

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

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Office of Dispute Resolution
August 28, 2015

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| PETITIONERS, on behalf of STUDENT, ¹ |) | Date Issued: August 28, 2015 |
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| Petitioners, |) | Hearing Officer: Peter B. Vaden |
| |) | |
| v. |) | Case No: 2015-0208 |
| |) | |
| DISTRICT OF COLUMBIA PUBLIC SCHOOLS, |) | Hearing Date: August 20, 2015 |
| |) | |
| Respondent. |) | Office of Dispute Resolution, Room 2006 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 Petitioners (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, Petitioners allege that respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by offering an inappropriate Individualized Education Plan (IEP) and educational placement in June 2015 and by not fully implementing Student’s January 20, 2015 IEP.

Student, an AGE youth, is a resident of the District of Columbia. Petitioners’ Due Process Complaint, filed on June 19, 2015, named DCPS as respondent. The

¹ Personal identification information is provided in Appendix A.

undersigned Hearing Officer was appointed on June 23, 2015. The parties met for a resolution session on July 6, 2015, but did not reach an agreement. The 45-day period for issuance of this Hearing Officer Determination began on July 20, 2015. On July 21, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer on August 20, 2015 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner FATHER appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Father testified and called as witnesses MARYLAND SCHOOL PSYCHOLOGIST, EDUCATIONAL ADVOCATE, and NONPUBLIC SCHOOL DIRECTOR. DCPS called as witnesses SPECIAL EDUCATION TEACHER and ASSISTANT PRINCIPAL. Petitioners' Exhibits P-1 through P-9 and P-11 through 29 were admitted into the evidence without objection, with the exception of Exhibits P-12 and P-18 which were withdrawn. DCPS' objection to Exhibit P-10 was sustained except as to page P-10-6, which was admitted over DCPS' objection. DCPS' Exhibits R-1 through R-14 were admitted into evidence without objection. Counsel for the respective parties made opening statements and closing arguments.

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

The following issues for determination were certified in the July 21, 2015

Prehearing Order:

- Whether Student was denied a FAPE by DCPS' June 3, 2015 IEP, which reduced the IEP specialized instruction services to 19.5 hours per week, and/or failed to provide sufficient hours of specialized instruction outside the general education setting;
- Whether DCPS failed to develop an appropriate IEP for Student on June 3, 2015, when it failed to provide Student a placement in a separate special education therapeutic day school;
- Whether CITY HIGH SCHOOL 3 is an inappropriate placement/location of services for Student because it lacks the programming in place to implement Student's IEP and to meet Student's IEP needs;
- Whether DCPS failed to include the parent as a meaningful participant in its decision to identify CITY HIGH SCHOOL 3 as Student's proposed placement/location of services; and
- Whether DCPS failed to implement Student's January 20, 2015 Individualized Education Program during the 2014-2015 school year by not providing the requisite hours of specialized instruction outside the general education setting.

For relief, Petitioners request that the Hearing Officer order DCPS to develop an appropriate revised IEP for Student and to fund Student's placement at Nonpublic School. In addition, Petitioners seek an award of compensatory education for the denials of FAPE alleged in their complaint.

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 resident of the District of Columbia. Testimony of Father. Student is eligible for special education and related services under the primary disability classification Multiple Disabilities (MD), based upon his underlying

impairments Specific Learning Disability (SLD) and Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD). Exhibit P-8. At the end of the 2014-2015 school year, Student was enrolled in GRADE at CITY HIGH SCHOOL 3.

2. Student was reportedly diagnosed with a learning disorder and provided with an initial IEP when he was in third grade. Exhibit P-16.

3. A DCPS school psychologist conducted a comprehensive psychological reevaluation of Student in spring 2014. On the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV), Student received a Full Scale IQ score of 81 in the Low Average range. For academic functioning, Student's Standard Scores on the Wechsler Individual Achievement Test - Third Edition (WIAT-III) were Low Average (69) for Basic Reading, Low (67) for Written Expression, Below Average (79) for Mathematics, Below Average (81) for Math Fluency and Below Average (70) for Total Reading. Student's reading level, assessed with the Scholastic Reading Inventory (SRI), was at a 1st grade level. On the Connors 3 assessment for ADHD and related disorders, ratings scales responses from Student, a teaching assistant and Mother, indicated that Student ranked in the Very Elevated or Elevated range for Inattention, Learning Problems/Executive Function, Hyperactivity/Impulsivity and Aggression/Defiance. Exhibit P-14.

