



June 22, 2015

[REDACTED]  
District of Columbia Public Schools  
[REDACTED]

RE: State Complaint No. 014-021

## LETTER OF DECISION

### **PROCEDURAL BACKGROUND**

On [REDACTED], the State Complaint Office of the Office of the State Superintendent of Education (OSSE), Division of Specialized Education received a State Complaint from [REDACTED] (complainants) against District of Columbia Public Schools (DCPS) and [REDACTED] Public Charter School [REDACTED] ([REDACTED] PCS) alleging violations in the special education program of their [REDACTED] (Student ID # [REDACTED] hereinafter “student” or “child.” DCPS is the local educational agency (LEA) responsible for ensuring provision of special education and related services to students attending [REDACTED] PCS.

The complainants alleged that DCPS and [REDACTED] PCS 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, failure to make available special education and related services in accordance with the student’s IEP.

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 revealed in the course of the investigation, raised the following issues under the jurisdiction of the State Complaint Office:

1. **Available special education and related services requirement at 34 CFR §300.323(c)(2)**
  - a. Failure to make available special education and related services in accordance with the student’s IEP, specifically with regard to speech therapy, occupational therapy, applied behavior analysis, functional behavioral



analysis, and the behavior intervention plan.

**INVESTIGATIVE PROCEDURE**

The investigation included interviews with the following individuals:

1. One complainant
2. [REDACTED] PCS [REDACTED]
3. [REDACTED] PCS [REDACTED]
4. [REDACTED] PCS [REDACTED]
5. [REDACTED] PCS [REDACTED]

The investigation also included review of the following documents which were either submitted by the complainants, submitted by DCPS and [REDACTED] PCS, 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 autism spectrum disorder (ASD), also known as autism.
3. The student attends [REDACTED] PCS.
4. The student’s LEA is DCPS.

**ISSUE ONE: MAKE SERVICES AVAILABLE**

**Findings of Fact**

1. An IEP team meeting was held on [REDACTED] and an IEP was developed.
2. The [REDACTED] IEP contains the following information relevant to this

investigation:

- a. The IEP prescribed 7.5 hours per week of specialized instruction inside the general education setting, 4 hours per month of speech-language pathology outside the general education setting, 180 minutes per month of occupational therapy services outside the general education setting, and 2 hours per month of behavioral support services inside the general education setting.
  - b. The positive behavior interventions and supports section states: “Historical documents suggest that [Student] has several behaviors that interfere with [redacted] ability to engage the general education environment to include hyperactivity, inattention/disengagement and poor social skills. [redacted] parents reportedly verbally [sic] that transitions cause [Student] marked anxiety which is a typical feature of student’s [sic] with ASD.”
  - c. The other classroom aids and services section lists the following: “Visual Supports as needed in [redacted] educational environment (checklists, visual schedule, graphic organizers) – Preferential Seating – Repeated Directions – Motor Breaks – Sensory breaks and strategies (sensory cushion, therapy ball, headphones) – Social Monitoring and prompting – Social Skills and social stories instructions – Behavior Intervention Strategies (visual schedule).”
  - d. The following six goals are listed under the adaptive/daily living skills area of concern including: “1) During a structured academic task/activities, [Student] will be able to attend to a given task for at least 5 minutes, by physically engaging in the activity in 4 out of 5 trials, with no more than 2 verbal prompts per activity. 2) Given a visual schedule and one verbal reminder, [Student] will follow classroom routines and [redacted] will transition independently between activities within the classroom in 8 out of 10 observed occasions. 3) Given fading visuals, [Student] will be able to participate in classroom activities by sitting in [redacted] assigned seat and demonstrating active involvement with the group activity by looking at the teacher, attempting to repeat words and songs, responding to questions, and gross motor movements with no more than 2 verbal prompts on 4 out of 5 days of the week.”
  - e. The following 3 goals are listed under the emotional, social, and behavioral development area of concern: “1) [Student] will stay engaged with social and cooperative play with a peer(s) for up to 15 minutes (requiring no more than 2 verbal prompts to stay engaged) [sic] 85% accuracy across all opportunities. 2) [Student] will be able to demonstrate interest and attention to a variety of topics that are presented, and, be able to shift away from topics that [redacted] is perseverating on with a maximum of 2 prompt [sic] 85% accuracy across all opportunities. 3) [Student] will be able to stay focused and attentive to group academic work and group play requiring no more than 2 verbal prompts across the natural beginning and end of activities.”
3. An IEP team meeting was held on [redacted] and an IEP was developed.

