

**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 11, 2014

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: December 10, 2014
Petitioner,)	
)	Hearing Officer: John Straus
v.)	
)	
District of Columbia Public Schools (“DCPS”))	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

The Petitioner, who is the Student’s mother, filed a due process complaint notice on September 26, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged that the District of Columbia Public Schools (“DCPS”) failed to implement the student’s November 5, 2013 Individualized Education Program (“IEP”) or failing to provide a location of services that can implement the November 5, 2013 IEP that was developed out of state since August 25, 2014; specifically services relating to the Student’s vision impairment. The Petitioner requested the Hearing Officer order DCPS to provide compensatory education to redress the lack of special education from August 25, 2014 to October 31, 2014. DCPS asserts it was a *de minimus* failure to implement, not a material failure to implement the IEP.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

¹ Personal identification information is provided in Appendix A.

Procedural History

The due process complaint was filed on September 26, 2014. Neither Petitioner nor Respondent waived the resolution meeting. The resolution meeting took place on October 8, 2014, at which time parties agreed to keep the resolution period open. The 30-day resolution period ended on October 26, 2014, the 45-day timeline to issue a final decision began on October 27, 2014 and the final decision is due by December 10, 2014. *See* 34 C.F.R. §§ 300.510 and .515.

The due process hearing took place on November 24, 2014. The due process hearing was a closed hearing.

Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in person. The Petitioner presented three witnesses: the Petitioner, a Teacher of the Visually Impaired (“VIT”) and a Tutoring Service provider (“Tutor”). DCPS presented a Special Education Teacher (“SET”).

The Petitioner’s Disclosure Statement, filed and served on November 17, 2014, consisted of a witness list of six (6) witnesses and documents P-01 through P-13. Documents P-2, P-6, P-7 and P-10 were admitted in to evidence over objection. The remaining documents were admitted in to evidence without objection.

The Respondent’s Disclosure Statement, filed and served on November 17, 2014, consisted of a witness list of six (6) witnesses and documents R-1 through R-5. The Respondent’s documents R-2 was admitted in to evidence over objection and the remaining documents were admitted in to evidence without objection.

The sole issue to be determined in this Hearing Officer Determination is whether DCPS denied the student a FAPE by failing to implement the student’s November 5, 2013 IEP or failing to provide a location of services that can implement the November 5, 2013 IEP that was developed out of state since August 25, 2014; specifically services relating to the Student’s vision impairment. For relief, the Petitioner requested the Hearing Officer order DCPS to provide compensatory education to redress the lack of special education from August 25, 2014 to October 31, 2014

Findings of Fact²

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

² 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.

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1. The Student is a resident of the District of Columbia who attends Middle School B. The Petitioner is the Student's mother. The Student transferred to DCPS from another state during the Summer of 2014 after moving to the District of Columbia.³
2. On November 5, 2013, the student received a vision assessment. The evaluator noted the Student has no light perception in the right eye and 10/200 in her left eye. The evaluator recommended the student receive preferred seating near the front of the class to maximize her distance vision and visual fields, orientation and mobility training, either 36 font print or be given a magnifier with regular sized print, audio literacy to strengthen her reading and listening skills and minimize visual fatigue, additional wait time due to slower audio processing and a seat copy to follow along with verbal directions.⁴
3. On November 5, 2013, the student received an assessment for orientation and mobility services. The evaluator observed the Student walks with her head tilted to better use her vision in her left eye, she keeps her head down while walking and she walks close to the wall while traveling. In a residential neighborhood setting, the Student could not identify features such as a block, driveway or a street sign name. She did not know whether it was safe to cross the street. Although the Student could not read signs from 15 feet away, she was able to read signs 15 feet away using a monocular. The evaluator recommended the student receive orientation and mobility training to use a monocular, residential concepts, street crossing procedures and the use of a long white cane for identification purposes and to increase safety in unfamiliar environments.⁵
4. On November 5, 2013, the IEP team convened. The team reviewed the vision assessment and the assessment for orientation and mobility and determined the Student is a student with Multiple Disabilities ("MD"); an Intellectual Disability ("ID") and Visual Impairment ("VI"), under the IDEA. The team noted that the Student's disability in Reading, Writing, Math and Vision causes the Student to struggle to demonstrate sufficient progress along the general education curriculum in all content areas. The team also noted the Student likes coming to school and is learning to become more interactive with her peers. Finally, the team noted that the Student benefits from Closed Captioned Television ("CCTV") to aide her in increasing visual functioning needs. The team determined the Student requires large print, magnifier, human reader or audio recording for verbatim reading of modified grade level text, audio materials such as audio books, notes and outlines, a scribe to accurately express the Student's thoughts, a calculator to assist in learning new math concepts and to check her work, graphic organizers to assist in identifying important ideas and information, organizing that information and making connections between and among ideas and identify sequential order from the text and extended time to complete the work due to the time and effort of visual scanning and copying and wait time for auditory processing in order to formulate an answer. The team developed goals in the areas of Phonics, Reading Comprehension, Math Calculation, Vision and Orientation and Mobility. The team determined the Student requires four hours and 40 minutes of classroom instruction per day to be provided by a special

