

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

PETITIONER, on behalf of)	Date Issued: February 26, 2016
STUDENT, ¹)	
)	Hearing Officer: Peter B. Vaden
Petitioners,)	
)	Case No: 2015-0394
v.)	
)	Hearing Date: February 11, 2016
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	Office of Dispute Resolution, Room 2004
)	Washington, D.C.
Respondent.)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (D.C. Regs.). In her due process complaint, Petitioner alleges that respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not offering her appropriate Individualized Education Plans (IEP) for the 2013-2014 and 2014-2015 school years and by providing an unsuitable educational setting for the 2014-2015 school year.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on December 15, 2015, named DCPS as respondent. The undersigned Hearing Officer was appointed on December 16, 2015. The parties met for a resolution session on December 29, 2015, but did not reach an agreement. The 45-day period for issuance of this Hearing Officer Determination began on January 15, 2016, making the final decision due by February 28, 2016. On January 4, 2016, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer on February 11, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner testified and called as witnesses INDEPENDENT SCHOOL PSYCHOLOGIST, INDEPENDENT SPEECH PATHOLOGIST, and EDUCATIONAL ADVOCATE. DCPS called as witnesses DCPS SCHOOL PSYCHOLOGIST, DCPS SPEECH-LANGUAGE PATHOLOGIST and GUIDANCE COUNSELOR. Petitioner's Exhibits P-1 through P-38, with the exception of Exhibit P-9, were admitted into evidence. Exhibits P-10, P-16 through P-19, P-23 through P-26, P-33 and P-34 were admitted over DCPS' objections. Exhibit P-9 was withdrawn. DCPS' Exhibits R-1 through R-7 were admitted into evidence without objection. Counsel for both parties made opening statements. In lieu of making closing arguments, counsel were granted leave until February 16, 2016 to file post-hearing written argument. Counsel for both parties filed written closings.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the January 4, 2016 Prehearing Order, as revised on January 16, 2016:

1. Whether DCPS denied Student a FAPE by failing to ensure that Student was offered appropriate IEPs on December 19, 2013 and November 14, 2014 in that the IEPs lacked appropriate speech-language and social-emotional goals and services; and
2. Whether during the 2014-2015 school year, DCPS failed to provide Student an appropriate education setting in that she was placed in a combined-grade class with a student-teacher ratio of 31 students, which was not appropriate given Student's needs relating to Attention Deficit-Hyperactivity Disorder (ADHD).

For relief, Petitioner requests that the Hearing Officer order compensatory education for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

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

1. Student, an AGE youth, resides with Mother in the District of Columbia. Testimony of Mother. Student is eligible for special education and related services under the primary disability classification Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder). Exhibit P-11.
2. Student currently attends PUBLIC CHARTER SCHOOL. From her kindergarten year through the 2014-2015 school year, she attended CITY PUBLIC SCHOOL. Student was identified as eligible for special education when she was in kindergarten and has had IEPs since the first grade. Testimony of Mother.

3. Student's October 5, 2012 IEP at City Public School included annual goals for Mathematics and Reading. The IEP provided 5 hours per week of Specialized Instruction, including 4 hours per week outside general education. The IEP did not provide related services. Exhibit P-18.

4. On her final 2012-2013 school year report card, Student's teacher wrote that she had made impressive growth in her work, that she was reading above grade level and that she needed to work on her computation skills in math. Exhibit P-33. Mother agreed that Student showed some growth, but felt that Student did not reach her academic potential. Testimony of Mother.

5. In November 2013, DCPS School Psychologist conducted a triennial comprehensive psychological reevaluation of Student. Student's scores on cognitive testing suggested that she was performing in the Average range. Her scores on the Woodcock-Johnson Third Edition education achievement tests were Low Average for spelling, Low for Writing Samples, Average for Writing Fluency, Average for Calculation, Low Average for Applied Problems, Low Average for Math Fluency, Average for Letter-Word Identification, Low for Passage Comprehension and Average for Reading. She was reported to be reading close to age-level expectations. DCPS School Psychologist reported that Student's deficits were better described as a result of her significant difficulties with attention, concentration, and mental control rather than as a learning disability. The evaluator recommended that Student's Multidisciplinary Team (MDT) consider Other Health Impairment (OHI) as Student's primary disability. Exhibit P-4.