4. For the 2013-2014 school year, Student was enrolled at City High School 1. Student's March 26, 2014 IEP at City High School 1 provided 15 hours per week of Specialized Instruction, all outside general education, divided among Reading, Written Expression and Mathematics. The IEP also provided 240 minutes per month of Behavioral Support Services and 60 minutes per month of Occupational Therapy (OT) services. Exhibit P-9. At the beginning of the 2013-2014 second semester, Student was

placed in a self-contained classroom setting at City High School 1. He reported not liking this environment. At City High School 1, Student received numerous off-site and in-school suspensions for offenses including obscene and abusive language, vandalism, being disruptive, leaving school without permission, fighting and making threats. He was marked “not present” for some 40 school days and accrued 105 unexcused absences. DCPS conducted a functional behavioral assessment (FBA) of Student in spring 2014. Exhibit P-15.

5. Student transferred to City High School 2 for the 2014-2015 school year. At the end of the first term, he received D’s and F’s in all of his classes and had numerous unexcused absences. Exhibits P-19 and P-20.

6. On December 24, 2014, the Petitioners filed a prior due process complaint concerning Student (Case No. 2014-0529). A resolution meeting was held on January 16, 2015. At that meeting, there was a consensus to increase Student’s IEP Specialized Instruction Services from 15 hours per week to full time, 27.5 hours, per week. Exhibit R-1.

7. On January 20, 2015, Student’s IEP was revised to increase his Specialized Instruction Services to full-time, 27.5 hours per week, outside general education. Exhibit P-8.

8. By letter of February 20, 2015, DCPS notified the parents that Student’s new location of services for special education would be City High School 3, which “has the programming in place to meet [Student’s] IEP needs.” Exhibit R-4.

9. The prior due process complaint was resolved with a settlement agreement executed on February 25, 2015 (the February 25, 2015 Settlement Agreement). As part of the settlement, the parties agreed that DCPS would convene a 30 day review meeting

“at the new location of service” and that, as compensatory education, DCPS would fund 100 hours of independent tutoring and 100 hours of independent behavior support for Student. Exhibits R-4, R-5, R-6, R-7. At the request of the Petitioners, the December 24, 2014 due process complaint was dismissed with prejudice. Exhibit R-7.

10. On March 3, 2015, DCPS issued an authorization letter to Petitioner MOTHER to authorize her to obtain, as compensatory education services for Student, 100 hours of independent tutoring and 100 hours of independent counseling. The deadline for completion of the authorized services was December 31, 2015. Exhibit R-6. As of the due process hearing date in the present case, Student had used 4.5 hours of the authorized independent tutoring and none of the counseling services. Exhibit R-14.

11. On approximately April 13, 2015, Student transferred to City High School 3. Testimony of Assistant Principal. At City High School 3, Student was placed in a Behavior and Education Support (BES) self-contained classroom taught by Special Education Teacher. In the BES classroom there were eight students served by three adults, including Special Education Teacher, an instructional aide and a behavior technician. The class day was divided into four class periods. For third period, one 80-minute period per day, Student went to the Junior ROTC program in a general education setting with nondisabled students. Typically Student would fail to return to his BES classroom after the 3rd period ROTC class. As a result, he would miss his 4th period math class. Student was also usually late arriving in the morning. School started at 8:45 a.m., but Student typically arrived around 10:00 a.m. For the weeks that Student attended City High 3, his attendance was very spotty. In April 2015, he attended two or three days. In May, his attendance averaged two days a week. His attendance improved as the school year progressed, but was still a hindrance to his

progress. Student did not attend enough class time between April 2015 and the end of the school year to give him a grade. Testimony of Special Education Teacher.

