷ Student.

⁴⁸ P18-1.

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reason.⁴⁹ Student increased to Level 2 on the Number and Operations Domain; and decreased to Level 4 on the Algebra and Algebraic Thinking Domain.⁵⁰

- c. The results of Test 3, on 4/7/15, were too recent to be included in the hearing record, but Special Education Teacher in Math testified that Student returned to Level 5 overall and jumped to Level 7 on Number and Operations Domain.⁵¹

15. Student was generally below the class average in Math, while in English Language Arts she was generally above her class average.⁵² Examples of Student's Math homework and work sheets reveal numerous issues with basic computational skills.⁵³ Psychologist emphasized Student's deficit in Math and proposed tutoring exclusively in Math in her Compensatory Education Proposal.⁵⁴

16. In Reading, Student moved from a low 3rd grade level to mid 3rd grade level over a period of months; Student "enjoys reading and has consistently been reading books on her level."⁵⁵ Student's SRI scores, showing her progress in Reading, had a baseline of 541 on 9/11/14, slipped to 534 on 11/5/14, and then had a big increase to 653 on 2/12/15.⁵⁶ Student was the 3rd most improved student in her inclusion class.⁵⁷ Student's teacher is hopeful that by the end of 2014/15 Student will have increased by 150 points, which would help her begin to catch up.⁵⁸ Student's "Broad Writing domain has a 3rd grade equivalent."⁵⁹

17. The Compensatory Education Proposal for Student recommends 200 hours of academic tutoring in Math, due to the lack of 20 hours per week of pull out for six months.⁶⁰ Psychologist, in developing the proposal, noted that the proposal is not a mechanistic correlation between hours missed and relief required, but took into account that Student was receiving inclusion services during the period of harm.⁶¹ In preparing the proposal, Psychologist reviewed the 2/19/15 draft IEP, rather than the final 3/24/15 IEP, but testified that the difference in hours in the two IEPs had no impact on her conclusions.⁶²

⁴⁹ R12; Special Education Teacher in Math.

⁵⁰ R12.

⁵¹ Special Education Teacher in Math; R16-1.

⁵² R15.

⁵³ P28.

⁵⁴ Psychologist; P29.

⁵⁵ R3-5; P20-3; R13.

⁵⁶ R13.

⁵⁷ P20-3.

⁵⁸ Special Education Teacher in Humanities; P20-3.

⁵⁹ R3-6.

⁶⁰ P29; Psychologist.

⁶¹ P29-3.

⁶² Psychologist. Psychologist also was off by two years on Student's age in her Comprehensive Psychological Evaluation, which she reviewed for the proposal. P4-1.

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Psychologist credibly testified that Student would have progressed further if she had received pull out hours and appropriate specialized instruction as required by her IEP.⁶³

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).

To provide a FAPE, once a child who may need special education services is identified, DCPS is obligated to conduct an initial evaluation and make an eligibility determination within 120 days. D.C. Code § 38-2561.02(a). If the child is found eligible, DCPS must then devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

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. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] 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).

In addition, DCPS must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that

⁶³ P29-3; Psychologist.

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education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114.

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.

“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 ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue: Whether DCPS denied Student a FAPE by failing to provide any hours of specialized instruction out of general education from about 9/15/14 until 3/16/15, even though Student's 8/7/14 IEP required 20 hours per week out of general education and Parent repeatedly objected to DCPS moving Student to an inclusion setting.

Petitioner met her burden of proof on this issue. There is no dispute that Student's IEP required 20 hours per week of specialized instruction out of general education, and that DCPS neither provided those hours nor amended her IEP for approximately six months in 2014/15. Moreover, there can be no serious dispute that this was a material deviation from Student's IEP, for good intentions and efforts to do what her teachers thought best for Student are not sufficient excuses.

Quite simply, 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, DCPS acknowledged that it pulled Student from her self-contained setting just a few weeks into the new 2014/15 school year because it was not a good fit for Student, but failed to modify Student's IEP until March 2015. Parent repeatedly objected to Student not receiving the services in her IEP, and Public School gave her the impression that Student

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would be returned to the self-contained classroom or otherwise provided the pull-out hours on her IEP, which Parent believed were critical to Student's progress.

Student's special education teachers had a very different view than Parent of what Student needed, from the perspective of working closely with both Student and others in her classes. But even if Student's teachers were correct about the best setting for Student, they cannot unilaterally override her IEP; any such change needed to be incorporated into Student's IEP through appropriate processes, as DCPS well knows. *See, e.g.*, 34 C.F.R. 300.324(a)(6), 300.322. Nor does Parent have unilateral power over Student's IEP, *see, e.g., Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010) (right conferred by the IDEA on parents to participate does not constitute a veto power over the IEP team's decisions), but she certainly has the right to know – and not be misled about – what setting her child is in, the right to participate in decisions about her child's IEP, and the right to challenge those decisions if she does not agree with them. *See* 34 C.F.R. 300.116(a)(1), 300.322, 300.324(a)(ii), 300.501(c), 300.507(a).

