

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

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STUDENT HEARING OFFICE
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Parent ¹ , on behalf of)	
Student,)	
)	
Petitioner,)	
)	Hearing Officer: James McKeever
v.)	
)	
DISTRICT OF COLUMBIA PUBLIC)	
SCHOOLS)	Hearing Date: February 14, 2012
)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction and Procedural Background

This is a due process proceeding brought in accordance with the Individuals with Disability Education Act 2004 (“IDEA”) and its implementing regulations codified at 20 U.S.C. Section 1400 *et seq.*, against Respondent, District of Columbia Public Schools (DCPS).

Petitioner is the parent of the Student, a year-old boy with a disability who resides in the District of Columbia and who currently attends a public charter school in the District of Columbia. The Student is eligible for special education and related services as a student with a disability under the IDEA (Exhibit P1).

On January 6, 2012, Petitioner filed a Due Process Complaint (DPC) against DCPS alleging that DCPS failed to offer the Student a free and appropriate public education (FAPE) during the 2011-2012 school year because DCPS failed to provide the Student with the special education services listed on the Student’s Individualized Education Plan (IEP), *inter alia*.

¹ Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

On January 18, 2012, DCPS filed its response. DCPS asserted a general denial to the allegations contained in the DPC and asserted that efforts were made to provide the Student's special education services, however, the Student refused to accept the services (DCPS Response).

The Resolution session was held on January 25, 2012. The parties did not resolve the issues raised in the DPC, but continued the resolution period to February 6, 2012. The initial forty-five day HOD timeline began on February 7, 2012.

The Prehearing Conference (PHC) was held on February 7, 2012. Counsel for Petitioner and counsel for DCPS participated. During the PHC the parties discussed the issues raised in the DPC and Petitioner's requested relief (set forth below). It was agreed that the Due Process Hearing (DPH) would be held on February 14, 2012 and that the disclosures would be filed by February 7, 2011.

The disclosures were filed as agreed on February 7, 2012. DCPS filed a supplemented disclosure on February 9, 2012. At the hearing, DCPS' counsel asserted that the supplemental disclosure could not be filed sooner because DCPS' counsel had not received them from her client in time. Petitioner objected to DCPS' supplemental disclosure. The objection was sustained and the documents were not entered into evidence because the supplemental disclosures were not filed and/or served within the 5-business day timeline as per the PHC.

Petitioner's Exhibits 1-24 were admitted into evidence. Respondent's Exhibits 1-9 were also admitted into evidence².

The following witnesses testified on behalf of the Petitioner: Parent and Advocate.

The following witnesses testified on behalf of the Respondent: Special Education Coordinator (SEC) at DCPS high school.

II JURISDICTION

The Due Process Hearing was held in accordance with the rights established under the Individuals with Disability Education Act 2004 ("IDEA), and its implementing regulations at 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25. This decision constitutes the Hearing

² A list of all Exhibits entered into evidence is annexed hereto at Appendix "B"

Officer's Determination (HOD) pursuant to 20 U.S.C. §1415 (f); 34 C.F.R. §300.513.

III. ISSUES PRESENTED

The following issues were certified for adjudication at the due process hearing:

Whether DCPS denied the Student a FAPE by failing to provide the Student with 5 hours of special education services per week and by failing to implement the Student's transition plan as per the Student's IEP dated January 26, 2011.

Petitioner requests a finding of a denial of FAPE and compensatory education services in the form of tutoring services and the opportunity for the Student to make up his missed assignments.

IV. FINDINGS OF FACT

Based upon the evidence adduced at the Due Process Hearing, I make the following findings of fact:

The Student is a 17-year-old boy who resides in the District of Columbia. The Student is eligible for special education and related services under the IDEA as a child classified as "other health impaired" based on a diagnosis of Attention Deficit Disorder (ADD). The Student presently attends 11th grade at a Charter School in the District of Columbia. DCPS is the LEA for the Charter School (Testimony of SEC). The Student has attended the Charter School for the last 6 years (Testimony of Parent).

