



November 13, 2013

[REDACTED]  
District of Columbia Public Schools  
[REDACTED]

RE: State Complaint No. 013-007

## LETTER OF DECISION

### **PROCEDURAL BACKGROUND**

The State Complaint Office of the Office of the State Superintendent of Education (OSSE), Division of Specialized Education received a State Complaint from [REDACTED], hereinafter “complainant,” on [REDACTED] against the District of Columbia Public Schools (DCPS), alleging violations in the special education program of [REDACTED] (Student ID # [REDACTED]).

The complainant alleged that DCPS violated certain provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and regulations promulgated at 34 CFR Part 300. Specifically, the complainant contends that DCPS failed to make special education and related services available to the child in accordance with the child’s IEP and failed to ensure that the student received specialized instruction from a highly qualified special education instructor.

The State Complaint Office for OSSE has completed its investigation of the State Complaint. This Letter of Decision is the report of the final results of OSSE’s investigation.

### **COMPLAINT ISSUES**

The allegations raised in the complaint, further clarified by a review of documents and interviews or revealed in the course of the investigation, raised the following issues under the jurisdiction of the State Complaint Office:

1. Whether DCPS failed to make available special education and related services in accordance with the student’s IEP, specifically in regard to specialized instruction, the provision of a dedicated aide, occupational therapy services, ABA coaching, speech therapy services, and assistive technology, as required by 34 CFR §§300.105 and 300.323(c)(2)?
2. Whether DCPS failed to ensure that the student received specialized instruction from a highly qualified special education instructor, as required by 34 CFR §300.156(d)?

### **INVESTIGATIVE PROCEDURE**

The investigation included interviews with the following individuals:



1. Parent
2. [REDACTED] Elementary School [REDACTED]

The investigation also included review of the following documents which were either submitted by the complainant, submitted by DCPS, or accessible via the Special Education Data System (SEDS):

[REDACTED]

**GENERAL FINDINGS OF FACT**

1. The student is a child with a disability as defined by 34 CFR §300.8.
2. The student’s disability category is multiple disabilities.

**ISSUES ONE & TWO: SPECIAL EDUCATION AND RELATED SERVICES; HIGHLY QUALIFIED TEACHER**

**Findings of Fact**

1. The [REDACTED] Elementary School special education teacher had obtained full certification as a special education teacher prior to the [REDACTED] school year.
2. The [REDACTED] IEP required provision of 15.5 hours per week of specialized instruction delivered outside the general education setting, 10 hours per week of specialized instruction delivered within the general education setting, 240 minutes per month of speech-language services, and 240 minutes per month of occupational therapy.

3. The [REDACTED] meeting notes documented discussion of modifying the student's specialized instruction hours and their distribution between an inclusion and separate classroom setting, but there is no indication that any modification was made prior to the development of the [REDACTED] IEP.
4. The student's [REDACTED] reported that the parent inquired about a dedicated aide at a 30-day review meeting at the beginning of the [REDACTED] school year.
5. In December [REDACTED] the student's special education teacher submitted a Justification and Plan for Dedicated Aide.
6. The [REDACTED] IEP included a dedicated aide.
7. The [REDACTED] IEP required provision of 18.5 hours per week of specialized instruction delivered outside the general education setting, 7 hours per week of specialized instruction delivered within the general education setting, 4 hours per month of speech-language services, 240 minutes per month of occupational therapy services, 30 minutes per month of speech-language pathology consultation, and 30 minutes per month of occupational therapy consultation.
8. The [REDACTED] Elementary School special education teacher was absent from [REDACTED] through [REDACTED], a total of four school days; from [REDACTED] through [REDACTED], a total of 12 school days; and from [REDACTED] through the end of the school year, a total of 25 school days.
9. Service trackers document the delivery of 1785 minutes of speech language services during the [REDACTED] school year.
10. Service trackers document the delivery of 2070 minutes of occupational therapy during the [REDACTED] school year.
11. The [REDACTED] hearing officer determination required DCPS to conduct an assistive technology (AT) evaluation or fund an independent AT evaluation.
12. The [REDACTED] assistive technology evaluation recommended use of an iPad with the Proloquo2Go application, and the iAdapter protective case; and a trial period with both voice output devices, including the Proloquo2Go application with the iPad, and the Logan ProxTalker.
13. The [REDACTED] IEP indicated that the student would be provided with an augmentative and assistive communication (AAC) device consistent with the recommendations of the [REDACTED] assistive technology evaluation conducted on [REDACTED] and documented in the [REDACTED] evaluation report. The IEP indicated that the device would be provided in a two-week trial to determine if it was appropriate.
14. The [REDACTED] DCPS memorandum indicates that a ProxTalker device was delivered to the student on the same day for a two-week trial.
15. The [REDACTED] meeting notes indicate that a one week trial of the ProxTalker device had been completed, and that the speech-language pathologist would try using the GoTalk device with the student.
16. The student began a two-week trial period with the ProxTalker on [REDACTED].
17. On [REDACTED] the parent communicated to a DCPS occupational therapist that [REDACTED] would prefer to undertake a trial period with the Dynavox Maestro rather than an AAC application on the iPad.
18. The [REDACTED] assistive technology service report included a summary of the