6. In November 2013, DCPS Speech-Language Pathologist conducted a speech and language reevaluation of Student. Student's scores were Low Average to

Average on receptive language skills and Below Average on expressive language skills. The evaluator concluded that Student's executive functioning limitations, due to ADHD, were likely affecting her test performance and her ability to listen, learn new information and follow through with tasks in the general education setting. Exhibit P-7. DCPS Speech-Language Pathologist recommended that Student be provided strategies to assist her in the general education classroom and she did not recommend that Student receive speech and language related services as part of her IEP. Testimony of DCPS Speech-Language Pathologist.

7. In fall 2013 pre-IEP meeting reports from Student's City Public School teachers, the teachers reported that classroom strategies for Student included, *inter alia*, differentiating instruction, working with her in small groups and redirection. Her Written Expression teacher wrote that during whole group lessons, Student's attention was intermittent. Exhibit P-20.

8. Student's IEP team at City Public School convened on December 12, 2013 for Student's annual IEP review. Mother attended the meeting. The revised IEP contained annual goals for Student in Mathematics, Reading and Written Expression. The IEP team determined that Student would be provided 8 hours per week of Specialized Instruction, including 4 hours outside general education. The IEP recites that Student benefitted from having a "tier 3 research based intervention program in a small group [removed from the general education] classroom" to help address her decoding and encoding deficits. Exhibit P-15.

9. The December 12, 2013 IEP states that Student is easily distracted and speaks at times impulsively. She requires steps to be broken down and repeated in order to her to be focused. (Mathematics); Student needs to be able to comprehend

instructions that are told to her and read by her. She will be asked to repeat instructions and phrases and in return she needs to be able to explain it back to the teacher. She will continue to work in small and whole groups and engage in meaningful conversations (Reading); Student continues to benefit from an instructor explicitly modeling how to use the writing prompt provided as a base for her answers. She is not able to access the general education curriculum without specialized instruction in the area of written expression (Written Expression); Following aids and services benefit Student: preferential seating, opportunities to respond orally, peer buddy, study carrel, extra processing time, breaks, praise, reward system, repetition/clarification of directions, have Student restate directions to ensure comprehension, *et al.* (Other Classroom aids and Services). Exhibit P-16.

10. By the end of the 2013-2014 school year, Student was reported to have mastered her Reading Fluency IEP goal and to be Progressing on all of her other IEP goals. Exhibit R-5.

11. Student's report card grades for the final term of the 2013-2014 school year were 1 (Below Basic) in Writing and Language; 2 (Basic) in Reading, Math, Social Studies, and Science; and 3's (Proficient) or higher in all other courses. Her classroom teacher wrote that she had grown as a learner over the school year. Exhibit P-22.

12. During the 2013-2014 school year, Student was a very energetic and enthusiastic individual. She participated in the classroom, enjoyed the company of her classmates and was actively involved with her peers at recess. Testimony of Guidance Counselor.

13. Student was not suspended from school during the 2013-2014 or 2014-

2015 school years. Mother did not receive calls from the school about behavior concerns. Testimony of Mother.

14. Student's IEP team at City Public School convened on November 14, 2014 for Student's annual IEP review. Mother attended the meeting. The revised IEP contained annual goals in Mathematics, Reading and Written Expression. The IEP team determined that Student would continue to be provided 8 hours per week of Specialized Instruction, including 4 hours outside general education. The team's written justification for providing 4 hours per week of specialized instruction, outside general education, was that the school had previously attempted small group instruction in the general education setting as well as other accommodations to address her academic deficits and cater to her impulsivity and her difficulties in attending to the given work.

Exhibit P-14.

