

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

Office of Dispute Resolution  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
November 24, 2014

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PETITIONER, an Adult Student,<sup>1</sup>

Petitioner,

Date Issued: November 22, 2014

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

Office of Dispute Resolution,  
Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the parent of Petitioner<sup>2</sup> (the Petitioner or STUDENT), 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 his Due Process Complaint, Petitioner alleges that he has been denied a free appropriate public education (FAPE) by the failure of Respondent District of Columbia Public Schools (DCPS) to ensure that NONPUBLIC SCHOOL fully

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<sup>1</sup> Personal identification information is provided in Appendix A.

<sup>2</sup> The complaint in this case was originally filed by Petitioner's mother. Before the due process hearing, Student reached his 18<sup>th</sup> birthday and was substituted as Petitioner for his mother.

implemented his Individualized Education Program (IEP) during the 2013-2014 school year and by DCPS' failure to afford his parent access to all of his education records.

Student, an AGE young man, is a resident of the District of Columbia.

Petitioner's due process complaint, filed on September 10, 2014, named DCPS as Respondent. The parties met for a resolution session on September 24, 2014 and did not reach an agreement. On October 9, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day period for issuance of this decision began on October 11, 2014.

The due process hearing was held before this Impartial Hearing Officer on  
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. The Petitioner and MOTHER appeared in person, and were represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner's Counsel made an opening statement. Petitioner called as witnesses Mother and EDUCATIONAL SERVICES PROVIDER. DCPS called as witnesses Nonpublic School PROGRAM DIRECTOR, SPEECH LANGUAGE PATHOLOGIST, and DCPS RESOLUTION COMPLIANCE OFFICER. Petitioner's Exhibits P-1 through P-12 and P-14 through P-25 were admitted into evidence, including Exhibits P-9 and P-10 which were admitted over DCPS' objections. DCPS' objection to Exhibit P-13 was sustained. DCPS' Exhibits R-1 through R-3 and R-5 were admitted into evidence without objection. Exhibit R-4 was not offered. At the conclusion of Petitioner's case-in-chief, DCPS' Counsel made a motion for a directed finding against Petitioner on the issue of implementation of Behavioral Support Services. I denied the motion. Counsel for both parties made closing arguments. Neither party requested leave to file a post-hearing

memorandum.

### **JURISDICTION**

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

### **ISSUE AND RELIEF SOUGHT**

The following issues for determination were certified in the October 9, 2014

Prehearing Order:

- Whether DCPS denied Student a FAPE by failing to implement significant portions of his IEP speech and language therapy and behavioral support services during 2013-2014 school year beginning January 2014;<sup>3</sup> and
- Whether DCPS denied Student a FAPE by failing to afford the parent access to Student's education records following a summer 2014 request.

For relief, Petitioner requests that DCPS be ordered to provide Student compensatory education to compensate for IEP services not provided during the 2013-2014 school year and that DCPS be ordered to afford the parent access to all of Student's education records as requested by the parent in summer 2014.

### **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. Testimony of Mother. Student is eligible for special education and related services based upon having Multiple Disabilities, including a Specific Learning Disability (SLD) and Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-

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<sup>3</sup> At the beginning of the due process hearing, Petitioner's Counsel withdrew Petitioner's additional claim that DCPS had failed to implement Student's IEP Occupational Therapy services.

ADHD). Exhibit P-1.

2. Since the 2010-2011 school year, Student has been enrolled at Nonpublic School under a DCPS-funded placement. Testimony of Mother. Student's November 4, 2013 Nonpublic School IEP provided that he would receive 24.5 hours per week of Specialized Instruction and, for Related Services, one-half hour per week of Occupational Therapy services, 1.5 hours per week of Behavioral Support Services and 1 hour per week of Speech-Language Pathology. Exhibit P-1.

3. From January through June 2014, schools in the District of Columbia were in session for approximately 24 weeks and, per his IEP, Student should have received approximately 24 hours of Speech-Language services. Hearing Officer Notice. During this timeframe Student received 135 minutes of Speech-Language Pathology services, all in the months of February and March. During the January through June 2014 period most of the Speech-Language services missed were due to the provider's being unavailable, Student's absences and Student's refusal of services. Speech-Language services were not provided at all to Student in April 2014 due to staffing issues. The speech-language pathologist was also unavailable for four sessions in May 2014 and for two sessions in June 2014. Exhibit P-2. The regular speech-language pathologist was out on maternity leave for 12 weeks, beginning in late March 2014. Testimony of Speech-Language Pathologist. During part of that period, Nonpublic School contracted with a replacement provider to provide Speech-Language services. Testimony of Program Director.

