

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
March 31, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: March 29, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office, Rooms

Respondent.

Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came for a hearing upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), 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 (DCMR). In her January 16, 2014 Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education

¹ Personal identification information is provided in Appendix A.

(FAPE) by failing to provide him special education services at CITY HIGH SCHOOL since the beginning of the 2013-2014 school year and by failing comply with the IDEA's discipline requirements for a student with a disability.

Student, an AGE young man, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on January 16, 2014, named DCPS as Respondent. On January 29, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

Pursuant to the IDEA, the original expedited due process hearing was convened before the undersigned Impartial Hearing Officer on February 18, 2014 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. On February 18, 2014, the Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS' COUNSEL. Subsequent to the February 18, 2014 hearing, I bifurcated the original case into two cases, identified as Case No. 2014-0026-A and Case No. 2014-0026-B, so as to address the disciplinary issues asserted by Petitioner separately from the non-disciplinary issues. I addressed the disciplinary issues in my Hearing Officer Determination issued February 25, 2014 in Case No. 2014-0026-A. On March 26, 2014, I reconvened the hearing in Case No. 2014-0026-B solely to receive additional evidence on Petitioner's requested compensatory education remedy. At the March 26, 2013 hearing, only counsel for the parties and EDUCATIONAL ADVOCATE appeared.

On February 18, 2014, Mother testified, and called as witness Educational Advocate. DCPS called DEAN OF STUDENTS as its only witness. Petitioner's Exhibits P-2 through P-16 were admitted into evidence without objection. Exhibit P-1 was

withdrawn. DCPS' Exhibits R-1 through R-5 were admitted without objection. On March 26, 2014, Educational Advocate was the only witness. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f), (k) and DCMR tit. 5-E, § 3029 and tit. 5-B, § 2510.

ISSUES AND RELIEF SOUGHT

The issues to be determined in this non-disciplinary part of the bifurcated case are:

Whether DCPS has denied Student a FAPE by failing to provide the services and accommodations contained in Student's March 28, 2013 Individualized Education Program (IEP) for the 2013-2014 school year at CITY HIGH SCHOOL and failing to provide the parent with periodic progress reports education and related services reports following a request made by Parent on or about October 9, 2013; and

Whether DCPS has denied Student a FAPE by failing to convene an IEP meeting to discuss the implementation of special education services, allegedly requested by Parent beginning September 13, 2013.

For relief, Petitioner had requested in her due process complaint that DCPS be ordered to fund Student's placement at an appropriate non-public therapeutic day school. At the due process hearing, Petitioner withdrew that request because she and Student prefer that he remain at City High School for the rest of this school year. The parent has also requested an award of compensatory education to compensate Student for educational harm resulting from DCPS' alleged denials of FAPE during the 2013-2014 school year.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE young man, resides with Mother in the District of Columbia. Student has resided with Mother since August 2013. Before then, Student lived in Maryland for a period of years with his father and, later, with foster parents. Student moved to the District in winter 2012 and was enrolled by his foster parents in CITY MIDDLE SCHOOL. Testimony of Mother.

2. Student is eligible for special education and related services as a student with a Emotional Disturbance (ED) disability. Exhibit P-12.

3. Before moving to the District, Student had an Anne Arundel County, Maryland Public Schools IEP, which provided learning and behavioral goals. Under the Anne Arundel County IEP, Student's special education services were provided in the general education setting. Exhibit P-15.

4. Student's IEP team at City Middle School revised his IEP on March 28, 2013. The March 28, 2013 IEP provided annual goals for Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development. The revised IEP provided that Student would receive 26.5 hours per week of Specialized Instruction and 240 minutes per month of Behavioral Support Services all outside the General Education setting. The City Middle School IEP team determined that the Least Restrictive Environment for Student was outside of the General Education setting because his behavioral concerns impeded his progress in general education and his "social emotional deficits warrant specialized instruction out of the general education setting." Exhibit P-12.

5. In August 2013, Mother obtained parental custody of Student and he began living with her. Mother enrolled Student at City High School, Student's new neighborhood school. When she enrolled Student, Mother provided City High School Student's transcript and his IEP from City Middle School. Testimony of Mother.

6. On October 28, 2013, City High School LEA REPRESENTATIVE mailed a letter of invitation to Student's former foster parent inviting him to an IEP meeting for Student, to be convened on January 28, 2014, to conduct an annual review of Student's IEP. Exhibit R-2. Mother did not receive this notice. Testimony of Mother.

