

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

Student Hearing Office  
810 First Street, N.E.  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
August 22, 2014

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PARENT, on behalf of  
STUDENT,

Petitioner,

Hearing Officer: Michael Lazan

V

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

This is a case involving a student with an Other Health Impairment.

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on May 15, 2014 in regard to the Student. On May 28, 2014, Respondent filed a response. A resolution meeting was held in this case on May 28, 2014. The resolution period expired on June 14, 2014.

On July 16, 2014, this Hearing Officer held a prehearing conference.

A prehearing conference order issued on July 21, 2014 outlining the summarizing the rules to be applied in this hearing and identifying the issue in the case.

A continuance motion was made by Petitioner because of witness availability. This motion was granted by this hearing officer on July 23, 2014, extending the date for the HOD to August 8, 2014.

A hearing date followed on August 1, 2014. This was a closed proceeding. Petitioner was represented by Miguel Hull, Esq. Respondent was represented by Tanya Chor, Esq. Petitioner entered into evidence exhibits 1-17, 19-26. Respondent entered into evidence exhibits 1-14, 16-17. Petitioner presented as witnesses: Petitioner; Witness A, advocate; and Witness B, Educational Consultant. Respondent presented: Witness C, the SEC/LEA representative at School A.

### **JURISDICTION**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **ISSUE**

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issue to be determined is as follows:

Did DCPS fail to implement the IEP of April 23, 2014, which required that the Student receive 26.5 hours of special education instruction per week?

As relief, Petitioner seeks compensatory education in the form of 1:1 tutoring. Issues 1 and 3 in the prehearing order were withdrawn without prejudice by Petitioner prior to the start of testimony.

## FINDINGS OF FACT

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

1. The Student is currently eligible for services as a student with an Other Health Impairment.
  
2. Student currently attends School A and will be starting fifth grade for the forthcoming school year. (P-2-1-2)
  
3. The Student has been diagnosed with Attention Deficit Hyperactivity Disorder and Mood Disorder. He does better when he is on appropriate medication. (P-2-9 P-11-1)
  
4. The Student has weaknesses in decoding, in spelling, and particularly reading fluency. He reads at a very slow pace. He benefits from tools used in small reading groups such as strategy bookmarks. (P-2-4-5; R-3-2)
  
5. The Student's writing issues involve having difficulty with the structure of a paragraph. His ability to write is significantly behind his peers. In writing, the Student benefits from a multi-step approach, modeling, and extra time. (P-2-7)
  
6. The Student's speech and language issues include unintelligibility issues. He benefits from the use of graphic organizers, multiple repetition, discussions, drilling and related interventions. (P-2-8)
  
7. The Student has significant behavioral issues in the classroom. He is impulsive and inattentive, and can be defiant and moody. He can be aggressive, striking and kicking and bullying other students. He seeks confrontation with others.

At other times he can be fearful, depressed, or struggle with

auditory and visual hallucinations. He is generally restless and off tasks and needs cues to restart tasks. He does not follow rules, has inconsistent concentration, and poor school attendance. He will get out of his seat in class. (P-2-9)

8. Woodcock-Johnson III Normative Update Tests of Achievement testing from March 26, 2012 reveals that the Student was well below grade level in reading and writing at that time. The Student's standard score for reading fluency was 68, and the Student's standard score for passage comprehension was 64. (P-6-3)

9. The Student was first determined to be eligible for services in the second grade. (Testimony of Petitioner)

10. For elementary school, the Student first attended School B and then went to School A. (Testimony of Petitioner)

11. For the 2013-2014 school year, for the fourth grade, the Student was in the X Program at School A. This is considered a "general education" program by Respondent. (P-2-9)

12. At the start of the school year, the Student's IEP called for 2.5 hours per week of specialized instruction outside general education in reading, and 2.5 hours per week of specialized instruction outside general education in writing. The IEP also called for behavioral support services outside general education for 2 hours per month and speech and language pathology outside general education for 2 hours per month. (P-3-12)

13. Throughout the school year, the Student's classroom had six students in it. Four of these students had IEPs. (Testimony of Witness C)

14. Adults in the classroom were Behavior Tech A, who was in the classroom full time; Teacher A, a general education teacher, who was in the classroom full time; Teacher B,

a special education teacher, who was in the classroom for two hours a day in reading; and Teacher C, a special education teacher, who was in the classroom for math for two hours a day. The classroom also included a speech and language therapist. (Testimony of Witness C)

15. The Student experienced behavioral issues in the classroom during the school year. The Student regressed in his emotional, social and behavioral development. He had tantrums, was destructive in the classroom, and did not take redirection. The Student was involved in numerous suspensions and behavioral incidents during the year. (P-10, 11, 13)

16. The Student's behavior got worse during the fourth grade year.

17. The Student's behavioral problems resulted in a call to the police department. The Student was hospitalized during the school year at Hospital A. (Testimony of Witness C)

18. Because of the Student's significant behavioral issues, an IEP team recommended a significant increase in services in the April 23, 2014 IEP. (Testimony of Witness C)