12. Student's behavior at City High School 3 was a problem. He would get up and walk around the classroom or walk out. He was off-focus, disrespectful and would use cursing language. Testimony of Special Education Teacher.

13. In the BES program at City High School 3, Student was offered 20 hours per week of Specialized Instruction Services. For some 400 minutes per week, he was placed in the general education ROTC program. Testimony of Special Education Teacher.

14. On June 3, 2015, an IEP team meeting was convened for Student at City High School 2. The purpose of the meeting was, *inter alia*, to conduct a 30-day review. Educational Advocate attended the meeting and Father participated by telephone. Special Education Teacher reported that when Student initially arrived in class, he would work well for 12-15 minutes, but from then on would be disruptive. Special Education Teacher reported that because of the distractions Student caused, his coming to class was not beneficial to him. Social Worker reported that she had only been able to provide Behavioral Support Services to Student on four occasions. The other days, he had been absent. The DCPS representative stated that no revisions would be made to Student's IEP at the meeting because he had not attended school on a consistent basis. Exhibit P-7. A draft IEP (Exhibit P-6) was distributed at the meeting, but it was not finalized. Testimony of Assistant Principal, Exhibit P-7.

15. For the 2015-2016 school year, City High School 3 will have a restructured BES program. All classes will be provided on the third floor of the school building and BES students will have no classes with nondisabled peers. A foreign language class

(Chinese) will be provided via computer streaming. Each student will be provided a laptop computer for the class and will be assisted by the classroom teacher who is fluent in Chinese. Testimony of Assistant Principal.

16. Nonpublic School is a private secondary school in suburban Maryland, able to service students with ADHD, emotional disabilities and learning disabilities. There are some 27 students enrolled in the school with no more than 7 students per classroom. The classrooms are staffed with a special education teacher and a paraprofessional. Behavior specialists and therapists are available as needed. Student has been accepted by Nonpublic School for the 2015-2016 school year. Nonpublic School holds a current Certificate of Approval issued by the D.C. Office of the State Superintendent of Education (OSSE). The tuition cost is approximately \$76,000 per year.

CONCLUSIONS OF LAW

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

BURDEN OF PROOF

The burden of proof in a due process hearing is 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).

ANALYSIS

A.

- Was Student denied a FAPE by DCPS' June 3, 2015 IEP, which allegedly reduced Student's IEP specialized instruction services to 19.5 hours per week, and/or failed to provide sufficient hours of specialized instruction outside the general education setting?
- Did DCPS fail to develop an appropriate IEP for Student on June 3, 2015, when it failed to provide Student a placement in a separate special education therapeutic day school?
- Did DCPS fail to include the parents as meaningful participants in its decision to identify City High School 3 as Student's proposed placement/location of services?

Alleged June 3, 2015 IEP

The first set of issues raised by the Petitioners concerns the adequacy of the special education and related services provided in Student's IEP and the appropriateness of Student's educational placement at City High School 3. The premise of Petitioners' claims, that Student's IEP was revised at a June 3, 2015 IEP meeting is grounded on a misunderstanding – that Student's January 20, 2015 IEP was actually changed at the June 3, 2015 IEP meeting. Based upon the evidence at the due process hearing, I have found that a draft revised IEP was distributed at the June 3, 2015 IEP team meeting. However, the IEP team decided that due to the limited time that Student had actually attended City High School 3 after he transferred in mid-April 2015, the IEP team would defer revising his IEP. This decision, which was testified to by Assistant Principal, is also reported in Educational Advocate's meeting notes. Therefore, Student's May 5, 2014 IEP, as amended on January 20, 2015, remains Student's current IEP. That IEP provides, *inter alia*, that Student will receive full-time, 27.5 hours per week, Specialized Instruction services outside general education. DCPS' Counsel

represented at the due process hearing that DCPS agrees that Student continues to require 27.5 hours of Specialized Instruction services in his IEP. Consequently, the Petitioners' first claim, that DCPS denied Student a FAPE by reducing his Specialized Instruction services in a June 3, 2015 IEP, is not established.