student's two-week trial period with the ProxTalker AAC speech generating device. The report includes a note that the occupational therapist discussed the student's use of this device with the complainant, and the parent concluded that [REDACTED] would prefer to move forward with a trial period of the Dynavox Maestro AAC device, which had recently been demonstrated for [REDACTED] by the student's speech-language pathologist. The report concluded that the speech-language pathologist would conduct trials with the Dynavox Maestro AAC device.

19. On [REDACTED] the student began a two-week trial period with the Dynavox Maestro device.
20. The [REDACTED] IEP required provision of a speech generating AAC device.
21. The complainant received the Dynavox Maestro device on [REDACTED], the last day of the [REDACTED] school year.
22. The [REDACTED] hearing officer determination required DCPS to revise the student's IEP to include provision of a dedicated aide in the general education setting and incorporate a 2:1 student-adult ratio outside the general education setting, at least for the remainder of the [REDACTED] school year. The hearing officer determination explicitly noted that DCPS could then conduct a review of the student's educational needs, and review and revise the IEP as appropriate for the [REDACTED] school year.
23. The [REDACTED] and [REDACTED] IEPs incorporate the required student-adult ratio and required provision of a dedicated aide from [REDACTED] through [REDACTED].
24. The [REDACTED] meeting notes indicate that in response to the parent's concerns about limiting the dedicated aide to the [REDACTED] school year, DCPS staff members explained that eligibility for a dedicated aide must be renewed every year.
25. The [REDACTED] IEP required provision of a dedicated aide from [REDACTED] through [REDACTED].
26. The [REDACTED] and [REDACTED] IEPs indicate that the student would continue to benefit from ABA-based practices, but do not identify any particular ABA-based service in the list of required special education and related services.

### **Discussion/Conclusion**

**DCPS is not in compliance with 34 CFR §300.323(c)(2).**

**DCPS is not in compliance with 34 CFR §300.156(d).**

**DCPS is not in compliance with 34 CFR §300.105.**

Pursuant to 34 CFR §300.323(c)(2), each public agency must ensure that as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. The IDEA regulations at 34 CFR §300.156(d) require LEAs take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services to children with disabilities. The IDEA regulations at 34 CFR §300.18(b) describe the qualifications of highly qualified special education teachers. The complainant alleges that DCPS did not make available the student's specialized instruction, speech-language services, occupational therapy, assistive technology, dedicated aide, and ABA coaching services during the [REDACTED] school year.

### *Specialized Instruction and a Highly Qualified Teacher*

The [REDACTED] IEP was in effect for the student from the beginning of the school year until the development of the [REDACTED] IEP. During this time period, the IEP required provision of 15.5 hours per week of specialized instruction delivered outside the general education setting, and 10 hours per week of specialized instruction delivered within the general education setting. The [REDACTED] Elementary School ([REDACTED] ES) special education teacher, a certified special education teacher, was absent from [REDACTED] through [REDACTED], a total of four school days. DCPS did not address the provision or qualifications of any substitute teacher in its response, and the [REDACTED] ES special education teacher could not confirm that there was a substitute teacher in place during her absence in October.

The [REDACTED] IEP was in effect from that date until the end of the school year. During this time period, the IEP required provision of 18.5 hours per week of specialized instruction delivered outside the general education setting and 7 hours per week of specialized instruction delivered within the general education setting. The [REDACTED] ES special education teacher was absent from [REDACTED] through [REDACTED], a total of 12 school days, and from [REDACTED] through the end of the school year, a total of 25 school days. The [REDACTED] ES special education teacher confirmed that a substitute teacher was in place during these absences, however, DCPS provided no confirmation that this substitute was a certified special education teacher.

It is appropriate to use a long-term substitute teacher where a full-time teacher is absent for an extended period. However, the LEA must ensure that students continue to receive all of the services indicated on their IEPs. DCPS has not provided any information related to the qualifications of the substitute teacher that was in place during the [REDACTED] school year. OSSE cannot confirm that the student received specialized instruction for 41 days, more than 20% of the school year. Therefore, DCPS is not in compliance with 34 CFR §§300.323(c)(2) and 300.156(d) with respect to the provision of specialized instruction.