15. The November 14, 2014 IEP states that Student is easily distracted and speaks at times impulsively. She requires steps to be broken down and repeated in order to her to be focused. Simplification of expectations is also important when solving for computation problems (Mathematics); Student needs to be able to comprehend instructions that are told to her and read by her. She will be asked to repeat instructions and phrases and in return she needs to be able to explain it back to the teacher. She will continue to work in small and whole groups and engage in meaningful conversations. With teacher prompting and guidance as to where in the text to focus her attention, Student is able to answer literal questions (Reading); Student continues to benefit from an instructor explicitly modeling how to use the writing prompt provided as a base for her answers. She is not able to access the general education curriculum without specialized instruction in the area of written expression (Written Expression); Following

aids and services benefit Student: preferential seating, opportunities to respond orally, extra processing time, breaks, praise, repetition/clarification of directions, have Student restate directions to ensure comprehension, “chunking” of text, *et al.* (Other Classroom aids and Services). Exhibit P-14.

16. Student’s report card grades for the final term of the 2014-2015 school year at City Public School were all 3's (Proficient)) except for Math for which she earned a 2 (Basic - Approaches expectation) and for Music (4 - Advanced). Her classroom teacher reported that she had been able to increase her reading level from W to Z (Above Proficient) on the Text Reading and Comprehension test (TRC), but continued to struggle in the area of math Exhibits R-6, P-28.

17. There were 31 students in Student’s City Public School classroom for the 2014-2015 school year with one teacher. Although Student sat at a table with 4-5 other students, because of the large class size, she could only get limited help from the classroom teacher. Testimony of Mother, Testimony of Educational Advocate.

18. For the 2015-2016 school year, Student moved to Public Charter School. Pubic Charter School conducted a psychoeducational evaluation of Student in September 2015. The examiner reported, *inter alia*, that on educational testing, Student’s strengths were in Written Expression and Broad Written Language, which suggested that her writing ability was adequate. Her weaknesses were in Broad Math and Reading. Student’s score in Broad Reading was in the Very Low Range. Her score of 70 in Broad Mathematics suggested that she was performing below grade level in math. Student’s total IQ score of 56 was in the Very Low range which suggested to the examiner that Student may suffer from a learning disability that manifests itself in reading and math. Exhibit P-5.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

ANALYSIS

A.

Did DCPS deny Student a FAPE by failing to ensure that she was offered appropriate IEPs on December 19, 2013 and November 14, 2014, in that those IEPs lacked appropriate speech-language and social-emotional goals and services?

Petitioner first contends that Student's IEPs for her last two years at City Public School were inadequate, because the IEPs did not contain annual goals or related services directed at speech-language or social-emotional deficits. DCPS responds that the IEPs were appropriate and provided Student the "basic floor of opportunity" required for a FAPE by the IDEA.

To determine whether an IEP is adequate to provide a FAPE, a hearing officer must determine "[f]irst, has the [District] complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational

benefits? If these requirements are met, the [District] has complied with the obligations imposed by Congress and the courts can require no more.” *A.M. v. District of Columbia*, 933 F. Supp. 2d 193, 203-04 (D.D.C. 2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (*Rowley*). Petitioner has not raised an IDEA procedural issue with respect to the development of Student’s IEPs. Therefore, I turn to the second prong of the *Rowley* inquiry: Were DCPS’ December 19, 2013 and November 14, 2014 IEPs reasonably calculated to enable Student to receive educational benefits?

In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Rowley*, 458 U.S. at 204, 102 S.Ct. 3034. IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a “basic floor of opportunity” for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than “a potential-maximizing education.” *Id.* at 197 n. 21, 102 S.Ct. 3034; see also *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be “ more appropriate or better able to serve the child”) (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee “the best possible education, nor one that will maximize the student’s educational potential”; instead, it requires only that the benefit “cannot be a mere modicum or de minimis; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.”) (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

K.S., 962 F.Supp.2d at 200-221.

The limited IEP appropriateness query in this case is whether either the December 19, 2013 IEP or the November 14, 2014 IEP was deficient for want of speech-

language or social-emotional annual goals and related services.

Annual Goals

The IDEA requires that every student's IEP must include a statement of measurable annual goals, including academic and functional goals, designed to,

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability.

