District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,[1]	)	
Petitioner,	)	
	)	**Hearing: February 7, 2018**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2017-0321**
District of Columbia Public Schools,	)	**Issue Date: February 14, 2018**
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This case involves a student who is currently eligible for services as a student with Other Health Impairment (the "Student").

A Due Process Complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on December 1, 2017. Petitioner is the parent of the Student. On December 11, 2017, Respondent filed a response. The resolution period expired on December 31, 2017.

II. Subject Matter 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

[1]Personally identifiable information is attached as Appendix A, which must be removed prior to public distribution.

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On January 2, 2018, the Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondent, appeared. A prehearing conference order was issued on January 5, 2018, summarizing the rules to be applied in the hearing and identifying the issue in the case.

There was one hearing date: February 7, 2018. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-27. There were no objections. Exhibits 1-27 were admitted. Respondent moved into evidence Exhibits 1-24. There were no objections. Exhibits 1-24 were admitted. At the close of testimony, both sides presented oral closing statements. Supplemental written statements were provided by the parties on February 9, 2018.

Petitioner presented as witnesses: Petitioner; the Student; and Witness C, an advocate. Respondent presented as witnesses: Witness B, a social worker; and Witness C, a special education teacher.

IV. Credibility.

The Student lacked full credibility because the Student denied having refused specialized instruction outside general education ("pull-out instruction") from Witness A. In fact, the Student did refuse this instruction multiple times, as memorialized by Witness A in a document signed by the Student. Otherwise, the witnesses presented testimony that was consistent with the documentation in the record.

V. Issue

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free Appropriate Public Education ("FAPE") issue to be determined is as follows:

Did Respondent fail to implement the Student's IEPs during the 2016-2017 and 2017-2018 school years? If so, did Respondent materially deviate from the terms of the IEPs and thereby act in contravention of such precedent as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did Respondent deny the Student a FAPE?

Petitioner pointed to Respondent's alleged failure to provide the Student with accommodations in the classroom such as preferential seating, extended time, and a visual schedule. Respondent also allegedly failed to provide transition services, sufficient special education hours, and sufficient behavior support services.

As relief, the parent is seeking compensatory tutoring in reading and transition services, and compensatory counseling. Respondent's position is that the IEPs were materially implemented during the two school years in question.

VI. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Other Health Impairment (Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder). The Student is respectful, personable, and well-liked. Prior in the Student's academic career, the Student went to School A, a charter school. The Student then began to attend School B, a selective public high school, which the Student currently attends. (P-1-1; P-6-3; Testimony of Petitioner; Testimony of Witness A)

2. The Student requires educational services to address organizational and attentional deficits. The Student also struggles in reading and writing. The Student was

functioning in the "average range" with respect to cognitive ability, with a Full Scale IQ of 94 as of August 3, 2015. The Student was functioning at the "low range" in reading skills, with a standard score of 77. The Student had weaknesses in recalling details from text, recognizing words, and answering questions about text. The Student preferred text to be read aloud. In writing, the Student was in the "low average" range, with weaknesses in spelling. The Student's least favorite classes were English Language Arts and Social Studies. (P-5-4; R-21-2-3; Testimony of Petitioner)

3. During the 2016-2017 school year, the Student attended School B. The Student's IEP dated September, 2016, provided for three hours per month of specialized instruction inside general education and two hours per month of behavioral support services outside general education. The IEP provided for frequent breaks as needed, preferential seating away from distractions (windows, friends, etc.), graphic organizers, an "editing checklist," specific positive reinforcement, small group instruction and testing, extended time on tests, and "fidget." The Post-Secondary Transition Plan in the IEP provided for 160 minutes per year of services with a counselor, social worker, and case manager on "career readiness"; 160 minutes per year of services with a counselor, social worker, and case manager on "job readiness"; and 160 minutes per year with a counselor, social worker, and case manager on independent living. (P-3)

4. Another IEP dated March 10, 2017, provided similar services except that Student's behavioral support services were decreased to eighty minutes per month. (P-2; P-3)