### *Speech-Language and Occupational Therapy Services*

Both the [REDACTED] and the [REDACTED] IEPs required provision of a total of 240 minutes per month of speech-language services, and 240 minutes per month of occupational therapy. The [REDACTED] IEP added 30 minutes per month of consultation services for speech-language services and occupational therapy. During the [REDACTED] school year, therefore, DCPS was required to provide a total of 2160 minutes of each of these services, based on a school year of approximately nine months. Service trackers document the delivery of 1785 minutes of speech-language services and 2070 minutes of occupational therapy during the [REDACTED] school year. From [REDACTED] to the end of the school year the student was entitled to receive 120 minutes of consultation for each service. Service trackers document receipt of 30 minutes of consultation for speech-language services and no consultation for occupational therapy services. Below is a table that shows the breakdown of services received by month.

Month:	█	█	█	█	█	█	█	█	█	█
<b>SPEECH</b>										
█ IEP 240 min/ month	120	225	210	150	150	90				
█ IEP 4 hrs/ month							240	300	180	120
<b>SPEECH CONSULTATION</b>										
█ IEP N/A	N/A	N/A	N/A	N/A	N/A	N/A				
█ IEP 30 min/ month							0	0	0	30
<b>OT</b>										
█ IEP 240 min/ month	180	240	120	120	120	180				
█ IEP 240 min/ month							270	120	300	180
<b>OT CONSULTATION</b>										
█ IEP N/A	N/A	N/A	N/A	N/A	N/A	N/A				
█ IEP 30 min/ month							0	0	0	0

These service trackers document a number of minutes of services missed for reasons including the provider's absence, the student's absence, school closure, and school field trips. OSSE's January 5, 2010 Related Services Policy sets forth best practices and recommends that IEP teams consider the impact of a provider's absence or a child's absence on the child's progress and performance, and determine appropriate next steps to ensure the provision of FAPE. If the IEP team believes that the missed sessions may be deemed a denial of FAPE, the LEA must ensure that missed sessions are available to the child and make-up sessions are conducted in the timeliest manner possible. There was no indication that the student's IEP team met during the [REDACTED] school year to determine if the missed services needed to be made up.

Therefore, DCPS is not in compliance with 34 CFR §300.323(c)(2) with respect to the provision of speech-language and occupational therapy.

#### *Assistive Technology*

A hearing officer's determination (HOD) issued on [REDACTED] required DCPS to conduct an assistive technology (AT) evaluation or fund an independent AT evaluation. This evaluation, dated [REDACTED], recommended use of an iPad with the Proloquo2Go application, and the iAdapter protective case. The evaluation also recommended a trial period with the ProxTalker and the Proloquo2Go application voice output devices. The [REDACTED] IEP indicated that the student would be provided with an augmentative and assistive communication (AAC) device consistent with the recommendations of the AT evaluation, and that the device would be provided in a two-week trial period to determine if it was appropriate.

What was described in the [REDACTED] IEP as a two-week trial period spanned multiple school years, multiple devices, and more than the two weeks referenced in the IEP. The IEP Team met in October [REDACTED] and discussed the ongoing trials with the complainant. DCPS phone logs, meeting notes, and reports indicate that, up until at least December [REDACTED] when the Dynavox Maestro device was identified for a trial period, the complainant agreed that the device trials should continue. Nearly three months later, on [REDACTED], the student's IEP was revised to require provision of a speech-generating AAC device. It was at this point that the [REDACTED] ES special education teacher indicates that the Dynavox Maestro device was ordered. The complainant received the Dynavox Maestro on [REDACTED], the last day of the [REDACTED] school year.

The trial of multiple devices over a span of several months does not constitute noncompliance given the terms of the [REDACTED] IEP. The three months that elapsed between the beginning of the Dynavox Maestro trial period and the [REDACTED] IEP meeting when the student's IEP was updated to specifically require provision of a speech-generating AAC device raises questions about the speed with which DCPS acted to revise the student's IEP. Given the timing of the device trial over winter break, and the fact that the parent and special education teacher gave conflicting accounts about the length of the trial period ranging from two to six weeks, this is not sufficient to sustain a finding of noncompliance according to the terms of the [REDACTED] IEP. However, the more than three months that elapsed between the development of the [REDACTED] IEP requiring provision of a device, and the actual receipt of the device on the last day of school, constitutes substantial delay.

