DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONERS, on behalf of [STUDENT],[1]	Date Issued: July 30, 2011
Petitioner,	Hearing Officer: Peter B. Vaden
v	Case No:
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	Hearing Date: July 20, 2011
Respondent.	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 the FOSTER PARENTS (the "Petitioners"), 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 their Due Process Complaint, the Petitioners allege that DCPS failed to fully implement Student's May 21, 2010 Individualized Education Program ("IEP") (i) by not properly utilizing the READ 180 reading program, (ii) by providing less than the specified 25 hours per week of specialized instruction

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

and less than the specified 60 minutes per week of physical therapy and (iii) by not providing a dedicated aide for Student.

Student, an AGE adolescent, is a ward of the District of Columbia and resides with Petitioners in Maryland. She is eligible for special education services under the primary disability, Multiple Disabilities ("MD"). The Petitioners' Due Process Complaint, filed on May 18, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on May 20, 2011. The parties met for a resolution session on June 21, 2011 and agreed that no agreement was possible. On June 22, 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 45-day timeline for issuance of this HOD started on June 22, 2011.

The due process hearing was held before the undersigned Impartial Hearing Officer on July 20, 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 Petitioners appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioners called as witnesses FOSTER MOTHER, TUTOR, EDUCATIONAL ADVOCATE and PRIVATE SCHOOL DIRECTOR. DCPS called as witness SPED COORDINATOR. Petitioners' Exhibits P-1 through P-18 were admitted into evidence without objection. DCPS's Exhibits R-1 through R-11 were admitted without objection. DCPS Exhibit R-12 was admitted over Petitioners' objection.

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

Whether DCPS failed to fully implement Student's May 21, 2010 IEP and denied Student a free appropriate public education ("FAPE") (i) by not properly utilizing the READ 180 reading program, (ii) by providing less than the specified 25 hours per week of specialized instruction and 60 minutes per week of physical therapy ("PT") and (iii) by not providing a dedicated aide for Student.

Petitioners request that DCPS be ordered to place Student at Private School as compensatory education relief.

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. Student is an Age ward of the District of Columbia. She resides with Petitioners, her foster parents, in Lanham, Maryland. Testimony of Petitioners.

2. Six years ago, Student was diagnosed with osteosarcoma (cancer in her right leg). Due to her illness and treatment, Student missed the majority of her school year and fell behind her peers in school work. Exhibit P-13.

3. At a DCPS multi-disciplinary team ("MDT") meeting in September 2006, Student was determined eligible for special education services under the classification Other Health Impaired ("OHI"). Exhibit R-2.

4. In a Report of Psychological Evaluation dated January 14, 2009, the DCPS school psychologist reported, based upon her review of Student's school records, her own evaluation and other data, that the data suggested the presence of a learning disability. Exhibit R-1.

5. On February 9, 2009, Student's MDT team determined Student was eligible for special education and related services under the Primary Disability, Multiple Disabilities. Exhibit R-5.

6. In a Comprehensive Psychological Evaluation report dated March 19, 2010, the examiner found that a diagnosis of a Learning Disability in the area of Reading was appropriate for Student, because her reading skills and spelling (phonetic skills) showed significant weaknesses. Exhibit P-13.

7. Since the 2008-2009 school year, Student has attended DISTRICT SCHOOL, a DCPS public school serving exclusively students with special education needs. Testimony of SPED Coordinator.

8. Student's IEP team at District School convened on May 21, 2010 to review and revise Student's IEP. The IEP team agreed that Student would receive 25 hours per week of specialized instruction outside general education and, *inter alia*, 60 minutes per week of PT as a Related Service. The IEP team also determined that Student required the full time support of a dedicated aide through June 18, 2010. Exhibit R-5.

9. At the May 21, 2010 IEP meeting, Foster Mother and Student's attorney expressed concern about Student's being involved in a research-based reading program. District School PRINCIPAL stated that Student would be enrolled in the READ 180 reading program for the 2010-2011 school year.

10. During the 2010-2011 school year, Student's daily school schedule at District School ran from 7:15 a.m. to 2:15 p.m. All in-school time, except for one hour for lunch was instruction time. Testimony of SPED Coordinator. All instruction at District School is provided outside of general education.

