

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

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
December 07, 2019

<i>Student,</i> ¹)	Case No.: 2019-0228
through <i>Parent,</i>)	
<i>Petitioner,</i>)	Date Issued: 12/7/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (Room): 11/25/19 (423)
("DCPS"),)	& 11/26/19 (teleconf.)
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to lack of Individualized Education Program (“IEP”) implementation. DCPS responded that the IEPs were properly implemented and there was no denial of FAPE.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 9/10/19, the case was assigned to the undersigned on 9/11/19. On 9/26/19, Respondent filed a response and did not challenge jurisdiction. On 9/30/19, Petitioner filed a Motion to Amend the Complaint, to which Respondent did not object, and which was granted by the undersigned on 10/12/19, restarting the timeline as of 9/27/19, the date the amended complaint was filed. The

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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resolution meeting was held on 9/25/19 without success. The 30-day resolution period for the amended complaint ended on 10/27/19. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 12/11/19.

Following the prehearing conference on 11/4/19 and issuance of the Prehearing Order that same day, the due process hearing took place on 11/25/19 and 11/26/19 (closing arguments by teleconference) and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present in person for the hearing.

Petitioner’s Disclosures, submitted on 11/18/19, contained a short cover pleading and documents P1 through P25, which were all admitted into evidence without objection. Respondent’s Disclosures, submitted on 11/18/19, contained a short cover pleading and documents R1 through R12, which were all admitted into evidence without objection.²

Petitioner’s counsel presented 3 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. Student
2. Parent
3. *Special Education Advocate* (qualified without objection as an expert in Compensatory Education)

Respondent’s counsel presented 3 witnesses in Respondent’s case (*see* Appendix A):

1. *Instructor*
2. *Teacher*
3. *Assistant Principal at Public School*

Petitioner’s counsel recalled Student as the sole rebuttal witness.

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DCPS denied Student a FAPE by failing to implement Student’s IEP and provide extended time to complete and submit assignments in history class during

² References herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, a hyphen, and the exhibit page number (or numbers, separated by commas) Respondent’s documents are consecutively page numbered throughout, so are referenced by an “R” followed by the exhibit number, followed immediately by a “p” (for page) and the page number(s).

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2017/18,³ resulting in Student failing the class. *Petitioner has the burden of persuasion on this issue.*

Issue 2: Whether DCPS denied Student a FAPE by failing to provide Student with adapted physical education after ear surgery in March 2018 made regular physical education class unsafe. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall adjust Student's transcript to change failing grades in Physical Education and History in 2017/18 to "M" for medical excusal.
3. DCPS shall provide or fund compensatory education for any denial of FAPE⁴ or, in the alternative, fund a study to determine an appropriate award of compensatory education.
4. Any other appropriate relief.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁵ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age*, *Gender* and in *Grade* at Public School.⁷ Student is hard of hearing, but

³ All dates in the format "2017/18" refer to school years.

⁴ Petitioner's counsel was put on notice at the prehearing conference that unless a compensatory education study was authorized, Petitioner would be expected to introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was similarly encouraged at the prehearing conference to introduce evidence contravening the requested compensatory education in the event a denial of FAPE were found.

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁶ Parent.

⁷ *Id.*

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primarily communicates through spoken English with a sign language interpreter to fill in what is missed in class through audition; Student is polite and well liked.⁸

2. IEPs. Each of Student's 3 IEPs in effect during 2017/18, the period at issue in this case, stated that Student's disability classification is Hearing Impaired and provided that the areas of concern are Hearing and Motor Skills/Physical Development, without including any academic area of concern.⁹ Each of the 3 IEPs provided 4.5 hours/week of specialized instruction outside general education, 4 hours/week of written expression inside general education, 60 minutes/month of occupational therapy consultation services, and 15 minutes/month of audiology consultation services; the 1/25/18 IEP provided for 30 minutes/month of behavioral support services inside general education, while the other IEPs did not include any related services.¹⁰ In Other Classroom Aids and Services, each of the 3 IEPs provided that "Teachers should send class notes and missed assignments via email or an online organization tool such as Dropbox or Google doc."¹¹ In Classroom Accommodations, each of the 3 IEPs provided that Student should have "Extended Time" for completing and submitting assignments.¹²