7. At City High School, from the beginning of the 2013-2014 school year until January 27, 2014, Student was placed only in general education classes. Testimony of Special Education Advocate; DCPS Response to Due Process Complaint. The evidence does not establish whether Student was, or was not, provided Behavioral Support Services in the 2013-2014 school year. By the end of the second grading period, January 24, 2014, Student was failing all of his courses except for Army Jr. ROTC. Exhibit P-9.

8. Beginning September 13, 2013, Petitioner's Counsel requested the City High School principal to convene a multidisciplinary team (MDT) meeting for Student. In a September 13, 2013 letter, Petitioner's Counsel wrote that it appeared that Student's IEP was never implemented by DCPS and Petitioner's Counsel requested an MDT meeting to "begin the process of having [Student] assessed for special eligibility services [sic] in the District of Columbia and to discuss what services can be immediately implemented until such time as that special education eligibility determination can be made." Exhibit P-2. Petitioner's Counsel followed up on his September 13, 2013 letter with emails to LEA Representative on September 30, 2013, October 23, 2013 and December 6, 2013 and with a voice mail message on November 1, 2013. Until December

6, 2013, Petitioner's Counsel received no response from City High School staff. Exhibits P-3, P-4, P-5.

9. On December 6, 2013, LEA Representative sent an email to Petitioner's Counsel regarding another student, stating that she looked forward to working with him soon. Exhibit P-5.

10. At City High School, Student was suspended from school from December 2 through December 13, 2013 for a total of ten school days. Exhibit R-3, Testimony of Dean of Students. In my decision in Case No. 2014-0026-A, I found that Petitioner had not met her burden of proof to show that Student was suspended from school during the 2013-2014 school year, other than for the 10-day period from December 2 through 13, 2013.

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 Petitioner in this case. *See* DCMR 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

– Did DCPS deny Student a FAPE by failing to provide the services and accommodations contained in Student's March 28, 2013 IEP for the 2013-2014 school year at City High School and by failing to provide the parent with periodic progress reports, education and related services reports following a request made by Parent on or about October 9, 2013?

– Did DCPS deny Student a FAPE by failing to convene an IEP meeting to discuss the implementation of special education services, allegedly requested by Parent beginning September 13, 2013?

It is undisputed that after Student matriculated to City High School at the beginning of the 2013-2014 school year, he was not provided the Specialized Instruction services specified in his March 28, 2013 IEP. That IEP required that Student receive 26.5 hours per week of Specialized Instruction services, all outside the General Education setting. DCPS' Counsel attempted to minimize DCPS' nonfeasance by arguing that City High School staff felt that Student's self-esteem and attendance would greatly suffer if he were placed in the full-time, self-contained classroom required by his IEP. This argument has no merit. A Local Education Agency (LEA) must implement an IEP as written. The IDEA regulations, 34 CFR § 300.324(b), provide procedures for revising an IEP. However, a school may not change a student's IEP, formally or informally, without prior notice to the parent and an opportunity for the 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 City High School did not seek to change Student's IEP. It just did not implement it.

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 failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.”); accord *S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan v.*

District of Columbia, 478 F.Supp.2d 73, 75 (D.D.C.2007); *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 275 (D.D.C.2011); *Turner v. District of Columbia*, 952 F.Supp.2d 31, 40-41 (D.D.C.2013). DCPS admits that until after the 2013-2014 winter break, City High School did not implement the Specialized Instruction requirements of Student's March 28, 2013 IEP. I find that this omission was a material deviation from the IEP and that Student was denied a FAPE.³ Petitioner also alleges that DCPS failed to implement the IEP's requirement for 240 minutes per month of Behavioral Support Services. There was no evidence at the due process hearing on whether City High School did, or did not, offer Student Behavioral Support Services. Therefore, I must find that Petitioner has not carried her burden of proof on this claim. Lastly, Petitioner claimed in her due process complaint that DCPS failed to provide her periodic progress reports, education and related services reports, which she allegedly requested on or about October 9, 2013. Petitioner offered no evidence at the due process hearing that she made a request for these records. Therefore, this claim was not established.

Compensatory Education

I have found in this decision that DCPS denied Student a FAPE by failing to provide his IEP Specialized Instruction services from the beginning of the 2013-2014 school year through the beginning of the winter break. The only relief Petitioner seeks in

³ Having determined that Student was denied a FAPE by DCPS' failure to implement his IEP Specialized Instruction Services for the first semester of the 2013-2014 school year, it is unnecessary to reach the second issue of whether DCPS also denied Student a FAPE by failing to convene an IEP meeting as requested by Mother. In my Findings of Fact, I found that beginning on September 13, 2013, Petitioner's Counsel requested an MDT meeting for Student and City High School did not respond to the request until December 2013. However, an LEA's failure to convene an IEP meeting when requested by a parent would be a procedural violation of the IDEA which, in this case, would not aggravate the effect on Student's substantive rights, already resulting from City High School's failure to implement his IEP. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (IDEA claim is viable only if procedural violations affected the student's substantive rights.)