Participation in Placement Decision

The parents allege that DCPS failed to comply with the IDEA's procedural requirements by not allowing them to participate in the February 2015 decision to place Student at City High School 3. The IDEA requires parental involvement regarding any decisions "on the educational placement of their child." *See Aikens v. District of Columbia*, 950 F.Supp.2d 186, 190 (D.D.C. 2013) (citing 20 U.S.C. § 1414(e); 34 CFR §§ 300.116(a)(1), 300.327). Conduct by the District that seriously infringes upon a parent's opportunity to participate in the IEP formulation process will result in a denial of a FAPE. *See, e.g., A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C.2005).

DCPS responds that its assignment of Student to City Middle School 3 was a site selection decision which did not require parental participation. Several decisions by courts in this jurisdiction support this argument. *See, e.g., Aikens v. District of Columbia*, 950 F.Supp.2d 186, 191 (D.D.C.2013) ("[E]ducational placement refers to 'the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school.'" *Id.*, citing *T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir.2009); *James v. District of Columbia*, 949 F.Supp.2d 1343 (D.D.C.2013) ("While the IDEA requires a student's parents to be part of the team that creates the IEP and determines the educational placement of the child, it does not explicitly require parental participation in site selection." *Id.* at 138, citation and

internal quotation omitted.) *But see Eley v. District of Columbia*, 2014 WL 2507937, 11 (D.D.C. Jun. 4, 2014) (Location where educational services are to be implemented is a vital portion of a student’s educational placement.)

DCPS also argues Student’s transfer to the BES program at City Middle School 3 was made in the context of resolving the parents’ prior due process complaint in Case No. 2014-0529 and that the parents participated in the transfer decision. After the parents filed their due process complaint in Case No. 2014-0529, a resolution meeting was held on January 16, 2015. At that meeting, there was a consensus to increase Student’s IEP Specialized Instruction Services from 15 hours per week to full time, 27.5 hours, per week. Student’s IEP was so amended, without an IEP meeting, on January 20, 2015. By letter of February 20, 2015, DCPS notified the parents that Student’s new location of services for special education would be City High School 3, which “has the programming in place to meet [Student’s] IEP needs.” Five days later, on February 25, 2015, the parents and DCPS entered into a settlement agreement in settlement of all issues in Case No. 2014-0529 and all relief that could result from those claims. The settlement agreement provided, *inter alia*, that DCPS would hold a 30 day review meeting “at the new location of service” to review and revise Student’s IEP, if necessary. On March 2, 2015, the Petitioners filed a Notice of Withdrawal with Prejudice of their due process complaint.

Therefore, whether or not DCPS was required to have the parents participate in the school site selection decision, an unsettled question in this jurisdiction, I conclude that the Parents did participate in, and implicitly consented to, the decision to implement Student’s IEP at City High School 3 by entering into the February 25, 2015 Settlement Agreement, after being informed that Student’s revised IEP would be

implemented at the school.

Separate Special Education Day School

At the June 3, 2015 IEP team meeting, the Petitioners' representative, Educational Advocate, requested that Student be placed in a separate special education day school. The IEP team did not change Student's placement, but the DCPS representative agreed to make a referral to DCPS' least restrictive environment (LRE) referral team. As of the due process hearing date, Student was slated to return to City High School 3 for the 2015-2016 school year. The Petitioners contend that Student should have been placed at a dedicated special education school at the June 3, 2015 meeting. DCPS' Counsel responds that at the time of the meeting, Student had not been at City High School 3 long enough to assess his need for a special school and that if Student does not make progress after the start of the 2015-2016 school year, the LRE referral process can proceed.

The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of his disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. *See* 5E DCMR § 3012, 20 U.S.C. § 1412(a)(5), 34 CFR § 300.115. The IDEA also requires that children with disabilities be placed in the "least restrictive environment" so that they can be educated in an integrated setting with children who are not disabled to the maximum extent appropriate. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012). "In determining the least restrictive environment, consideration is given to the types of services that the child requires." *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 34 CFR § 300.552(d)).