3. Attendance. Student missed a great deal of school in 2017/18 due to illness and medical appointments; Student had frequent headaches, dizziness and vomiting.¹³ Student had serious ear surgery on 2/28/18 during which a tumor was found, resulting in unexpected hearing loss; Parent provided a reminder about the 2/28/18 surgery to Public School the day before, reported the results the day of the surgery, and later provided doctor's notes.¹⁴ After the 2/28/18 surgery, Student's doctor provided a written excuse covering 2/28/18 to 3/14/18, and requested that Student be allowed 7 half-days until 3/23/18 for making up missed work.¹⁵ Spring break was the following week, from 3/26/18 through 3/30/18.¹⁶

4. Advanced Placement World History. On 3/6/18 Parent raised concerns about Student "falling quickly behind" in school and asked how she could pick up missed work.¹⁷ In response that day, Teacher suggested pursuing a "Medical" for Student's grade in Advanced Placement ("AP") World History, as Student had missed "a ton of seat hours and

⁸ P1-2; P3-3.

⁹ P1-1,3,4 (3/27/17 Amended IEP); R2p15,18,19 (1/25/18 IEP); P2-1,3,4 (5/2/18 Amended IEP).

¹⁰ P1-6; R2p21; P2-6.

¹¹ *Id.*

¹² P1-8; R2;23; P2-8; Teacher.

¹³ Student; Parent; P25.

¹⁴ P7-1; P8-1; Parent.

¹⁵ P12-1.

¹⁶ Parent; Administrative Notice of DCPS 2017/18 School Calendar.

¹⁷ P9-3.

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probably won't be able to make up the work."¹⁸ Teacher testified that he doesn't give "M" grades, which are up to the administration.¹⁹

5. Parent asked for a meeting to develop a plan for Student to make up work and plan for physical education ("PE").²⁰ At the resulting 4/3/18 Multi-disciplinary Team ("MDT") meeting, Teacher stated that it was not possible for Student to make up half the advisory (term) in AP World History, so the plan was to let the 3rd advisory go and during the 4th advisory to focus on attendance, participation, meeting with Teacher for extra help, and submitting work; the meeting notes state that all members agreed, but Parent testified that she did not recall that plan so didn't agree.²¹

6. Teacher routinely put all resources, including his entire lesson plan, PowerPoints, notes, links to other online resources and videos, from his AP World History class into an online Google Doc which was accessible to everyone in the class, including Student, and referenced regularly.²² At the hearing, Student claimed not to know about the online AP course materials, although Student acknowledged Teacher went over the availability of notes and study guides at the beginning of the school year.²³ The AP World History course is the only AP course that Student has attempted at Public School.²⁴

7. Extended Time. Student struggled with AP World History throughout 2017/18; Student was provided extended time for assignments, but received a "D" first term and "Fs" thereafter.²⁵ Teacher provided Student as much time as Student wanted and graded assignments whenever Student turned them in, regardless of how late.²⁶ Teacher never marked down Student's assignments for being late, and specifically never made a 50% reduction in Student's grade; Teacher boosted Student's grade by giving 50% on any work turned in, if a good faith effort was made, even if it deserved a lower grade.²⁷ The Deaf/Hard of Hearing ("DHOH") Specialist at Public School advocated for Student and worked with Student to ensure that extended time was provided.²⁸

8. During the 3rd and 4th terms, Student turned in assignments for earlier terms, as Student testified during cross-examination.²⁹ Teacher tried to get Student to do work for the AP class and turn in work late, but Student often failed to complete work or rushed through

¹⁸ P9-2,3.

¹⁹ Teacher.

²⁰ Parent.

²¹ R5p54; Parent.

²² R1p6; Teacher.

²³ Student.

²⁴ *Id.*

²⁵ R12-90; R8p62; Teacher.

²⁶ Teacher.

²⁷ *Id.*

²⁸ P5-1,2,3.

²⁹ Student.