Moreover, the decision by Student's teachers was not merely a choice between a self-contained classroom and an inclusion classroom. While in the inclusion setting, Student was not even pulled out regularly by the special education teachers, even though other children were. DCPS asserts that Student was doing fine in her inclusion class and did not need to be pulled out with other children who would hold Student back. But Student's IEP required specialized instruction outside general education. It is no answer to say that Student did not fit well into the existing small groups offered by Public School, for the point of Student's IEP is to have Public School provide specialized instruction that fit Student's unique needs. This Hearing Officer is persuaded that Student would have benefited from such specialized instruction in Math, where she particularly struggled.

The IDEA and its regulations establish the process for developing and implementing an IEP, and carefully define the composition of the IEP Team to ensure that the particular needs of Student are considered and incorporated into her IEP, all the while ensuring adequate parental participation. 34 C.F.R. 300.116, 300.324, 300.323, 300.322, 300.321. A school may not change Student's IEP, formally or informally, without prior notice to Parent and an opportunity for Parent to discuss any proposed changes with the public agency. *See* Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46685 (August 14, 2006). Here DCPS did not change Student's IEP, but knowingly failed to implement it, albeit with good intentions. Even if this were viewed as only a procedural violation, there can be no doubt that it “[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child,” which is sufficient for a denial of FAPE. 34 C.F.R. 300.513(a).

DCPS cannot simply override the IEP developed by the Team and keep Parent out of the decision-making process – or even worse, mislead her. This is not a case of Public School missing a few minutes of services here or there, which might be excused as a “minor discrepancy,” *Van Duyn*, 502 F.3d at 822, but was a failure for some six months to provide

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the services called for by Student's IEP or to modify her IEP to reflect the services that Student required, which this Hearing Officer concludes was a denial of FAPE.

Compensatory Education Request

The remaining question is whether – or the extent to which – this material deviation from Student's IEP caused her harm, and how to remedy any such harm. Petitioner seeks an award of compensatory education to compensate for DCPS's denial of FAPE in 2014/15. Compensatory education is educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA. The proper amount of compensatory education, if any, depends upon how much more progress a student might have shown if she had received the required special education services, and the type and amount of services that would place the student in the same position she 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 ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

The challenge of determining what additional educational benefits would have accrued, if DCPS had provided Student specialized instruction outside general education for six months in 2014/15, does not permit the effort to be avoided. *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). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *See Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, it is clear that Student's primary need for specialized instruction out of general education was in Math, which was one of three areas to be covered (along with Reading and Written Expression) by the 20 hours per week on her 8/7/14 IEP. This is generally confirmed by the March 2015 IEP which provides (with Parent's agreement) that Math is the only subject in which Student will be pulled out, at a rate of five hours per week. This suggests that Student missed approximately 125 to 175 hours of specialized instruction during the six-month period from mid-September to mid-March 2015, which is not mechanically applied herein to reach an award, but provides a helpful frame. This Hearing Officer concludes that Student was making some progress in her inclusion setting during the time Student was not pulled out for specialized instruction, but did not make as much progress as she would have with appropriate specialized instruction. Student's i-Ready scores showed that her overall ranking in both September 2014 and April 2015 were at Level 5, which should have improved with additional specialized instruction. Looking at the domains, Student increased greatly in one domain (Numbers and Operations) over the year, but decreased notably in another (Algebra and Algebraic Thinking) from one test to another, showing the need for additional tutoring in Math.

In making an award, this Hearing Officer is also considering other relevant factors, including the greater benefit of one-on-one tutoring compared to small group pull-out from the classroom, and the fact that Student received some benefit in the inclusion classroom.

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However, the impact of the outside tutoring that Student received during 2014/15 is not being considered to reduce the number of hours awarded herein. Based on the considerations set forth, the testimony of the witnesses, including Student, the Compensatory Education Proposal and testimony of Psychologist, and other documents submitted into evidence, in an exercise of his broad discretion and with consideration of the equities, this Hearing Officer concludes that 90 hours of one-on-one academic tutoring is appropriate to restore Student to the level she should have achieved but for the denial of FAPE. While the focus is on what Student missed in Math, the tutoring awarded may address whatever academic area is most needed by Student at the time she receives the tutoring. Further, such tutoring shall continue with Tutor, if available, who has been working with Student since September 2014.

ORDER

Petitioner has met her burden of proof as set forth above. Accordingly, **it is hereby ordered that:**

- (1) DCPS shall provide a letter of funding within 10 business days for independent compensatory education consisting of 90 hours of one-on-one tutoring in academic subjects. Such tutoring shall continue with Tutor, if possible.
- (2) Any and all other claims and requests for relief are **dismissed with prejudice.**

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).