The Student's IEP dated January 26, 2011, provides the Student with 5 hours per week of specialized instruction in the general education setting with 30 minutes per week of counseling services outside the general education setting (Exhibit P-10, Testimony of Advocate).

According to the IEP, special education services were needed because the Student "needs to improve his knowledge of constructing a paragraph and adding appropriate details" and because he struggles with managing the work requirements of his class." Additionally, his "lack of organization" and time management skills "negatively impacts his grades" (Exhibit P-10). Specifically, the IEP indicates that the Student's learning disability "impacts his ability to complete [his] grade level writing curriculum (Exhibit P-10, page 2) and that the Student's needs to "improve his knowledge of constructing a paragraph and adding appropriate details" (Exhibit P1-0, page

2). The annual goal was to improve his “written expression skills by one grade level by displaying knowledge of writing coherent compositions...,” among other things (Exhibit P-10, page 2).

On November 20, 2011, an MDT meeting was convened at the request of the parent. During the meeting it was revealed that the Student was not receiving direct special education instruction as per his IEP.

The Student has significant deficits in organization which impacts on his ability to begin and/or complete tasks (Exhibit P-5).

The Student’s special education teacher modifies the Student’s work for his English class, but not does provide services in the classroom (Exhibit P-10). The Special Education teacher is available to meet with the Student for one hour after school on Tuesdays, but the Student has refused to meet with her because the Student does not want to receive special education services (Testimony of Advocate).

During the first and second marking period in the fall of 2011, the Student failed honors English, health and pre-calculus (Exhibit P-8). The Student’s poor performance during this time was the result of not being organized and because the Student failed to complete his assignments (Exhibit P-9). At the end of November 2011, the Student had an “A” in English, an “A” in pre-calculus and an “A” in Spanish (Exhibit P-9). No evidence was presented with respect to the Student’s performance in Health after the second quarter marking period.

The score sheets maintained by the Charter School indicate that the Student could make up assignments that he failed to complete (Exhibit P-9).

The parent communicated her concerns about the Student’s academic struggles and her concern that DCPS was not implementing the special educational services listed on the Student’s IEP (Testimony of Parent). The Charter School’s response to the parent was that Student doesn’t like having an IEP and that the Student does not want to be different (Testimony of Parent, Respondent’s Response).

The Student’s transition plan includes goals for independent living and employment as well as college preparation. The transition goals include exploring careers by researching one career per week, learning how to balance a checkbook and preparation for college. The Student’s transition goals are to be implemented by the Student’ special education teacher (Exhibit P-10, page 8). The DCPS SEC was unaware of this mandate and he did not know the name of the special teacher who teaches the Student’s

college preparation class. DCPS removed this mandate from the Student's current IEP, dated January 27, 2012 (Exhibit P-1).

The special education teacher identified by the SEC at the impartial hearing, who is in the Student's math class, does not provide direct special education services to the Student and has not been identified as the Student's special education teacher on the Student' IEP or on any other document entered into the record (Testimony of Parent, all Exhibits). The parent was not informed of the existence of this special education teacher until the SEC identified this person at the impartial hearing (Testimony of Parent).

V. BURDEN OF PROOF

The burden of proof in a special education due process hearing lies with the party seeking relief. DCMR 5-3030.3; see, Schaffer v. Weast, 546 U.S. 49 (2005).

VI. SUMMARY

The Hearing Officer concludes that Petitioner has met her burden of proof with respect to the alleged denial FAPE based on the DCPS and the Charter Schools' failure to implement the Student's IEP, dated January 26, 2011.

VII CREDIBILITY DETERMINATIONS

This Hearing Officer finds that all of the witnesses at the due process hearing provided credible testimony with the exception of the SEC whose testimony regarding the special education services provided to the Student during his math class was not credible. The evidence shows that direct special education services are not provided to the Student at all during the school day and that the special education teacher identified at the hearing by the SEC had not been identified as the Student's special education teacher on the Student' IEP or on any other document entered into the record. The evidence also shows that the parent, who has had regular and frequent contact with the Student's school, was never informed of the special education teacher identified by the SEC at the impartial hearing and that the parent did not learn of this person until the impartial hearing (Testimony of Parent). As such, I will not credit the SEC's testimony with respect to these facts.