5. The Student's IEP dated April 12, 2017, provided for goals in reading, written expression, and emotional, social, and behavioral development, and for ten hours

per month of specialized instruction outside general education. This constituted a seven-hour-per-month increase over the prior IEP. The IEP also provided for 120 minutes per month of behavioral support services, a forty-minute increase from the prior IEP. Additionally, the IEP provided for forty-five minutes per month of behavioral support services as a "consultation service." Accommodations included preferential seating, location with minimal distractions, small group testing, and extended time ("time and a half") on tests, quizzes, and assignments (not including holidays, vacations, breaks). The IEP also provided for breaks as needed, seating away from distractions (windows, friends, etc.), graphic organizers, an "editing checklist," specific positive reinforcement, small group instruction, and "fidget." The Post-Secondary Transition Plan in the IEP again provided for 160 minutes per year of work with a counselor, social worker, and case manager on "career readiness"; 160 minutes per year of work with a counselor, social worker, and case manager on "job readiness"; and 160 minutes per year with a counselor, social worker, and case manager on independent living. All of the services were to be provided from April 12, 2017, through April 11, 2018. (P-1)

6. Witness B provided the Student's behavioral support services for the 2016-2017 and the 2017-2018 school years. The Student missed approximately four to six sessions during the 2016-2017 school year for a variety of reasons, such as Witness B participating in an IEP meeting, or the Student being unavailable or absent. There were three months during this school year when the Student did not get the full mandate of behavioral support services: September, December, and June. (R-8; Testimony of Witness B)

7. The Student worked with Teacher A in a "suite" with one other student from April, 2017, to the end of the 2016-2017 school year. The work focused on biology studies. The Student received no transition services after the April, 2017, IEP through the end of the 2016-2017 school year. (Testimony of Student; Testimony of Witness C)

8. The Student's grades declined during the 2016-2017 school year. Even so, the Student's science teacher said that the Student did not need an IEP. The Student's grades for the last quarter of 2016-2017 included an "F" in Spanish, a "C+" in biology, a "D+" in English I, a "D" in World History, and a "C+" in writing and research skills. The Student's progress report dated June 14, 2017, indicated progress in reading, written expression, and emotional, social, and behavioral development. (Testimony of Petitioner; P-7; P-18-2-3)

9. The Student continued at School B for the 2017-2018 school year. The Student started out "doing well," but by October, 2017, Petitioner had concerns. Petitioner therefore asked Witness A for a document indicating the nature of the work she was performing with the Student. (Testimony of Petitioner)

10. The Student told Witness A that s/he did not want her to come into the room to retrieve the Student because it embarrassed the Student to be singled out. There were "quite a few times" that the Student refused specialized instruction outside general education. As a result, Witness A "pushed into" the Student's English class for 160 minutes per week or 240 minutes per week, depending on the cycle of classes. The Student was taught in a small group of three or four other students within the general education classroom. The Student did not like push-in instruction either, because the Student still felt singled out. The Student was offered the opportunity to receive services

from Witness A during advisory or lunch, or any other time that the Student needed support, but the Student did not take advantage of this offer. (P-16; Testimony of Witness A; Testimony of Witness C; Testimony of Student)

11. In or about November, 2017, the Student proposed to come to Witness A on an "as-needed" basis. Witness A told the Student that she would do that if the Student would sign a paper to that effect. A document was then created and signed by the Student stating that the Student would come to Witness A when the Student needed to. (Testimony of Witness A; R-15-1)

12. The Student received few transition services during the 2017-2018 school year. None of the Student's transition services goals were introduced in the first term of the 2017-2018 school year. One goal was "just introduced" in the second term, and one goal was considered "progressing" in the second term. The Student took the Casey Life Skills Assessment during that term. (Testimony of Witness A; R-19)

13. The Student's progress report dated November 3, 2017, indicated progress in reading and writing, though writing at length was problematic for the Student. The Student mastered a goal for using strategies on self-control in emotional, social, and behavioral development. (P-6)