11. At District School, Student received physical therapy from PT PROVIDER. PT Provider's Service Tracker logs show that Student received PT for 60 minutes per week for most weeks during the school year, except when school was closed or Student was not available. Exhibit R-12. Testimony of SPED Coordinator.

12. AIDE was assigned to Student as a dedicated aide for the 2010-2011 school year. Testimony of SPED Coordinator. However, AIDE was not consistently present to attend to Student on a 1:1 basis. Testimony of Educational Advocate. During three observations by Educational Advocate in fall 2010 and spring 2011, the dedicated aide was absent from the classroom or not directly assisting Student.

13. At the May 21, 2010 IEP meeting, District School PRINCIPAL stated that Student would be enrolled in the READ 180 reading program beginning May 24, 2010 and continuing for the 2010-2011 school year. Exhibit R-10. The vendors of the READ 180 program recommend that the program be implemented 90 minutes per day over125 instruction days. Exhibit P-9. During the 2010-2011 school year, READ 180 was implemented for Student for 30 to 45 minutes per day. Testimony of Educational Advocate. District School also used the Wilson reading program. Testimony of SPED Coordinator.

14. READ 180 computer testing showed growth by Student through the 2010-2011 school year. Student made substantial progress on READ 180 in May 2011. Testimony of Educational Advocate.

CONCLUSIONS OF LAW

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

DISCUSSION

Petitioners contend that DCPS failed to fully implement Student's May 21, 2010 IEP[2] and denied her a free appropriate public education ("FAPE") by (i) not properly utilizing the READ 180 reading program, (ii) by providing less than the specified 25 hours per week of specialized instruction and less than 60 minutes per week of physical therapy and (iii) by not providing a dedicated aide for Student. The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioners 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). In this case, DCPS initially conceded that it had not provided a dedicated aide for Student. This concession was recited in the Prehearing Order. One week before the due process hearing date, DCPS withdrew its concession. Petitioners moved for an order to preclude DCPS from introducing evidence that Student had been provided a dedicated aide, on the grounds that Petitioners had relied upon DCPS's concession. I denied Petitioners' motion, subject to shifting to DCPS the burden of proof on whether Student was provided a dedicated aide. *See* Decision and Order on Motion in Limine, July 19, 2011. Accordingly, the burden of proof is on DCPS to establish that Student was provided a dedicated aide pursuant to the May 21, 2010 IEP.

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[2] Petitioners do not challenge the appropriateness of the May 21, 2010 IEP.

1. DID DCPS DENY STUDENT A FAPE BY NOT PROPERLY IMPLEMENTING THE READ 180 PROGRAM?

At the May 21, 2010 IEP team meeting, Foster Mother and Student's attorney expressed concern about Student's being involved in a research-based reading program. District School principal stated that Student would be enrolled in the READ 180 reading program for the 2010-2011 school year. Although District School did use the READ 180 program for Student, the school did not adhere to the intense 90 minute per day schedule recommended by the READ 180 vendors. Petitioners contend that District School's failure to follow the instruction schedule recommended by the READ 180 vendors constituted a failure to implement Student's IEP.

In *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007), U.S. District Judge Kennedy followed the standard for failure-to-implement claims articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 348-49 (5th Cir.2000). In *Bobby R.*, the court wrote:

> [T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. *Bobby R.*, 200 F.3d at 349. Thus, a court reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material."

Catalan, supra at 75.

With regard to the READ 180 program, Petitioners have not shown that DCPS failed to implement substantial or significant provisions of Student's May 21, 2010 IEP. The IEP does not require the use of READ 180. It specifies that a "Reading Program e.g. Read 180" will be an

accommodation for Student for the duration of the IEP. Exhibit R-5, p. 12. The evidence at the hearing established that District School used the READ-180 program for the entire 2010-2011 school year for Student, as well as the Wilson reading program. Moreover, even if District School Principal's commitment to use the READ 180 program, made at the May 21, 2010 IEP team meeting, were deemed to be an unwritten element of the IEP, Petitioners' evidence does not establish a failure to implement. It establishes only that the program was implemented for Student for 30 to 45 minutes per day, for the entire 2010-2011 school year -- instead of for 90 minutes per day over 125 instruction days as recommended by the vendors. I find that a failure to follow the READ-180 vendors' recommended schedule was not a material deviation from Student's IEP. DCPS prevails on this issue.