VII STATUTORY FRAMEWORK

Through the IDEA, the federal government provides funding to state and local educational agencies, including those of the District of Columbia, see 20 U.S.C. § 1401(31), for the education of disabled children. As a

condition of receiving that funding, an educational agency must maintain policies and procedures ensuring that a "free appropriate public education is available to all children with disabilities residing in the [jurisdiction] between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "central component of a disabled student's special education under the IDEA" is the individualized education program ("IEP"), which is a written statement setting out the student's "individually tailored goals and the means of achieving them." *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010) (citing 20 U.S.C. § 1414(d)). The IDEA also guarantees a student's parents "both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Id.* at 890 (quoting *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)) (internal quotation marks omitted).

VI. ANALYSIS AND CONCLUSIONS OF LAW

A free appropriate and public education "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Bd. Of Education v. Rowley*, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982). Under *Rowley*, a child is deprived of a free and appropriate public education: (a) if the LEA violated the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free and appropriate public education, or (b) if the IEP is not reasonably calculated to enable a child to receive educational benefits.

Although the D.C. Circuit has not yet squarely addressed the question of what standard governs failure-to-implement claims under the IDEA, the consensus approach to this question among the federal courts that have addressed it has been to adopt the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). *See, Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007). The *Bobby R.* court wrote:

[A] party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

Bobby R., 200 F.3d at 349.

The D.C. Circuit has noted that, because the IDEA defines "free appropriate public education" to mean special educational services that are, inter alia, "provided in conformity with" a student's IEP, 20 U.S.C. § 1401(9)(D), a "complete failure" to implement a student's IEP is "undoubtedly" a denial of an appropriate education under the IDEA. *Abney ex rel. Kantor v. District of Columbia*, 849 F.2d 1492, 1496 n.3 (D.C. Cir. 1988). 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*, 478 F. Supp. 2d at 75.

Moreover, evidence of the type required by the Hearing Officer -- while often useful -- is not necessary to establish that a departure from an IEP constituted a material failure to implement that IEP: "the materiality standard *does not require that the child suffer demonstrable educational harm* in order to prevail" on a failure-to-implement claim. *Van Duyn*, 502 F.3d at 822 (emphasis added); cf. *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA). Rather, courts applying the materiality 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. *See, e.g., Van Duyn*, 502 F.3d at 822; *S.S.*, 585 F. Supp. 2d at 65-68; *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 115-16 (D.D.C. 2008); *Catalan*, 478 F. Supp. 2d at 76.

Here, the Student's IEP, dated January 26, 2011, which is the IEP at issue, indicates that the Student's learning disability "impacts his ability to complete [his] grade level writing curriculum (Exhibit P-10, page 2). The IEP identified the Student's needs as "improv[ing] his knowledge of constructing a paragraph and adding appropriate details" (Exhibit P1-0, paged 2). The annual goal was to improve his "written expression skills by one grade level by displaying knowledge of writing coherent compositions..., among other things. Significantly, no other area of academic concern was identified on the Student's IEP³ (Exhibit P-10). As indicated above, the Student's IEP mandated that he receive 5 hours per week of specialized

³ The Student's behavior supports were not at issue in this matter.