14. In November, 2017, Petitioner and Respondent attended a meeting. At this meeting, Witness A stated that she had a large caseload, and that it would be difficult for the Student to receive ten hours of specialized instruction at School B. Witness A said the Student was failing Fitness and Lifetime Sports II, Computer Science, Algebra II, and Chemistry. Witness B indicated that the Student missed five behavioral support sessions during the 2017-2018 school year. Petitioner accepted Witness B's plan to

make-up the missed five sessions in 2017-2018 by "doubling up" the services. The parties agreed that the Student should receive an educational evaluation and a revised IEP. (P-12-3-4; Testimony Witness A; Testimony of Witness B; Testimony of Witness C; Testimony of Petitioner)

15. Behavior support services for the Student varied from month to month in the 2017-2018 school year. In August, 2017, Witness B did not provide behavior support services for the Student. In September, 2017, Witness B sought to provide ninety minutes of behavioral support services to the Student. In October, 2017, Witness B provided sixty minutes of behavioral support services to the Student. Witness B was unavailable for two sessions, and on October 31, 2017, the Student refused to come. In November, 2017, the Student was offered 200 minutes of behavior support services, and Witness B was unavailable once. In December, 2017, the Student was offered 155 minutes of services. (P-16-1; R-12-5; P-20; P-11-1; Testimony of Witness B)

VII. Conclusions of Law

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

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

> Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due

> process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

D.C. Code Sect. 38-2571.03(6)(A)(i)

The sole FAPE issue in this case relates to "IEP implementation" and does not directly challenge the appropriateness of the Student's existing or proposed IEP or placement. Accordingly, the burden of persuasion is with Petitioner, the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005).

Did DCPS fail to implement the Student's Individualized Education Program ("IEP") during the 2015-2016 school year? If so, did DCPS materially deviate from the terms of the IEP and thereby act in contravention of such precedent as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did DCPS deny the Student a FAPE?

"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 show that material, or "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 (9th Cir. 2007). This standard does not require that the child suffer demonstrable educational harm in order to prevail. Courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. Garmany v. Dist. of Columbia, 935 F.Supp.2d 177, 181 (D.D.C. 2013).

Petitioner pointed to four different failures of Respondent to implement the IEPs at issue. Petitioner argued that the Student did not receive the mandated amount of behavioral support services for both the 2016-2017 and 2017-2018 school years. Petitioner also argued that, pursuant to the April, 2017, IEP, the Student did not receive the required accommodations, nor the required ten hours of specialized instruction per week outside general education, nor the required transition services.

Behavior Support Services

Petitioner contended that the Student missed approximately nine sessions of behavioral support services through the 2016-2017 school year. Petitioner also contended that the Student did not make up all of those sessions but did make up three sessions. Witness B indicated that the Student made up all of the missed sessions for the 2016-2017 school year between April, 2017, and June, 2017.

The Student was entitled to 120 minutes per month of behavioral support services through March 10, 2017. At that time, through the March, 2017, IEP, the Student's behavioral support services were reduced to eighty minutes per month. A subsequent IEP dated April, 12, 2017, required that the Student again receive 120 minutes per month of behavioral support services.

Petitioner's calculation of the behavioral support services that were missed did not factor in student absences and student unavailability. Caselaw suggests that the school district should not be penalized for the Student's own unavailability. T.M. v. District of Columbia, 75 F. Supp. 3d 233, 242 (D.D.C. 2014). Factoring in student absence and student unavailability, there were three months during the 2016-2017 school year when the Student did not get the full mandate of behavioral support services:

September, December, and June. However, a review of the related service trackers indicated that the Student consistently received behavioral support services throughout the year and that make-up sessions *more* than made up for the time missed.

Similarly, for the 2017-2018 school year, a review of the service trackers indicated that the Student did not receive behavioral support services in the abbreviated initial month of August, 2017, and received ninety minutes of behavioral support services in September, 2017, and sixty minutes of behavioral support services in October, 2017. However, the Student received 185 minutes of behavioral support services in November, 2017, and was offered 185 minutes of behavioral support services in December, 2017. The additional services in November and December made up for the deprivation in August, September, and October. In any event, such a minor deprivation of services does not amount to FAPE denial pursuant to caselaw. Catalan ex rel. E.C. v. D.C., 478 F. Supp. 2d 73, 76 (D D.C. 2007)(therapist missed a handful of sessions and cut others short because E.C.'s fatigue was rendering the therapy unproductive, and other sessions did not take place due to snow days, holidays, E.C.'s absence from school).