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it.³⁰ Teacher permitted rewrites of written assignments, but Student never tried to boost the grade by rewriting assignment.³¹ Student struggled and beginning in October 2017 Teacher modified the AP classwork for Student with scaffolding and cutting as much as possible from Student's workload to focus Student on what was critical to the AP course.³² Student turned in very few things following the 4/3/18 meeting; Student had no measurable academic growth so received an "F" in AP World History based on lack of work and failure to meet the course standards.³³

9. Physical Education. Student was enrolled in a regular PE class in the second half of 2017/18; after the 2/28/18 ear surgery Student was not expected to participate physically in PE and the issue was whether Student would do written work related to the PE class.³⁴ Instructor explained that Student should have gone to class and completed the written work, but did not need to do anything active.³⁵ Instructor took PE work packets to DHOH Specialist and told her that Student needed to do the work; Student was present and aware of the requirement, but returned none of the packets.³⁶ Student was working with DHOH Specialist to make up missed work during the period for PE class 3 times/week.³⁷ Instructor repeatedly asked Student for completed packets and Student repeatedly promised to get them in "tomorrow," but never did.³⁸ Student acknowledged in testimony doing nothing for PE class.³⁹ Student would not have gotten an "F" in PE if packets had been completed.⁴⁰

10. Student's IEPs included nothing specifically relating to PE; if Student had a disability relating to PE it should have been included on the IEP.⁴¹ Adding PE to the IEP would be only for a permanent or ongoing disability rather than a temporary concern.⁴² Parent emailed Instructor and others on 4/24/18, due to concern about Student's absences and stating that they were waiting on "adaptive PE."⁴³ Adaptive PE is a class offered by Public School; a doctor's note would not mean Student would go to adaptive PE, but would have a medical excuse to sit out of PE.⁴⁴

11. Grades. Student received good grades which improved over time, with many "As"; Student receive a single "C-" as the lowest grade in 2016/17, a pair of "B-" grades were the

³⁰ Teacher.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Parent; Student; P11-1; Instructor.

³⁵ Instructor.

³⁶ *Id.*

³⁷ Parent; Student.

³⁸ Instructor; P13-3 (Student did not complete any PE assignments).

³⁹ Student.

⁴⁰ Instructor.

⁴¹ Assistant Principal.

⁴² *Id.*

⁴³ P10-1.

⁴⁴ P13-1; R12p90.

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lowest in 2017/18 (apart from the “Fs” at issue in this case); and a single “B” the lowest grade in 2018/19.⁴⁵ Parent understood she could appeal Student’s grades of “F,” but did not have the forms and did not do so.⁴⁶ All forms are online on the DCPS website.⁴⁷

12. “M” Grade. Parent didn’t know the procedure to obtain an “M” or “medical” grade due to missing school.⁴⁸ Assistant Principal credibly testified that the 2015/16 DCPS Secondary School Grading and Reporting Policy document was in effect in 2017/18 and provided that an “M” grade should not be given unless specific criteria were met relating to Home and Hospital Instruction Program (“HHIP”); chronic absence was not sufficient.⁴⁹ Student did not meet the requirements of being approved for HHIP, but being in a course not available through HHIP and for which work packets could not be provided.⁵⁰

Conclusions of Law

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

The overall purpose of the IDEA is to ensure that “all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA “aims to ensure that every child has a meaningful opportunity to benefit from public education”).

“The IEP is ‘the centerpiece of the statute’s education delivery system for disabled children.’” *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), *quoting Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Andrew F.*, 137 S. Ct. at 994, *quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935

⁴⁵ P4-1; Parent.

⁴⁶ Parent.

⁴⁷ Assistant Principal.

⁴⁸ Parent.

⁴⁹ Assistant Principal; R11p86,87.

⁵⁰ R11p87; Parent (told Student didn’t qualify for HHIP).

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F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. The Act’s FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child’s potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Endrew F.*, 137 S. Ct. at 1001.

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to implement Student’s IEP and provide extended time to complete and submit assignments in history class during 2017/18, resulting in Student failing the class. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on the initial implementation issue, for Student was provided extended time, as well as assistance that went beyond the limited requirements of Student’s IEP, which during the relevant time period did not include any academic areas of concern.