See 34 CFR § 300.320(a)(2)(i). *See, also, Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 598 (1988) (IEP sets out the child's present educational performance, establishes . . . objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.)

Petitioner's expert, Independent SpeechPathologist, opined that City Public School's 2013 and 2014 IEP goals for Student were inadequate because Student needed speech and language goals, beginning with the December 19, 2013 IEP, especially to strengthen her vocabulary skills. However, the IDEA does not require goals to be written for each specific discipline. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46662 (August 14, 2006). Student's 2013 and 2014 IEPs included academic annual goals which related to Student's vocabulary deficits, including, *e.g.*, being able to solve math word problems (2013 and 2014 IEPs), being able to ask and answer questions to demonstrate understanding of text (2013 and 2014 IEPs), being able to apply phonics and word analysis skills and being able to read with sufficient fluency to support reading comprehension (2013 IEP), and being able to determine the meaning of new vocabulary

words (2014 IEP). I find that the academic goals in Student's IEPs were reasonably designed to meet the needs resulting from Student's disability and I find unpersuasive Independent Speech Pathologist's opinion that the IEPs were inadequate for want of speech-language goals specifically targeting Student's vocabulary deficits.

With regard to social-emotional goals, Petitioner's evidence did not establish that in the 2013-2014 or 2014-2015 school years, Student required social-emotional goals in her IEPs in order to be involved in and make progress in the general education curriculum. *See* 34 CFR § 300.300.320(a)(2)(i). DCPS School Psychologist testified that at City Public School, Student did not have behavior issues which adversely affected her access to education. I also found credible the testimony of Guidance Counselor that Student enjoyed the company of her peers and participated in the classroom.

Independent School Psychologist testified that any student who presents with any sort of disability will experience anxiety and social stress. She opined that Student currently need counseling designed for autism spectrum disorder presentation. I did not find Independent School Psychologist to be a credible witness. Independent School Psychologist has never met or evaluated Student, who does not have a autism spectrum disorder diagnosis.

Mother testified that in the 2013-2014 and 2014-2015 school years, Student was affected by verbal bullying by her peers. However, Mother acknowledged that she had not observed this bullying first hand. Guidance Counselor testified that Student did not report bullying incidents to her. She explained that occasionally Student would impulsively make inappropriate remarks to other students to which the classmates responded negatively. According to Guidance Counselor these incidents were not frequent and were successfully addressed by peer mediation with the students involved.

Whether or not Student was bullied as Mother believes, it was not established that Student needed social-emotional goals in her IEPs in order to be involved in and make progress in the general education curriculum. *See* 34 CFR § 300.320(a)(2)(i), *supra*.

Related Services

I similarly find that the 2013 and 2014 IEPs were not inappropriate because they did not include direct related services for speech and language or behavioral support. Under the IDEA, related services are only required to the extent that such services are necessary to enable the student to benefit from special education. *See* 34 CFR §§ 300.34(a), 300.34(c)(2). *See, also, Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984). (To determine if a service is a required related service under the IDEA, court must determine whether the service is a “supportive service [] . . . required to assist a child with a disability to benefit from special education.” 20 U.S.C. § 1401(26)(A).) Related services, as with any other service in an IEP, are determined on an individual basis by the student’s IEP Team. *See Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. at 46663.

With regard to whether Student required speech-language services in her 2013 and 2014 IEPs, DCPS Speech-Language Pathologist testified that she completed a speech and language reevaluation of Student in December 2013 and found that Student’s receptive and expressive language skills were just below average, which the expert attributed to Student’s ADHD disability. At the time, she recommended classroom accommodations to address Student’s needs, including repetition, simplifying directions and teacher “check-in”. DCPS Speech-Language Pathologist did not recommend, and Student’s City Public School IEP teams did not provide, speech-

language pathology services in Student's December 19, 2013 IEP. Under the 2013 IEP, Student progressed on all of her IEP goals. No evidence was offered at the due process hearing that adding speech and language services to Student's November 14, 2014 IEP was requested by the parent or considered by the IEP team.