Therefore, DCPS is not in compliance with 34 CFR §§ 300.105 and 300.323(c)(2) with respect to the provision of specified assistive technology.

#### *Dedicated Aide*

The [REDACTED] HOD required DCPS to revise the student's IEP to include provision of a dedicated aide in the general education setting and incorporate a 2:1 student-adult ratio outside the general education setting. These changes were required to remain in effect for at least the remainder of the [REDACTED] school year. The HOD explicitly noted that DCPS could then conduct a review of the student's educational needs, and review and revise the IEP as appropriate for the [REDACTED] school year. The IEPs dated [REDACTED] and [REDACTED] incorporate the required student-adult ratio and specify that the student required the support of a dedicated aide from [REDACTED] through [REDACTED] the end of the [REDACTED] school year. The notes from the [REDACTED] IEP meeting indicate that during the discussion of the decision to limit the provision of a dedicated aide to the remainder of the [REDACTED] school year, DCPS staff explained that eligibility for a dedicated aide must be renewed every year. This explanation suggests that the decision to terminate the dedicated aide at the end of the school year was based not on the student's educational needs, but on DCPS's internal procedure. DCPS points to the language of the HOD permitting revision of the IEP after the end of the [REDACTED] school year in its response, but it does not indicate in what way the decision to eliminate the dedicated aide for the [REDACTED] school year was consistent with the student's educational needs. Although DCPS' decision to stop providing a dedicated aide at the end of the [REDACTED] school year may not have been based on the student's educational need, that decision falls outside of the investigation timeline for this complaint.

DCPS' procedure of renewing a student's eligibility for a dedicated aide each school may cause lapses in receipt of a needed service for students. At a 30-day review meeting at the beginning of the [REDACTED] school year the parent brought up the student's need for a dedicated aide. The IEP team student's special education teacher began the process for requesting a dedicated aide and submitted a justification and plan for dedicated aide in December [REDACTED]. A dedicated aide was again added to the student's [REDACTED] IEP. All documentation indicates that the student's need for a dedicated aide continued from the [REDACTED] school year into the [REDACTED] and DCPS' procedure of annually renewing eligibility for a dedicated aide caused the student to go without a needed service for the first six months of the [REDACTED] school year.

Therefore, DCPS is not in compliance with 34 CFR §300.323(c)(2) with respect to provision of a dedicated aide.

#### *ABA coaching*

The [REDACTED] and [REDACTED] IEPs indicate that the student would continue to benefit from ABA-based practices. However, none of these IEPs requires provision of any particular ABA-based service. DCPS details certain ABA methodologies on its website which are used in its autism programs, and DCPS provided a number of discrete trial data sheets used in working with the student during the [REDACTED] school year. However, this ABA-based practice is a system employed by DCPS, not a service due to the student pursuant to [REDACTED] IEP. Therefore, OSSE can identify no noncompliance associated with the implementation of ABA-based practices.



Finally, OSSE notes that DCPS’s response focuses, in part, on its contention that the parent has not demonstrated that the student was denied a FAPE. While a hearing officer may find that a child did not receive a FAPE only if any procedural inadequacies impeded the child’s right to a FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefit, the state complaint process contains no such limitation. *Compare* 34 CFR §§300.151 – 300.153 to 300.513(a). The state complaint process is intended to address procedural failures; a parent need not demonstrate that a student was denied a FAPE in order to support a finding of noncompliance.

**CORRECTIVE ACTION**

1. In order to correct the noncompliance with 34 CFR §§300.323(c)(2) and 300.156(d):
  - a. By [REDACTED], DCPS must convene a meeting, at a time and location convenient to the parent, to develop a compensatory education plan to address the failure to make available all required specialized instruction, occupational therapy, speech-language services, assistive technology, and a dedicated aide. If DCPS and the parent cannot reach agreement, DCPS must offer a minimum of 50 hours of compensatory education or services to be distributed between occupational therapy, speech-language services, and tutoring according to the parent’s preferences. DCPS must provide a copy of a finalized compensatory education plan to OSSE by [REDACTED].
  - b. By [REDACTED], DCPS must certify to OSSE that decisions related to the provision of dedicated aides from school year to school year are made based on student’s educational needs.

All corrective actions must be completed by the due date specified and in no case later than one year from the date of this Letter of Decision. If you have any questions regarding this decision, please contact Jennifer Masoodi, Manager, State Complaints, at [jennifer.masoodi@dc.gov](mailto:jennifer.masoodi@dc.gov) or 202-741-0479.

Sincerely,

Amy Maisterra, Ed.D., MSW  
Assistant Superintendent for Specialized Education

cc: [REDACTED], Complainant