For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student’s IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch.*

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Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student’s] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is “no requirement that the child suffer educational harm in order to find a violation” in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Here, the issue is whether Teacher provided extended time to Student in the AP World History class in 2017/18 to complete and submit assignments. This Hearing Officer is clear based on the testimony from Teacher and Student that extended time was provided as required. In fact, the solid testimony from Teacher was that he accepted assignments from Student at any time, including work that Student submitted months late, even though Teacher encouraged Student to focus on trying to keep up with the current work. Student had the understanding when late assignments were turned in that Teacher reduced Student’s grade to 50% just for being late. But Teacher convincingly testified that he did not ever reduce Student’s grade on assignments for being late, and that Teacher’s policy was to give 50% credit as a floor on assignments as long as a good faith effort was made by the student, even if the content did not justify that score.

Although not included in the issue above (or the issue as articulated in the due process complaint), Petitioner’s counsel argued at the due process hearing that there was a failure by Teacher (and Instructor below) to send class notes and missed assignments to Student via email. The Other Classroom Aids and Services on Student’s IEPs did call for teachers to send class notes and missed assignments via email or Dropbox or Google Docs. However, Teacher credibly testified at length about how everything relating to the AP class was maintained in the online Google Doc he made available in multiple ways to all students in his AP World History class, and that Teacher repeatedly attempted to get Student to complete assignments there. While Student denied knowing about online AP course information and materials, which strained the credulity of the undersigned, Student did acknowledge that Teacher went over the availability of notes and study guides at the beginning of the school year. Thus, the undersigned holds that there was no failure to implement this classroom aid or service, even if it had been properly challenged in this case. Moreover, if there was any failure to implement it was clearly *de minimis*. See *Johnson*, 962 F. Supp. 2d at 268.

Although generally a good student, the unfortunate reality was that apart from any disability Student had trouble handling the intensive work required by the AP class – the only such class that Student has attempted at Public School, before or since. Even after Student returned to school full-time and the MDT team met on 4/3/18 to develop a plan, Student turned in very little work in AP World History. This Hearing Officer thus concludes that Student received an “F” in the AP World History class based on Student’s lack of work and failure to meet the AP course standards, not because of any failure to implement Student’s IEP or any denial of FAPE.

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Issue 2: *Whether DCPS denied Student a FAPE by failing to provide Student with adapted physical education after ear surgery in March 2018 made regular physical education class unsafe. (Petitioner has the burden of persuasion on this issue.⁵¹)*

Petitioner also failed to meet her burden of persuasion on the second issue relating to physical education, as there was no failure to implement Student's IEP or any other violation of the IDEA. As Assistant Principal confirmed in uncontroverted testimony, Student's IEPs included nothing specifically relating to PE. Certainly, after serious ear surgery Student was not expected to physically participate in PE, but Student failed to complete the written work, which unfortunately resulted in an "F" that could have been avoided by completing the written packets provided. However, none of this was related to Student's IEP or the IDEA.

If Student did have a disability relating in some way to PE, it should have been included on the IEP, but Petitioner did not invoke the eligibility process to seek to add PE to Student's IEP. Nor did Public School have any reason to initiate the process for adding adapted PE to Student's IEP, for such a change would only be made for a permanent or ongoing disability, not a temporary situation such as recovering from surgery.⁵² See 34 C.F.R. § 300.306 (determining eligibility for special education requires a group of qualified professionals and the parent to determine whether the child has a disability).

At the hearing, the closest Petitioner's counsel came to connecting PE to Student's IEP was the Other Classroom Aids and Services discussed in Issue 1, which calls for teachers to convey assignments and class notes electronically to Student. Here, Instructor did not transmit PE packets to Student electronically, but instead provided them in person to DHOH Specialist in Student's presence, as DHOH Specialist was working regularly with Student to assist in making up missed work. In the view of the undersigned, that is not a failure to implement Student's IEP, but if it were it must certainly be considered to be *de minimis*.

⁵¹ Prior to the hearing, Petitioner's counsel raised an objection about Petitioner bearing the burden of persuasion on Issue 2; the objection was denied by the undersigned based on Petitioner's articulation of the issue as being about providing service. However, the US is clear that the outcome would be no different if Respondent had the burden of persuasion on this issue.

⁵² The possible IEP designation of "adapted" PE should not be confused with "adaptive" PE, which was a class Public School offered at certain times.

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ORDER

Petitioner has not prevailed on any claim in this case. Accordingly, any and all claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.
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 U.S.C. § 1415(i).

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