19. The Student was recommended to receive 26.5 hours of specialized instruction per week in the April 23, 2014 IEP. This instruction is mandated to be "outside of the general education environment." (P-2-10-11; R-3-1)

20. At the time the IEP was written, the Student was having serious, ongoing behavioral and emotional difficulties in his school adjustment. (P-2-9; Testimony of Witness C)

21. Despite the change in the IEP, the Student's services remained the same for the rest of the 2013-2014 school year. (Testimony of Witness C)

22. The Student's fourth term during the 2013-2014 school year was not "very good" for him. He had tantrums, he was destructive, and he was aggressive. He did not take redirection or remain in the

classroom. Classroom focus was impossible for him at times of disruption. He was also absent for many days. (P-5-4-5)

23. In the X Program at School A during the 2013-2014 school year, the Student demonstrated progress in phonics, fluency and comprehension skills. (R-3-1)

24. During the 2013-2014 school year, the Student's grades were mostly 2, 3, and 4, with more 2 grades for the first three terms. There was improvement in the Student's grades for Term 4. (P-4-1)

25. The Student's skills were considered to be "developing" in most areas of writing and language and in speech during the 2013-2014 school year. (P-4-2)

26. A meeting was held on July 21, 2014 at School B relating to the Student. At this meeting, Witness A was told by the Student's special education teacher that School A did not fully implement the Student's IEP. (Testimony of Witness A)

27. I found all the witnesses credible in this proceeding.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

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

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Schaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in

Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

“Failure to implement” claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must indicate that substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding no failure to implement where District’s school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007).

The record reveals that this Student had severe behavioral problems at the X Program at School A during the 2013-2014 school year, necessitating a change in program. As a result of the behavioral issues, the Student’s hours of specialized instruction per week increased from 5 hours per week to 26.5 hours per week in the April 23, 2014 IEP. However, after the IEP was written, the Student’s services were not changed. The Student remained in the X program at School A and received ten hours of instruction with a special education teacher per week. A substantial portion of the IEP was not implemented by the X Program at School A.

This failure to implement had a material impact on the Student, who requires a special education teacher in the classroom. Without such a teacher, the Student’s performance continued to be poor during the fourth term of the 2013-2014 school year. He had out of control tantrums, he was destructive to his classroom, and he was aggressive. He engaged in silliness and crying episodes. He did not take redirection or remain in the classroom. At times,

classroom focus was impossible for him. While the Student's grades did increase during the fourth term, there was no corroborative evidence, testimony or argument to explain why or how the grades increased given the extreme behavior that was exhibited at this time.

Respondent suggests that the X program at School A was in fact a special education program, and that the Student therefore did receive 26.5 hours of specialized instruction per week. The April 23, 2014 IEP, however calls, for instruction "outside of general education" and clearly indicates that the X program is considered a general education program. Moreover, the IEP clearly called for a change in program. There was no change in the delivery of services after the IEP.

As a result of the foregoing, I find that Respondent denied the Student a FAPE when it did not implement the April 23, 2014 IEP.

As a remedy, Petitioner asserts that appropriate relief in this matter is to provide 120 hours of compensatory education in the form of academic tutoring. Petitioner seeks 40 hours of instruction in reading, 1 hour per session per week for 10 months; 40 hours of instruction in written language, 1 hour per session per week for 10 months; and 40 hours of instruction per session in math, 1 hour per session per week for 10 months.

When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated:

The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confer broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet their

unique needs.

School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

One of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award "educational services. . . to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, 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. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award." Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524. Specifics regarding the type of relief sought may not be required by Courts if witnesses have identified where the Student was before FAPE denial, where the Student should be after FAPE denial, the number of hours of compensatory education needed for the Student, and what program would get the student where he should be, and what it would consist of. Cousins v. District of Columbia, 2012 WL 3090265 (D.D.C. 2012).

Petitioner presented a witness, Witness B, who was qualified as an expert in IEP development and implementation. This witness reviewed the record, considered the impact of the Student's FAPE deprivation since April, 2014, and then calculated the proposed award. The award is premised on the witness's experience as an educator. I found the witness credible, and I find the award mostly reasonable and in keeping with the Reid standards.

However, the witness provided an award for math remediation even though no math services are recommended on the Student's IEP. While there is some evidence to suggest that the Student did have deficiencies in math, there is insufficient evidence to show that the Student needed specialized instruction in math. Accordingly, I will therefore reduce the award to 80 hours of academic tutoring, to be provided 1:1, 1 hour a week, for 10 months.

### **ORDER**

Based upon the above Findings of Fact and Conclusions of Law:

1. Respondent is adjudged to have denied the Student a FAPE by its failure to implement its April, 2014 IEP;

2. The Student is hereby awarded 80 total hours of compensatory education in the form of 40 hours per week of 1:1 academic tutoring in reading, 1 hour per week, for 10 months, and 40 hours per week of 1:1 academic tutoring in writing, 1 hour per week, for 10 months.

This compensatory education may be provided by public or private provider.

Dated: August 8, 2014

*Michael Lazan*  
Impartial 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 USC §1415(i).

Date: August 8, 2014

*Michael Lazan*  
Impartial Hearing Officer