4. The [REDACTED] IEP contains the following information relevant to this investigation:
  - a. The IEP changed the setting in which the student's specialized instruction was delivered from 7.0 hours per week in the general education setting to 2.5 hours per week of specialized instruction inside the general education setting and 5 hours per week of specialized instruction outside the general education setting. The student's other service hours remained the same: 4 hours per month of speech-language pathology outside the general education setting, 180 minutes per month of occupational therapy services outside the general education setting, and 2 hours per month of behavioral support services inside the general education setting.
  - b. The positive behavior interventions and supports section, the other classroom aids and services section, and the adaptive/daily living skills goals sections remained identical to the same sections in the [REDACTED] IEP.
  - c. The IEP contains 5 different goals under the emotional, social, and behavioral development area of concern: "1) [Student] will independently initiate social interaction with social worker, teacher, or peers 30% of the time. 2) [Student] will become more mindful about appropriate boundaries with staff and peers and should keep [REDACTED] hands, feet, and body to himself 60% of the time. 3) [Student] will handle frustrations without melting down and/or throwing tantrums and will use [REDACTED] coping skills 50% of the time. 4) [Student] will follow a one-step direction in four out of five opportunities in classroom settings or outside of the classroom. 5) Given prompts, [Student] will transition from one activity to another in four out of five opportunities without incident."
5. The [REDACTED] IEP team meeting notes state: "[REDACTED] receives visual supports, preferential seating, repeated directions, simplified directions, motor breaks, sensory breaks and strategies, social monitoring and prompting, social skills and social stories instruction and behavior intervention strategies (visual schedule)." ... "[Student] does not have a BIP at this time and [REDACTED] behavior does not warrant an FBA." ... "[Student's] behaviors have decreased from the beginning of the school year and we continue to see growth." The notes also state: "The team has seen growth with [REDACTED] academics and decrease in behaviors. [Student] continues to required [sic] classroom aids and services in the general education setting, such as visual supports, preferential seating, simplified directions, motor and sensory breaks and social monitoring and prompting."
6. Neither the [REDACTED] IEP nor the [REDACTED] IEP require any applied behavior analysis (ABA) therapy or ABA-based service.
7. An IEP team meeting was held on [REDACTED] and an IEP was developed.
8. The [REDACTED] IEP team meeting notes state: "[Student] needs to improve [REDACTED] attention and social skills to prevent removal from the general education curriculum. [REDACTED] requires consistent prompts, redirection, verbal reinforcement and other behavior supports to successfully participate in the general education curriculum. Behavior

support counseling will be provided to [Student] to help [redacted] develop effective strategies to address [redacted] problem behaviors and reduce their negative impact on [redacted] academic performance. The likelihood of [Student] accessing grade level content will be significantly increased by addressing [redacted] problem areas.” The notes also state: “DCPS will conduct a FBA and draft a BIP (if needed). The team will reconvene during the second/third week of June to review the documents.”

9. The [redacted] PCS first day of school for the [redacted] school year was [redacted].
10. Between August [redacted] and April [redacted] the student missed 7 hours of speech-language services, 6 hours and 45 minutes of occupational therapy services, and received all required behavioral support services.
11. On [redacted] DCPS authorized 3 hours of independent speech-language therapy services and 6 hours of occupational therapy services.

### **Conclusion/Discussion**

**Based on the analysis below, DCPS and [redacted] PCS are not in compliance with 34 CFR §300.323(c)(2) due to the failure to provide all speech-language and occupational therapy services required by the student’s IEP, but are in compliance with §300.324(a)(2)(i) as the use of positive behavioral interventions and supports were considered to address behavior.**

Pursuant to 34 CFR §300.323(c)(2), as soon as possible following development of the IEP, special education and related services must be made available to the child in accordance with the IEP. The complainants allege that the school did not provide speech therapy, occupational therapy, applied behavior analysis, functional behavior analysis, and a behavior intervention plan from August [redacted] through the date of the complaint on [redacted].

### **Related Services**

Both the [redacted] and [redacted] IEPs prescribed the same amount of related services: 4 hours per month of speech-language pathology outside the general education setting, 180 minutes per month of occupational therapy services outside the general education setting, and 2 hours per month of behavioral support services inside the general education setting.<sup>1</sup> OSSE reviewed service trackers from August [redacted] to April [redacted] to calculate whether the student has been receiving the amount of related services required by [redacted] IEP.<sup>2</sup> As required

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<sup>1</sup> OSSE notes that the student’s IEP requires behavioral support services to be delivered inside the general education setting; however service trackers reflect that services are often delivered outside of the general education setting. The record reflects that the parent and LEA staff mutually agreed to student receipt of these services outside of the general education setting. OSSE reminds the LEA of its responsibility to ensure the IEP accurately reflects the student’s related services. Should the student continue to receive behavioral support services outside of the general education setting, the student’s IEP should be revised according to the OSSE IEP Amendment Policy issued on [redacted].