4. During the January through June 2014 time frame, per his IEP, Student should have received some 36 hours of Behavioral Support Services. During the period, the Nonpublic School social worker provided 1.5 hours per week of counseling to

Student, including one hour of group counseling and one-half hour of individual counseling. Hearing Officer Notice.

5. On July 29, 2014, Petitioner's Counsel wrote Program Director at Nonpublic School by email, to request identified education records for Student, including Service Trackers for speech, occupational therapy and behavioral support services provided to Student during the 2013-2014 school year. An administrative assistant from Nonpublic School responded by email to Petitioner's Counsel that she was unable "to track down the [Behavioral Support Services] logs." By email of October 2, 2014, the school's administrative assistant wrote Petitioner's Counsel that if and when she was able to print out the data she would send copies to her, but that never happened. Exhibits P-17, P-20, P-21, P-22. Based upon Nonpublic School's computerized billing system, Program Director verified that Speech-Language services were provided to Student for the entire school year. Due to the billing software limitations, Program Director was unable to print the billing program data. Program Director also observed that Student was regularly pulled out of class by the school social worker for counseling sessions. Testimony of Program Director.

### **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:

#### **Burden of Proof**

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.14. *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

1. Did DCPS deny Student a FAPE by failing to implement significant portions of his IEP speech and language therapy and behavioral support services during 2013-2014 school year, beginning January 2014?

Petitioner alleges that from January through June 2014, DCPS failed to ensure that Nonpublic School fully implemented the provisions for Speech-Language and Behavioral Support Services specified in Student's November 4, 2013 IEP. DCPS maintains that for the 2013-2014 school year, Student was provided his IEP-specified Behavioral Support Services and that any omission of Speech-Language Pathology services was *de minimis*.

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 (D.D.C.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. *Id.* (internal quotation and citation omitted.)

Student's November 4, 2013 IEP provided that he would receive 1.5 hours per week of Behavioral Support Services and 1 hour per week of Speech-Language Pathology.

I find that Petitioner failed to establish that Nonpublic School did not provide Student his IEP specified Behavioral Support Services. Program Director's testimony that the services were in fact provided was not refuted by the adult student who did not testify. To the extent that Mother testified that the Behavioral Support Services were not provided, I found her testimony to be less credible than that of Program Director, who personally examined the computerized billing records for services provided to Student and who observed Student receiving counseling services at school.

Petitioner did establish that Student only received 135 minutes of Speech-Language services from January through June 2014, when his IEP provided for approximately 24 hours of services – a deficit of over 21 hours of services. I find that by providing less than an eighth of the Speech-Language Pathology services, specified in Student's IEP, in the second half of the 2013-2014 school year, Nonpublic School failed to implement a substantial provision of the IEP and that, as a result, Student was denied a FAPE.

2. Did DCPS deny Student a FAPE by failing to afford the parent access to Student's education records following a summer 2014 request?

On July 29, 2014, Petitioner's Counsel wrote Program Director at Nonpublic School by email, to request identified education records for Student, including Service Trackers for speech, occupational therapy and behavioral support services provided to Student during the 2013-2014 school year. An administrative assistant from Nonpublic School responded by email to Petitioner's Counsel that she was unable to track down the Behavioral Support Services logs. Petitioner's Counsel argues that the school's failure to provide the Behavioral Support Services logs violated the parent's right to inspect Student's education records.

A Local Education Agency (LEA) must permit parents to inspect and review any education records, that are collected, maintained, or used by the agency, with respect to the identification, evaluation, and educational placement of their child, and the provision of a FAPE to the child. *See* 34 CFR §§ 300.501 (a), 300.613(a). *See, also, Jalloh ex rel. R.H. v. District of Columbia*, 535 F.Supp.2d 13, 21 (D.D.C.2008) (Parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records.) The LEA must comply with a parent's request to inspect education records without unnecessary delay and in no case more than 45 days after the request has been made. *See* 34 CFR § 300.613(a).