Separate schooling, or other removal of children with disabilities from the regular educational environment may occur only if the nature or severity of the disability is such that education in a regular public school, cannot be achieved satisfactorily. *See* 34 CFR § 300.118(a)(2)(ii). Special Education Teacher testified that Student was not at City High School 3 long enough to become acclimated to the structure of the BES classroom and that he needed more time to “relearn” how his behavior in school should be. She also testified that she thought Student could benefit from the BES program, if he would attend regularly. Petitioners’ expert, Maryland School Psychologist, opined to the contrary that for a student with severe behavior issues, a large school like City High School 3 presents challenges with routines, distractions, transitions and staff training. Maryland School Psychologist recommended that Student be placed in a setting with a lot of structure where staff is trained specifically to work with students with academic and behavioral issues. However, Maryland School Psychologist never met Student or conferred with his parents or the educational staff at City Middle School 3. Nor did he ever conduct an observation at the school or visit the BES classroom. I found Maryland School Psychologist’s testimony to be less credible than that of Special Education Teacher. Given Congress’ preference for inclusion-based education, I find that Petitioners have not met their burden of proof to show that education in a special school, with no interaction with nondisabled peers, is required in Student’s case. *See, e.g., Presely v. Friendship Public Charter School*, 2013 WL 589181, 11 (D.D.C. Feb. 7, 2013) (citing *N.T. v. Dist. of Columbia*, 839 F.Supp.2d 29, 35 (D.D.C.2012)).

Notwithstanding, at the June 3, 2015 IEP meeting, the DCPS representative agreed that it was appropriate to formally assess whether Student requires a more restrictive environment than the BES program at City High School 3. Although

Petitioners have not met their burden of proof to show that Student requires placement in a special school at this time, I do find that it is appropriate for DCPS to proceed with its LRE assessment of Student and I will so order.

B.

– Did DCPS fail to implement Student’s January 20, 2015 Individualized Education Program during the 2014-2015 school year by not providing the requisite hours of specialized instruction outside the general education setting?

-- Is City High School 3 an inappropriate placement/location of services for Student because it lacks the programming in place to implement Student’s IEP and to meet Student’s IEP needs?

Petitioners contend after Student began attending City High School 3 in mid-April 2015, the school failed to implement Student’s IEP requirement for 27.5 hours of Specialized Instruction outside of general education. Specifically, they allege that Student was provided Junior ROTC instruction in the general education setting with nondisabled peers. DCPS does not dispute that for his elective Junior ROTC course, Student was instructed in the general education setting and that as a result, he was only offered 20 hours per week of Specialized Instruction outside general education – not the 27.5 hours per week required by his January 20, 2015 IEP.

The standard for failure-to-implement claims, used by the courts in this jurisdiction, was formulated by the Fifth Circuit Court of Appeals in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). This standard requires that a petitioner “must show more than a *de minimis* failure to implement all elements of [the student’s] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP” in order to prevail on a failure-to-implement claim. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (Aug. 27, 2013) (quoting *Bobby R.*, 200 F.3d at 349). Courts

applying this 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. *Johnson, supra*. In the present case, from mid-April 2015 through the end of the regular school year, Student was not provided over one-fourth of the hours of Specialized Instruction, outside general education, required by his January 20, 2015 IEP. The harm was compounded by the problem that after attending the Junior ROTC class in the general education setting, Student would regularly fail to return to the BES classroom for his last period math class. I find that this was a failure by DCPS to implement a substantial provision of the January 20, 2015 IEP and Student was denied a FAPE as a result.

The Petitioners also contend that City High School 3 remains an inappropriate location of services for Student because it lacks the programming in place to implement Student's IEP and to meet Student's IEP needs. A placement is appropriate if the school is capable of "substantially implementing" the IEP. *See Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (D.D.C.2013). The uncontested evidence established that City Middle School 3 is now fully able to implement Student's IEP requirement that all of his instruction be provided outside general education. Assistant Principal testified that programming changes have been made at City High School 3, which will enable the school to now offer elective foreign language instruction, through video streaming, to students in the BES classroom. As a result, City High School will be able to provide full-time instruction for BES students in its dedicated classrooms, outside of general education. I find, therefore, that City High School 3 now has the programming in place to fully implement Student's IEP.