instruction within the general education setting beginning on January 26, 2011 and ending on January 25, 2012. The evidence demonstrates that the Student did not receive any specialized instruction within the general education setting from the beginning of the 2011-2012 school year to the date of the filing of the within DPC (February 3, 2012) (Exhibits P-2, P-5, Testimony of Advocate, Testimony of Parent). Although DCPS has argued that support services were available to the Student after school and that there was a special education teacher in the Student's math class who could have help the Student if he asked for help, the evidence shows that DCPS failed to provide any of the specialized instruction listed on the Student's IEP within the general education setting and that no other services were provided to the Student to support his written expression deficits as per his IEP (Exhibit P-10, Testimony of SEC). Accordingly, based on these facts, I find that DCPS' complete failure to provide any of the Student' mandated specialized instruction within the general education setting was more than a minor discrepancy and that that proportion of services mandated on the Student's IEP to those actually provided by DCPS, which in this case was none, resulted in a material failure to implement the IEP and was a denial of FAPE for this Student. *S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan*, 478 F. Supp. 2d at 75. Further, although the evidence shows that the Student performed well at end of the fall semester of 2011 (Exhibit P-9), this does not excuse DCPS' failure to provide the services that the Student's IEP team felt were required for his continued development.

With respect to the Student's transition plan, the evidence shows that the plan included goals for independent living and employment as well as college preparation. The transition goals also included exploring careers by researching one career per week, learning how to balance a checkbook and preparing for college. According to the IEP, these goals were to be implemented by the Student' special education teacher (Exhibit P-10, page 8). The evidence shows that the DCPS was unaware of this mandate and that the SEC could not identify a special education teacher who teaches the Student's college preparation class (Testimony of SEC). Accordingly, based on these facts, I find that DCPS' failure to implement the Student's transition plan with the assistance of a special education teacher, was more than a minor discrepancy with respect to the implementation the Student's IEP and resulted in a denial of FAPE for this Student.

Compensatory Education:

Where a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education, which is the replacement of educational services that the child should have received in the first place Reid v. District of Columbia, 401 F 3d.

516 (D.C. Cir. 2005). Because compensatory education is a remedy for past deficiencies in student's educational program, a finding as to whether a student was denied a FAPE in the relevant time period is a "necessary prerequisite to a compensatory education award," Peak v. District of Columbia, 526 F. Supp. 2d 32, 36 (D.D.C. 2007).

As indicated above, Petitioner has proven that the Student was denied a FAPE for the 2011-2012 school year. As such, the Student is entitled to compensatory education. See, The Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115 (D.D.C. 2008). Petitioner request compensatory education services in the form of tutoring services and the opportunity for the Student to make up his missed assignments. At the hearing. Petitioner's Advocate testified that based on her assessment, the Student required a tutor to help him with his organizational deficits and that the Student should have an opportunity to make up the missed assignments which led to his failing grades during the fall of 2011 (Testimony of Advocate). The evidence is undisputed that that the Student performed well without receiving the specialized instruction on his IEP and that the Student has refused to seek assistance after school during the current school year. As such, I find that it is unlikely that tutoring services would address DCPS' failure to provide the Student's specialized instruction because the evidence does not support of finding of any academic harm. Additionally, the evidence shows that, if offered, it is unlikely the Student would avail himself of any tutoring services after school because these services were offered to the Student during the current school year and he refused to attend. Therefore I will not provide tutoring services as a compensatory education service. However, the evidence shows that the Student should be given the opportunity to make up all of his missed assignments from the beginning of the 2011-2012 school year because it is apparent that the lack of "organizational" support contributed to the Student's failure to complete his assignments (Exhibit P-9). Accordingly, DCPS and the Charter School shall permit the Student to make up all of the missed assignments from the first day of the 2011-2012 school year up to the date of this decision. . The Student shall be permitted to make up the missed assignments during this time period up to the last day of the 2011-2012 school year.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 18th day of March, 2012, it is hereby

ORDERED, that DCPS and the Charter School shall provide 5 hours per week of specialized instruction within the general education setting to support the Student's deficits in written expression.

ORDERED, that DCPS and the Charter School shall permit the Student to make up all of the missed assignments from the first day of the 2011-2012 school year up to the date of this decision. The Student shall be permitted to make up the missed assignments up to the last day of the 2011-2012 school year.

Dated March 18, 2012

By: /s/ James McKeever
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer's Determination shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. Section 1415(i)(2).