³ Petitioner

⁴ P-4, VIT

⁵ P-3

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education classroom teacher, 3-thirty minute sessions of classroom instruction per month to be provided by a teacher of the VI and 6-thirty minute sessions of orientation and mobility training services per quarter to be provided by an orientation and mobility specialist.⁶

5. The Student and Petitioner moved to the District of Columbia during the summer of 2014. The Petitioner enrolled the Student in Middle School A, the Student's neighborhood school, at the beginning of the 2014-2015 school year. The Petitioner provided Middle School A staff a copy of the Student's November 5, 2013 IEP when she enrolled the Student.⁷
6. On August 25, 2014, the IEP team convened. The team noted the Student is blind in her right eye and currently uses a cane intermittently. The team reviewed the November 5, 2013 IEP and developed a new IEP for the Student. The team determined the Student requires goals in the area of Mathematics, Reading, Vision and Motor Skills/Physical development. The team determined the student required large text and the use of a magnifying glass as needed. The team further determined the Student required 22 hours per week of specialized instruction, 90 minutes of specialized instruction per day and 45 minutes of orientation and mobility per month outside general education.⁸
7. The Student was placed in a full time class for students with ID at Middle School A. The ID classroom was located on the fourth floor of the Middle School A building. The Petitioner escorted the student to her classroom every day for the first four weeks of school in order to allow the Student to access the classroom. The special education teacher did not have any training regarding students with VI and the student did not receive any orientation and mobility services. The Student cried every day because she did not want to go to school.⁹
8. On September 23, 2014, the IEP team convened again. The special education teacher stated she felt bad that the student was not able to read because she could not see. The special education coordinator acknowledged that the Student was not benefiting from the program at Middle School A; however, she was not able to locate another program to meet the Student's needs.¹⁰
9. The Petitioner filed this instant complaint on September 26, 2014. DCPS convened a resolution meeting on October 8, 2014. At the meeting, DCPS offered to place the student at Middle School B. The Petitioner stated that she wanted to observe Middle School B before agreeing to place the student there. The Petitioner was not able to observe the program at Middle School B until October 22, 2014 because she was starting a new job. After observing the program at Middle School B, the Petitioner agreed with the program at Middle School B and the student was enrolled in Middle School B on

⁶ P-1

⁷ Petitioner

⁸ P-2

⁹ Petitioner

¹⁰ Petitioner

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November 3, 2014. The student is receiving her services and supplemental aids, services and program modifications and supports. The student is doing well in her new program.¹¹

10. The TVI and Tutor recommend the Student receive 180 hours of specialized tutoring and 24 hours of orientation and mobility support services to redress the lack of appropriate special education and related services from August 25, 2014 to November 3, 2014.¹²

Conclusions of Law

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

“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 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).

DCPS denied the student a FAPE by failing to implement the student's November 5, 2013 IEP or failing to provide a location of services that can implement the November 5, 2013 IEP that was developed out of state since August 25, 2014; specifically services relating to the Student's vision impairment

In the case of a child with a disability who transfers school districts, who enrolls in a new school the district must provide such a child with FAPE. 34 C.F.R. § 300.323(e).