Petitioner's expert, Independent Speech Pathologist, opined that Student should have been eligible for speech-language services beginning with the 2013 IEP, because she needed help, especially in vocabulary areas. I found DCPS Speech-Language Pathologist's testimony to be a more credible than that of Independent Speech Pathologist, who never met or evaluated Student. Moreover, Independent Speech Pathologist did not contend that direct speech-language services were required to assist Student to benefit from special education – which is the IDEA's threshold for IEP related services – and she acknowledged that Student's vocabulary deficits could be addressed in the classroom setting. Further, as explained in the above discussion of IEP goals, Student's IEP teams provided for Specialized Instruction services which were intended to enable Student to meet her IEP academic goals, including goals related to Student's vocabulary deficits. Neither did Petitioner establish that social-emotional services were necessary to enable Student to benefit from the special education services provided in her 2013 and 2014 IEPs. *See Tatro, supra.* As discussed above, DCPS School Psychologist credibly testified that at City Public School, Student did not have behavior issues which adversely affected her access to education. Mother conceded in her testimony that Student did not have disciplinary suspensions during this period and the school did not call her with behavior concerns. Finally, in both the 2013-2014 and 2014-2015 school years, Student progressed on her IEP goals. For the 2014-2015 school year, Student earned marks well above passing. I conclude that Petitioner did not meet

her burden of proof that, for the 2013-2014 or the 2014-2015 school years, Student required social-emotional related services in her IEPs to assist her to benefit from special education.²

2. During the 2014-2015 school year, did DCPS fail to provide Student an appropriate educational setting in that she was placed in a combined-grade class, with a student-teacher ratio of 31 students, which was not appropriate given Student's needs relating to Attention Deficit-Hyperactivity Disorder (ADHD)?

For the 2014-2015 school year, DCPS officials decided there was an insufficient number of pupils in Student's grade at City Public School to warrant two general education classrooms. The school placed all of the students in one class, resulting in 31 students in the classroom and a 31 to 1 student to teacher ratio. (Contrary to Petitioner's allegation in her due process complaint, all of the students were in the same grade.) Petitioner contends that this placement was not suitable for Student due to her ADHD disability. The IEP requires that DCPS' implementation of every IEP must include offering an educational setting that is capable of fulfilling the IEP. *See O.O. ex rel. Pabo v. D.C.*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008); *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013). "In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not

² Student's October 1, 2015 IEP at Public Charter School includes annual goals for Communication/Speech and Language and Emotional, Social and Behavioral Development as well as Speech-Language Pathology and Behavioral Support Services as related services. The decision of Student's IEP team at Public Charter School to provide these services is not probative of whether Student's 2013 and 2014 IEPs at City Public School were reasonably calculated to provide educational benefit without related services. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008) ("[B]ecause the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student." (Citation and internal quotation omitted.))

solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.” *Assistance to States for the Education of Children with Disabilities, supra*, 71 Fed. Reg. at 46588.

Student’s primary disability is Attention Deficit-Hyperactivity Disorder. In fall 2013, Student’s teachers reported to the IEP team that classroom strategies for Student included, *inter alia*, differentiating instruction, working with her in small groups and redirection. Her Written Expression teacher wrote that during whole group lessons, Student’s attention was intermittent. Both the 2013 and 2014 IEPs were clear that Student is easily distracted and needed small group instruction. For example for the Mathematics area of concern, the December 19, 2013 IEP team wrote that Student was able to do math operations in small groups with the help and assistance from an instructor. In Reading, Student needed to be able to repeat instructions and phrases and be able to explain it back to the teacher. In Written Expression, Student benefitted from an instructor’s explicitly modeling how to use writing prompts. In the November 14, 2014 IEP, the IEP team again wrote that in math, Student was easily distracted and required steps to be broken down and repeated in order for her to be focused. In Reading, Student needed to work in small and whole groups. In Written Expression, Student continued to benefit from an instructor’s explicit modeling. In both the 2013 and 2014 IEPs, for Other Classroom Aids and Services, the IEP teams specified that Student needed, *inter alia*, preferential seating, opportunities to respond orally, praise, and repetition-clarification of directions.