this case is a compensatory education award. The IDEA gives hearing officers “broad discretion” to award compensatory education as an “equitable remedy” for students who have been denied a FAPE. *See Reid v. District of Columbia*, 401 F.3d 516, 522-523 (D.C.Cir. 2005). A compensatory education award must “rely on individualized assessments” after a “fact specific” inquiry. *Id.* at 524. “In formulating a new compensatory education award, the hearing officer must determine ‘what services [the student] needs to elevate him to the position he would have occupied absent the school district’s failures.’” *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) (quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527.) *See, also, e.g., Turner, supra*, 952 F.Supp. 2d at 10-11. 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. *Gill v. District of Columbia*, 770 F.Supp.2d 112, 116-117 (D.D.C.2011), *aff’d.*, *Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011).

In my January 29, 2014 Prehearing Order in this case, I alerted the parties that to establish a basis for a compensatory education award, the Petitioner must be prepared at the hearing to document with exhibits and/or testimony “the correct amount or form of compensatory education necessary to create educational benefit” to enable the hearing officer to project the progress Student might have made, but for the alleged denial of FAPE, and further quantitatively defining an appropriate compensatory education award. I informed the parties that if an adequate record were not established, the hearing officer may be obliged to deny a compensatory education award or to

continue the hearing for the Petitioner to offer additional evidence sufficient to support the claim for compensatory education.

At the February 18, 2014 due process hearing in this case, Educational Advocate, who testified as Petitioner's educational specialist, recommended a compensatory education award of "200 hours of specialized instruction to be spread out over his academic subjects." Despite her many years' experience as a special educator and school administrator, Educational Advocate was not a credible witness on this issue. She had never met Student or conducted any type of assessment to determine the specific educational deficits caused by DCPS' denial of FAPE. Moreover, the award recommended in Educational Advocate's compensatory education plan was based upon Student's missing 2,120 hours of specialized instruction. At the due process hearing, Educational Advocate volunteered that she had erred and Student had missed 420 hours of specialized instruction – approximately one-fifth of the deficit stated in her compensatory education plan. Yet, Educational Advocate stood by her recommendation for 200 hours of specialized instruction, whether Student missed 2,120 hours or one-fifth that number. I concluded that I lacked sufficient information to make an informed decision with respect to an appropriate compensatory education award. *See Latynski-Rossiter v. District of Columbia*, 928 F.Supp. 2d, 57, 62-63 (D.D.C.2013).

I reconvened the due process hearing on March 26, 2014 to allow Petitioner the opportunity to offer additional evidence in support of her compensatory education request. At the reconvened hearing, Educational Advocate again testified. Since the last hearing day, she had met with Student and Mother, who both told her that Student had not made any progress because of numerous suspensions since the February 18, 2014 hearing. Educational Advocate learned that for the most recent school term, Student

had received F's in all subjects, except for World History. Educational Advocate opined that in order for Student to achieve passing grades, he should receive some 127 hours of one-on-one tutoring.

By focusing on Student's achieving passing grades, Educational Advocate missed the point of a compensatory education award. Certainly Student's attaining passing grades should be an objective of his IEP team. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.") However, the appropriateness of Student's IEP is not an issue in this case. Petitioner's burden for the compensatory education inquiry was to show where Student is now academically, as compared to where he should be if DCPS had provided his IEP services, and what compensatory education services Student needs to get him there. *See Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148-149 (D.D.C. 2012). Besides opining on what services Student needs to obtain passing grades, Educational Advocate also testified that, for Student to make adequate progress toward reaching his IEP goals, he needs 20 hours of one-on-one tutoring to compensate for DCPS' not implementing his IEP in the fall of 2013. While a more comprehensive analysis should have been offered by Petitioner, the IDEA does not require a student to have a perfect case to be entitled to compensatory education. *Id.* at 148. I will therefore award Student 20 hours of one-on-one tutoring as a compensatory education award for DCPS' denial of FAPE in this case.

ORDER

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

ORDERED:

DCPS shall provide Student 20 hours of one-on-one academic tutoring in subject areas as reasonably determined by Mother and Student's educators would be most beneficial to him. The services shall be provided by a qualified tutor who has experience working with students with an Emotional Disturbance disability. Provision of the tutoring services shall be completed by the end of the 2013-2014 school year; and

All other relief requested by Petitioner in this matter is denied.

Date: March 29, 2014

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).