2. DID DCPS DENY STUDENT A FAPE BY NOT PROVIDING THE 25 HOURS PER WEEK OF SPECIALIZED INSTRUCTION AND 60 MINUTES PER WEEK OF PHYSICAL THERAPY SPECIFIED IN THE MAY 21, 2010 IEP?

Student's May 21, 2010 IEP specified that she was to receive, *inter alia*, 25 hours per week of specialized instruction and 60 minutes per week of PT. Petitioners argue that Student's 2010-2011 class schedule provided less than 25 hours per week of specialized instruction. In their school-time breakdown, Petitioners exclude non-course specific hours, such as homeroom, from specialized instruction time. I believe that Petitioners' analysis is misguided. Specialized instruction means adapting, as appropriate to the needs of an eligible child the content, methodology, or delivery of instruction—

> (i) To address the unique needs of the child that result from the child's disability; and
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> (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 CFR § 300.39(b)(3) (Definition of "Specially designed instruction".) Petitioners offered no evidence that instruction at District School, which provides a full-time special education program and serves only special education students, was not adapted to address the needs of Student that result from her disability – whether the instruction was provided in core academic subjects, electives or homeroom. At District School, 25 hours per week is a full time program. The school operates on a 7 hour per day schedule, which includes one-half hour for breakfast and one hour for lunch. Even excluding breakfast and lunch time, Student was still offered over 5 hours per day (25 hours per week) of specialized instruction. DCPS prevails on this issue.

Petitioners also claim, based upon the Student's classroom schedule sheet, that she only received 30 minute per week of PT instead of the 60 minutes specified in her IEP. While Student's schedule does only indicate 30 minutes of PT per week, the PT Provider's records show Student received 60 minutes per week of PT for most weeks. SPED Coordinator confirmed that Student received the IEP-specified PT services. The Petitioners fail to meet their burden of proof of this issue.

3. DID DCPS FAIL TO IMPLEMENT THE MAY 21, 2010 IEP BY NOT PROVIDING A FULL-TIME DEDICATED AIDE FOR STUDENT?

Petitioners allege that the May 21, 2010 IEP provides that Student would have a dedicated aide. However, the May 21, 2010 IEP team meeting notes do not mention the provision of a dedicated aide and the IEP provided that Student would have full-time dedicated aide support only through June 18, 2010. Notwithstanding, the evidence in this case establishes that DCPS did provide a dedicated aide for Student for the 2010-2011 school year. Educational Advocate testified, based upon her own in-class observations in fall 2010 and spring 2011 and upon admissions of District School staff, that the aide was frequently absent from the classroom and not regularly assisting Student on a 1:1 basis. However, because the May 21, 2010 IEP did

not require DCPS to provide a dedicated aide for Student after June 18, 2010, I find that DCPS's alleged failure to ensure that the dedicated aide continually attended to Student during the 2010-2011 school year was not a material deviation from the May 21, 2010 IEP.[3] DCPS prevails on this issue.

SUMMARY

In summary, I find that Petitioners have not met their burden of proof to establish that DCPS deviated in a material way from the requirements for a reading program and the provision of specialized instruction hours and PT hours specified in the May 21, 2010 IEP. DCPS has established that it provided dedicated aide support to the extent required by the IEP. Because Petitioners have not established a denial of FAPE to Student, there is no basis on which to award Student compensatory education or other relief.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED: All relief requested by the Petitioners in their Due Process Complaint is denied.

Date: July 30, 2011

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

[3] In its April 26, 2011 justification for a dedicated aide, Student's IEP team reported that Student could manage in the classroom without the intervention of a dedicated aide. However, based upon the strong recommendation of Educational Advocate, the IEP Team decided to provide Student a full time dedicated aide from April 26, 2011 through April 25, 2012. *See* Exhibit R-6.

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).