Parent’s witness, Educational Advocate, opined that the 31-student classroom setting which City Public School provided Student for the 2014-2015 school year was

inappropriate because, although Student sat at a table of 4 to 5 students, she could not get the individualized attention from the teacher that she needed. DCPS offered no evidence did not refute this opinion.

The standard for failure-to-implement claims, used by the courts in this jurisdiction, was formulated by the Fifth Circuit Court of Appeals in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). This standard requires that a petitioner “must show more than a *de minimis* failure to implement all elements of [the student’s] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP” in order to prevail on a failure-to-implement claim. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (Aug. 27, 2013) (quoting *Bobby R.*, 200 F.3d at 349).

I conclude that Petitioner has established that for the 2014-2015 school year, by placing Student in a very large classroom with only one teacher, DCPS failed to implement a significant provision of Student’s IEPs, namely her need, as formulated by the IEP teams for small group instruction with intensive instructor interaction. Student was denied a FAPE as a result.

Remedy

For her remedy in this case, Petitioner seeks an award of compensatory education for Student. Where a parent has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake “a fact-specific exercise of discretion” designed to identify those compensatory services that will compensate the student for that denial. The proper amount of compensatory education, if any, depends upon how much more progress a student might have shown if she had received the required special education services and the type and amount of services that would place the

student in the same position she would have occupied but for the school district's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005). "Compensatory education consists of prospective services '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.'" *Holman v. District of Columbia*, 2016 WL 355066 at 2 (D.D.C. Jan. 28, 2016) (quoting *Reid*, 401 F.3d at 524.)

At the due process hearing, Educational Advocate proffered a detailed compensatory education plan, based upon all of the IDEA violations alleged in the due process complaint, including Petitioner's allegations that Student's 2013 and 2014 IEPs were inappropriate. In this decision, I have found that the only denial of FAPE established by the Petitioner was the failure of DCPS to offer Student, for the 2014-2015 school year, an educational setting that was capable of fulfilling her IEP. The type and amount of compensatory services needed to place the student in the same position she would have occupied, had she been offered an appropriate small class-size setting, is not readily determined from the evidence. The hearing evidence established that Student mastered most of her IEP goals over the 2014-2015 school year and earned "Proficient" marks for most subjects for the final school term. However, in her compensatory education proposal, Educational Advocate suggests that Student missed one-half year of expected academic progress for the school year she was placed in a general education classroom with 31 students. *See Exhibit P-35-8*. (Evidence that given the floor of opportunity, students with disabilities tend to make approximately half the progress that their non-disabled peers make.) In support of this assumption, Educational

Advocate cited the results of educational achievement testing administered by Public Charter School in September 2015 (Woodcock-Johnson IV-Tests of Achievement), which indicated that Student's Grade Equivalence in Broad Math was essentially unchanged since 2013 and had actually declined in Broad Reading. Although the extent of resulting harm is not certain from the evidence, Petitioner has established a denial of FAPE by DCPS and Student is not required "to have a perfect case to be entitled to compensatory education." See *Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148 (D.D.C.2012).

Educational Advocate recommends that Student be awarded compensatory education in the form of 1.5 hours of academic tutoring from 2-3 times per week for a single school year. Taking into account this recommendation as well as the conflicting evidence on the extent of harm to Student from not being offered a small class-size educational setting, I find that an award of 1.5 hours per week of academic tutoring for one school year (36 weeks) would be reasonably calculated to provide the educational benefits that likely would have accrued, had Student been offered a suitable educational setting for the 2014-2015 school year.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

- a. As compensatory education for the denial of FAPE in this case, DCPS shall provide Student 54 hours of individual tutoring by a qualified DCPS or independent tutor in such academic areas recommended by her instruction team at Public Charter School. These tutoring services must be used by the end of the 2016-2017 regular school year or shall be forfeited; and
- b. All other relief requested by the parties herein is denied.

Date: February 26, 2015

s/ Peter B. Vaden
Peter B. Vaden, 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).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team