REMEDY

Private Placement

For their remedy in this case, Petitioners seek an order for DCPS to fund Student's placement at Nonpublic School and an award of compensatory education. As explained above in this decision, separate schooling may occur only if the nature or severity of the Student's disability is such that education in a regular public school, cannot be achieved satisfactorily. In *Jenkins v. Squillacote*, 935 F.2d 303 (D.C.Cir.1991), the D.C. Circuit Court of Appeals explained that "if there is an "appropriate" public school program available, *i.e.*, one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *Id.* at 305 (internal citations and quotations omitted). In this decision, I have found that Petitioners have not met their burden of proving that Student's education cannot be achieved satisfactorily in the BES program at City High School 3. Therefore, I decline to order DCPS to fund Student's placement at Nonpublic School.

Compensatory Education

If a parent has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those compensatory services that will compensate the student for that denial. 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 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 school district's violations of the IDEA. See *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid v. District of Columbia*, *supra*, 401 F.3d at 518.)

In this decision, I have concluded that DCPS denied Student a FAPE by failing to provide some 7.5 hours per week of Specialized Instruction, required by his IEP, from mid-April 2015 to the end of the 2014-2015 school year. Petitioners propose a compensatory education award based upon a plan drafted by Educational Advocate (Exhibit P-29). Educational Advocate recommends, *inter alia*, that Student be provided 160 hours of academic tutoring as compensation for the District's failure to provide Student all of the Specialized Instruction hours required by his IEP. However, Educational Advocate's plan assumes that Student began attending City High School 3 on March 2, 2015, when he actually started some 6 weeks later. It appears that for a period of some 10 weeks, Student was provided only 20 hours per week of Specialized Instruction when his IEP required 27.5 hours. Therefore, DCPS failed to offer Student some 75 hours of Specialized Instruction outside general education.

Pursuant to the February 25, 2015 Settlement Agreement in Case No. 2014-0249, Student was awarded compensatory education, including 100 hours of independent tutoring and 100 hours of independent behavior support. However, as of the due process hearing date in this case, Student had utilized only 4.5 of the authorized 100 hours of tutoring and none of the counseling hours. Under the original DCPS authorization, the compensatory education hours awarded in Case No. 2014-0249 must be used by December 31, 2015.

Compensatory education is an "equitable remedy" designed to place disabled children in the same position they would have occupied but for the school district's

violations of IDEA. *See Walker, supra; Reid v. District of Columbia*, 401 F.3d 516, 522-523 (D.C.Cir. 2005). Petitioners have made no showing that providing Student additional hours of compensatory education tutoring, on top of the unused hours Student has “in the bank,” would somehow restore him to the position he would have occupied but for DCPS’ placing him in the general education setting for one class per day. Instead of ordering DCPS to fund more tutoring hours for Student, I find that an appropriate equitable remedy would be to extend the time for Student to use the remaining hours of tutoring and counseling, authorized pursuant to the February 25, 2015 Settlement Agreement, through the end of the DCPS 2016 summer break.

ORDER

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

ORDERED:

1. Petitioners’ request that DCPS be ordered to fund Student’s placement at Nonpublic School is denied without prejudice;
2. DCPS shall ensure that within 20 calendar days of the start of the 2015-2016 school year, an assessment of Student’s need for a more restrictive environment is initiated and promptly conducted in accordance with DCPS policies. No later than 30 calendar days after the more restrictive environment assessment is initiated, DCPS shall ensure that Student’s IEP team meets to review DCPS’ findings and recommendation and to revise, as appropriate, Student’s IEP and educational placement;
3. The deadline date for completion of the hours of compensatory education tutoring and counseling services, authorized in DCPS’ letter to Mother dated March 3, 2015 (Exhibit R-6), shall be extended to the last Friday before the first day of school for the 2016-2017 school year; and
4. All other relief requested by the Petitioners herein is denied.

Date: August 28, 2015

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).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team