<sup>2</sup> The [redacted] PCS first day of school for the [redacted] school year was August 25, [redacted]. As a result, the student was entitled to receive one week of related services hours during August [redacted].

by the OSSE Related Services policy, LEAs must make up missed services due to provider absences, but are not required to make up missed services due to student absences.<sup>3</sup> LEAs are also not required to make up missed services due to school closure where educational services are not available to any student. The total hours below show service hours delivered and service hours attempted but missed due to the student's absence or school closure:

	<i>Speech-Language</i> 4 hrs (240 mins)/month	<i>Occupational Therapy</i> 180 mins/month	Behavioral Support Services 2 hrs/month
Aug. ■■■ (1 week)	0 minutes delivered	0 minutes delivered	0 minutes delivered
Sep. ■■■	180 minutes delivered	135 minutes delivered	0 minutes delivered
Oct. ■■■	240 minutes delivered	90 minutes delivered, 135 minutes attempted	240 minutes delivered
Nov. ■■■	180 minutes delivered	135 minutes delivered, 45 minutes attempted	180 minutes delivered
Dec. ■■■ <sup>4</sup>	60 minutes delivered, 60 minutes attempted	90 minutes delivered, 120 minutes attempted	120 minutes delivered
Jan. ■■■	120 minutes delivered	135 minutes delivered, 90 minutes attempted	180 minutes delivered
Feb. ■■■	120 minutes delivered, 60 minutes attempted	135 minutes delivered, 45 minutes attempted	190 minutes delivered
Mar. ■■■	120 minutes delivered, 240 minutes attempted	0 minutes delivered	60 minutes delivered
Apr. ■■■ <sup>5</sup>	180 min received, 180 minutes attempted	0 minutes delivered	150 minutes delivered

### *Speech-Language Services*

OSSE found that the student missed 420 minutes (or 7 hours) of speech-language services between August ■■■ and April ■■■ either due to the service provider's unavailability or a lack of attempted service delivery. OSSE finds that the failure to deliver these services constitutes a violation of the responsibility to provide related services. Although OSSE does not find a violation for hours that were attempted but missed due to the student's absence or school closure, there was only one month during the school year in which the student received all required speech-language therapy service hours. While there is no hard requirement to

<sup>3</sup> OSSE Related Services policy (January 5, 2010) at p. 10.

<sup>4</sup> ■■■ PCS was closed from December 22, ■■■ through January 2, ■■■ for winter break. Due to school closure for the last 2 weeks of December, the LEA was not required to provide the full amount of services that month.

<sup>5</sup> ■■■ PCS was closed from April 13, ■■■ through April 17, ■■■ for spring break. Due to school closure for this week, the LEA was not required to provide the full amount of services that month.

provide make-up services for student absences, LEAs should conduct a case by case analysis to determine the necessity of make-up services or amendment to services in cases where students have missed several days.<sup>6</sup> On [REDACTED], DCPS authorized 3 hours of independent speech-language therapy services as make-up services.<sup>7</sup> The remaining 4 hours must be made up and the IEP team should also consider whether the additional hours that were attempted but not delivered resulted in a denial of FAPE to the student.

#### *Occupational Therapy Services*

OSSE found that the student missed 6 hours and 45 minutes of occupational therapy services between August [REDACTED] and April [REDACTED] either due to the service provider's unavailability or a lack of attempted service delivery. Forty-five minutes of services were missed in August [REDACTED] and September [REDACTED] for a total of 90 minutes. Between October [REDACTED] and February [REDACTED] all required occupational therapy services were delivered or attempted. No services were delivered in March and April [REDACTED] due to service provider unavailability, for a total of 5 hours and 15 minutes. A total of 6 hours and 45 minutes of occupational therapy services hours were missed over the relevant period of time.

Although all required occupational therapy service hours were delivered or attempted between October, [REDACTED] and February [REDACTED] the student did not receive all required hours for any single month of the school year. Missed services were discussed at the [REDACTED] [REDACTED] IEP meeting and subsequently, on [REDACTED], DCPS authorized 6 hours of independent occupational therapy services as make-up services. The remaining 45 minutes must be made up and the IEP team should also consider whether the additional hours that were attempted but not delivered resulted in a denial of FAPE to the student.

#### *Behavioral Support Services*

OSSE found that the student missed 3.5 hours of behavioral support services between August [REDACTED] and April [REDACTED] either due to the service provider's unavailability or a lack of attempted service delivery. OSSE's review of service trackers indicates that the student received all required behavioral support services from October [REDACTED] through February [REDACTED] and during April [REDACTED]. Although no services were delivered in August and September [REDACTED] due to the lack of a service provider at [REDACTED] PCS, a make-up services plan was created and the record reflects that all missed services were made up in October and November [REDACTED] after a social worker was hired. Additional services were provided in April [REDACTED] that serve as make-up hours for the 60 minutes of missed services in March [REDACTED]. The complainant expressed concern that some of

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<sup>6</sup> OSEP Letter to Clarke, March 8, 2007 (48 IDELR 77).