The new school district must provide services comparable to those described in the previously held IEP, in consultation with the parents until such time as it adopts the previously held IEP or develops, adopts and implements a new IEP that is consistent with federal and state law. 34 C.F.R. § 300.323(e). The IDEA does not obligate a district receiving a special education student from another state to accept the evaluation results, eligibility determinations, and IEP decisions made by the other state. However, the LEA is obligated to provide FAPE, in accordance with state education standards, to all eligible students. *Letter to Sims*, 103 LRP 22737 (OSEP 10/09/02).

Here, the Petitioner provided DCPS a copy of the Student's IEP prior to the start of the 2014-2015 school year. DCPS convened an IEP team meeting on the first day of school, and developed an IEP for the Student and the Student was placed in a class for students with ID.

The new district is required to provide a transfer student with services that are comparable to those in the last IEP in effect at the time of the transfer. *A.M. v. Monrovia Unified School District*, 55 IDELR 215 (9th Cir. 2010). Although the IDEA requires the new district to provide a transfer student with "services comparable to those described in the child's IEP from

¹¹ Petitioner, SET

¹² P-10, VIT, Tutor

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the previous public agency," it does not define the term "comparable services." The United States Department of Education noted that it was not necessary to provide a definition in the regulations, as it interpreted comparable to mean "similar" or "equivalent." 71 Fed Reg. 46,681 (2006).

The IEP developed by DCPS on August 25, 2014 differed significantly from the November 5, 2013 IEP. The November 5, IEP includes 23 hours and 20 minutes of classroom instruction per week to be provided by a special education classroom teacher, 3-thirty minute sessions of classroom instruction per month to be provided by a teacher of the VI and 6-thirty minute sessions of orientation and mobility training services per quarter to be provided by an orientation and mobility specialist. DCPS reduced the hours of service to 22 hours per week of specialized instruction, 90 minutes of specialized instruction per day and 45 minutes of orientation and mobility per month.¹³ The November 5, 2013 IEP includes supplementary aides and services and program modifications or supports for school personnel such as large print, magnifier, human reader or audio recording for verbatim reading of modified grade level text, audio materials such as audio books, notes and outlines, a scribe to accurately express the Student's thoughts, a calculator to assist in learning new math concepts and to check her work, graphic organizers to assist in identifying important ideas and information, organizing that information and making connections between and among ideas and identify sequential order from the text and extended time to complete the work due to the time and effort of visual scanning and copying and wait time for auditory processing in order to formulate an answer. DCPS pared down that list to large text and the use of a magnifying glass as needed.¹⁴

DCPS did not need to convene an IEP meeting on the first day of the 2014-2015 school year because an IEP for a summer transfer can be adopted by the new public agency unless the new public agency decides an evaluation is needed. 71 Fed Reg. 46,682 (2006). If a copy of the child's IEP is available, whether from the parents or the former school district, the new school district can implement that IEP if the parents are satisfied with it and the new school district determines that the old IEP is appropriate. Only, if the child's current IEP is not available, or if either the new school district or the parent believes that it is not appropriate, an IEP meeting would have to be conducted. *Letter to Anonymous*, 25 IDELR 525 (OSEP 1996).

The Student's teachers at Middle School A were not familiar with the Student on the first days of school; therefore, they could not make any determinations regarding the student's special education needs. DCPS should have simply adopted the November 5, 2013 IEP and then found a program for the Student. In this case, the team presumed the student would remain at the neighborhood school; then the team developed the Student IEP. *See* 34 C.F.R. § 300.116(b)(2) (The student's placement should be based on the student's IEP; not the IEP based on the student's placement.) By the time the IEP team convened again on September 23, 2014, it was clear that the student was not receiving a FAPE at Middle School A. Despite the special

¹³ It is not at all clear in the IEP what the extra 90 minutes of specialized instruction provides other than to substitute for the 3-thirty minute sessions of classroom instruction per month to be provided by a teacher of the VI.

¹⁴ Pursuant to 34 C.F.R. § 300.320(a)(4), the IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum.