Nonpublic School provided Petitioner's Counsel copies of all the records she requested, except the Service Trackers for Behavioral Support Services which could not be located. For unexplained reasons, Nonpublic School was unable to locate the Behavioral Support Service Trackers for Student for the 2013-2014 school year. Program Director was able to view comparable information, brought up on a computer monitor, using the school's computerized billing program, but she was unable to print out the data due to the constraints of the software. There was no evidence that Nonpublic School ever denied a request by the parent or Petitioner's Counsel to examine Student's education records at the school or to view the Behavioral Support Services billing records on Nonpublic School's computer. I conclude, therefore, that Petitioner has not shown that DCPS failed to comply with the IDEA's requirement that the parent be allowed to inspect and review Student's education records.

#### Compensatory Education Remedy

In this decision, I have found that DCPS denied Student a FAPE by failing to implement most of his IEP Speech-Language services from January through June 2014.

For relief, Petitioner seeks a compensatory education award. Compensatory education is educational service that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA. Compensatory education is designed to place disabled children in the same position they would have occupied but for the school district's violations of 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 LEA's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *See Reid v. District of Columbia*, 401 F.3d 516 (D.C.Cir. 2005). The burden of proof is on the Petitioner to produce sufficient evidence demonstrating the type and quantum of compensatory education that is appropriate. *See Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012)

Petitioner has proposed a compensatory education plan for Student (Exhibit P-29), devised by Educational Services Provider. This plan proposes that Student receive four hours of compensatory speech-language services for each hour missed during the time period concerned. Educational Services Provider's 4:1 compensation proposal is based upon the recommendation of her consultant, AUDIOLOGIST. Audiologist reviewed Student's November 4, 2013 IEP and concluded that the IEP's provision of one hour per week of Speech-Language Pathology was insufficient and that Student needed three hours of Speech-Language services per week. Based upon Audiologist's analysis, Educational Services Provider recommended that Student should receive four hours of compensatory education services for each hour of speech-language services missed.

The appropriateness of the November 4, 2013 IEP is not an issue in this case.

Therefore, whether or not Audiologist considered the Speech-Language Pathology services in Student's IEP to be adequate is wholly irrelevant to determining the amount of services Student should receive as compensatory education for failure to implement the IEP. Here, any compensatory education award must be designed to place Student in the same position he would have occupied but for Nonpublic School's failure to implement the Speech-Language services determined appropriate by the IEP team – not an alternative services plan designed months later by Audiologist. Because Educational Services Provider's compensatory education proposal is largely intended to remedy what Audiologist considered an inappropriate IEP and does not correlate the actual denial of FAPE in this case, namely Nonpublic School's failure to provide over 21 hours of IEP Speech-Language services, I find that the recommendation of Educational Services Provider, endorsing Audiologist's proposal, is not entitled to any weight.

I conclude, therefore, that Petitioner has failed to support her claim for compensatory education for the denial of FAPE in this case. *See, Gill v. District of Columbia*, 770 F.Supp.2d 112, 118 (D.D.C.2011), *aff'd.*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011) (Due to the lack of evidentiary support, the Court is compelled to find that Plaintiffs have failed to support their claim for compensatory education.) While a court has discretion to take additional evidence concerning the appropriate compensatory education due a student, *see Gill, supra*, 751 F.Supp.2d at 114, I am constrained under the DCMR to issue my final Hearing Officer Determination in this case no later than November 24, 2014. *See* DCMR tit. 5-E, § 3030.11. Therefore, based on the record before me, I will deny, without prejudice, Petitioner's request for a compensatory

education award.<sup>4</sup>

ORDER

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

ORDERED:

1. All relief requested by Petitioner herein is denied;
2. Petitioner's request for a compensatory education award to compensate Student for Nonpublic School's failure to implement the Speech-Language Pathology services required by Student's November 4, 2013 IEP, from January 2014 through the end of the 2013-2014 school year, is denied without prejudice.

Date: November 22, 2014

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

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<sup>4</sup> In my October 9, 2014 Prehearing Order, I advised the parties that under the case law in this jurisdiction, to establish a basis for a compensatory education award, the Petitioner must be prepared at the due process hearing to document with exhibits and/or testimony the correct amount or form of compensatory education to enable the hearing officer to project the progress Student might have made, but for the alleged denial of FAPE, quantitatively defining an appropriate compensatory education award, and that if an adequate record were not established, the hearing officer may be obliged to deny a compensatory education award.

**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).