<sup>7</sup> The parent reported that she raised her preference to the IEP team on [REDACTED] for the delivery of missed services to take place through independent providers. The parent reported that this was due to concerns regarding changes in personnel and additional removal of the student from the classroom on a weekly basis. The record reflects the LEA agreed to this request from the parent by issuing a missed services authorization letter on the same date.

the behavioral support services trackers were falsified. After reviewing the service trackers, which included the provider's notes for each session, and interviewing the [REDACTED] PCS social worker and other staff members, OSSE found no reason to believe that the service trackers were falsified.

OSSE's review of the record indicates that during November [REDACTED] through April [REDACTED] the student received 250 minutes (4 hours and 10 minutes) of additional counseling services delivered outside of the general education setting. OSSE reminds [REDACTED] PCS that removal of the student from the classroom for time beyond that of IEP-required related services or make-up services may constitute a change in the student's placement. If these additional removals continue, the IEP team should consider whether the student's IEP should be revised in order to ensure the provision of FAPE to the student.

#### Functional Behavioral Analysis (FBA) and Behavioral Intervention Plan (BIP)

In the case of a child whose behavior impedes the child's learning or that of others, IEP teams must consider the use of positive behavioral interventions and supports and other strategies to address that behavior. (34 CFR §300.324(a)(2)(i)) The student's [REDACTED] and [REDACTED] IEPs list behavior concerns related to staying engaged in the classroom, social skills development, and transitions. Both IEPs list strategies to use with the student including visual supports, preferential seating, breaks, repeated directions, and social skills assistance. These strategies were discussed at the [REDACTED] IEP team meeting and the IEP team agreed that they would continue to be used in the classroom.

The student's IEP goals were also reviewed at the [REDACTED] IEP meeting. The IEP goals under the adaptive and daily living skills area of concern include 3 of 6 goals to address the student's ability to engage and participate in class. The student's previous IEP, dated [REDACTED], contained 3 goals in the area of emotional, social, and behavioral development to help the student build social skills and learn to engage with peers. The IEP team revised these goals at the [REDACTED] meeting to include 5 goals to help the student build social skills with peers and staff, appropriately handle frustrations, follow directions, and transition between activities. The student receives behavioral support services where the [REDACTED] PCS [REDACTED] worker works with [REDACTED] on these goals. At the [REDACTED] IEP team meeting the social [REDACTED] reported that the student's targeted behaviors had decreased and that [REDACTED] continued to make progress. The IEP team agreed that the student's behavior did not warrant completion of a functional behavioral assessment (FBA). In interviews, [REDACTED] PCS staff reported that the student exhibits only minor behavioral concerns in class that are not outside the range of what is able to be addressed through the interventions and strategies included in the student's IEP. Staff reported that, on occasion, the student has difficulty transitioning to school in the morning, but that [REDACTED] has made progress throughout the school year using the existing IEP-required behavior strategies and supports.



At the [REDACTED] IEP team meeting the team discussed the student's progress and reviewed the behavior strategies and supports that were in place. Staff reported that the student continued to require prompts and redirection to stay on task. Pursuant to the parents' request, DCPS agreed to complete an FBA and create a BIP, if necessary. The record indicates that DCPS and [REDACTED] PCS have taken all necessary steps to address all of the student's behavioral concerns and that it has not been determined necessary to complete an FBA.

#### Applied Behavior Analysis (ABA)

The parents have requested ABA therapy to benefit the student. This request has been discussed at IEP team meetings and [REDACTED] PCS staff has considered having the school's social worker trained in ABA methodology; however, neither of the IEPs in effect during the investigation timeline required provision of any particular ABA-based service. Therefore, OSSE cannot identify noncompliance associated with the implementation of ABA therapy services.

#### CONCLUSIONS

1. DCPS and [REDACTED] PCS are not in compliance with the requirement to make available special education and related services as required by 34 CFR §300.323(c)(2), but are in compliance with the requirement to consider positive behavioral interventions and supports as required by §300.324(a)(2)(i).

#### CORRECTIVE ACTION

1. In order to correct the noncompliance with 34 CFR §300.323(c)(2), DCPS and [REDACTED] PCS must make up 4 hours of speech-language therapy services and 45 minutes of occupational therapy services.

If you have any questions regarding this decision, please contact Victoria Glick, Manager, State Complaints, at [victoria.glick@dc.gov](mailto:victoria.glick@dc.gov) or 202-724-7860.

Sincerely,

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

cc: [REDACTED], parents  
[REDACTED], [REDACTED] PCS