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education teacher's best efforts, the Student was not receiving educational benefit at Middle School A because the special education teacher did not have any training regarding students with VI. However, the special education coordinator stated she was unable to locate a program where the student would receive educational benefit. See *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).

It would be inconsistent with the responsibility to provide FAPE if the child were placed, even temporarily, without appropriate special education services. *Letter to Anonymous*, 25 IDELR 525 (OSEP 1996). The IDEA does not establish timelines for the new public agency to adopt the child's IEP from the previous public agency. However, consistent with 34 C.F.R. § 300.323(e) and (f), the new public agency must take these steps within a reasonable period of time to avoid any undue interruption in the provision of required special education and related services. *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, 54 IDELR 297 (OSERS 2010).

In this case, but for the Petitioner retaining counsel and filing this instant complaint, the Student would have remained at Middle School A. It was not until a resolution meeting was convened that the Petitioner was offered a program at Middle School B where the student could receive services relating to the Student's vision impairment. The purpose of the IDEA is to provide a "cooperative process" between parents and schools, and a central component of this collaboration is the IEP process. *Schaffer v. Weast*, 546 U.S. 49 (U.S. 2005). The failure of an IEP team to address a child's educational needs will likely result in a denial of FAPE. *Forest Grove Sch. Dist. v. T. A.*, 52 IDELR 151 (U.S. 2009).¹⁵

DCPS asserts that the denial is a *de minimus* denial of FAPE and cites *Johnson ex rel. F.J. v. District of Columbia*, 61 IDELR 286 (D.D.C. 2013)¹⁶ to support that the Petitioner must show more than a *de minimus* denial of FAPE to prevail. However, in this case, the fact that DCPS placed the Student in Middle School B where the Student could avail herself to VI services evinces that there was more than a *de minimus* denial of FAPE. The student was not receiving any services from a VI teacher and was not receiving most of the supplementary aides

¹⁵ A district's obligation to provide FAPE to a student with a disability is satisfied when the district provides the student with the personalized educational program necessary to allow the child to derive an educational benefit from that instruction. In other words, the FAPE requirement of the IDEA demands access to educational opportunity only, not the specific achievement of educational results. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982).

¹⁶ In *Johnson*, concluding that a public high school would have been capable of implementing a substantial portion of an IEP for a student with an emotional disturbance, the District Court rejected the parent's claim that the placement offer was fatally flawed. Affirming an administrative hearing officer's decision, the court dismissed the parent's claim for reimbursement of private school costs. When the student's current school closed, the District of Columbia proposed placing her in a program for students with emotional disturbances housed in a public high school. The parent rejected the offer, enrolled the student in a private school, and pursued tuition reimbursement. An Independent Hearing Officer denied it, and the parent appealed. On appeal, the District Court first observed that, despite the parent's argument to the contrary, the proper analysis was not whether the placement could implement the student's entire IEP "as written." Rather, the question was whether the school was capable of substantially implementing the student's IEP. Here, even if the student's IEP was read as calling for precisely 31 hours of instructional time, as the parent contended, the proposed high school would have provided 28.25 hours of instructional time after subtracting time for lunch and other breaks. A comparison of the hours demonstrated that the deviation from the student's IEP, if any, would be slight.

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and services and there were no program modifications or supports for school personnel. The lack of these services prevented the Student from receiving education benefit at Middle School A. The student's special education teacher at Middle School A made good efforts to address the Student's VI but did not have the appropriate training, equipment or support to address the student's needs. The student was not receiving benefit from Middle School A. Therefore, the Hearing Officer finds that there was a more than *de minimus* denial of FAPE.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 522 & 524.

In this case, the Student was denied a FAPE for thirty two school days until the Petitioner was offered a FAPE at the resolution meeting. Therefore, the hearing officer awards the Petitioner compensatory services to redress the lack of FAPE.

ORDER

- (1) DCPS shall provide the student with 80 hours of specialized tutoring and 15 hours of orientation and mobility support services to be completed no later than the end of the 2014-2015 school year; and
- (2) No further relief is granted.

IT IS SO ORDERED.

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).

Date: December 10, 2014

/s/ John Straus
Hearing Officer