Accommodations

This claim is based on the Student's testimony. However, the Student's testimony was compromised because the Student said that s/he had refused pull-out instruction only once, a week before the hearing. This testimony is not credible, since the Student signed a note to the contrary on November 1, 2017. There are other documentary references to these refusals in the record, including Witness C's meeting notes dated November 15, 2017. (P-12-1) Accordingly, it is hard to believe the Student's contentions pertaining to accommodations, most of which were not corroborated in the record. Even if the Student

can be credited for raising these issues, the Student's contentions relating to IEP accommodations were not persuasive. The Student admitted getting extended time in some classes, but complained of being penalized for being late in handing in assignments. However, even with extended time, a student can be considered late if the student fails to submit an assignment by the extended deadline. The Student complained that one teacher did not give breaks and also that s/he sat in the back of the room in Chemistry and Spanish. However, the Student did not ask for preferential seating and did not say that the seat placements were undesirable. While Respondent could have delivered the IEP accommodations with more exactitude, and while it is concerning that a teacher may not have provided breaks for the Student, any discrepancies with the IEP are not material enough to be considered "substantial and significant" and did not deny the Student a FAPE.

Specialized Instruction

With respect to the 2016-2017 school year, Petitioner's case is premised on the testimony of the Student. As noted previously, the Student's testimony was not especially credible, and the Student only "kind of" remembered what services were provided that year. However, there is no dispute that the Student did not receive the mandated ten hours per week of specialized instruction outside general education ("pull out instruction") during the 2017-2018 school year. Additionally, there is no argument that the offer to provide the Student services during lunch and advisory made up for the lack of pull-out instruction.

The Student received ten hours or more per month of specialized instruction inside general education ("push-in instruction") during the 2017-2018 school year. But

Petitioner argued that there is a significant difference between push-in instruction and pull-out instruction, pointing to Turner v. District of Columbia, 952 F. Supp.2d 31 (D.D.C. 2013). In Turner, the complaint was that the student did not receive push-in instruction from DCPS. DCPS argued that it provided the Student with ten hours per month of additional pull-out instruction. Applying the "proportionality" approach referenced previously, Judge Ellen Segal Huvelle distinguished the two services and did not give DCPS credit for providing the pull-out instruction, holding that DCPS denied the Student a FAPE when it did not provide the student with any push-in instruction at all.

Respondent argued that there should be an exception to the "proportionality" approach given the circumstances in this case, where the Student refused to accept the pull-out instruction. Respondent cited to T.M., where the issue was the extent to which the Student was provided with occupational therapy services. However, in T.M., Judge Richard Leon also applied the "proportionality" approach. Judge Leon pointed out that the student in T.M. received twenty-four hours of occupational therapy and ten hours of occupational therapy. The Student did refuse some sessions, but the crux of the decision was the fact that the Student missed only some services, which Judge Leon referred to as "short gaps." Accordingly, Judge Leon held that the IEP was substantially implemented, and dismissed the claim.

Parenthetically, Respondent's approach to the Student's refusal to be serviced is understandable. Still, the correct response would have involved reconvening the IEP team and changing the IEP, rather providing the Student with different services. Additionally, as Petitioner pointed out, Respondent could have provided the Student with a "schedule," premised on the Student going to the services without a prompt from the

teacher. This might have addressed the issue of refusal, since the Student, a self-conscious teen, did not want to appear to be in need extra help in front of friends.

It is noted that, as pointed out by Witness C, there is a difference between services inside general education and services outside general education. When services are provided inside general education, the services ordinarily aligned with what the general education students are doing in class on a given day. When services are provided outside general education, the services can take the form of a review of previously taught material.[2]

Transition Services

District of Columbia courts have found that the failure to implement transition services obligations on an IEP can deny students a FAPE. Again applying the "proportionality" approach, in Joaquin v. District of Columbia, Civ. No.: 14–01119 (RC), 2015 WL 5175885, (D.D.C. 2015), the Court found that the failure to provide any transition services on an IEP denied the Student a FAPE.

The record supports Petitioner's contention that the Student received insufficient transition services after the issuance of the April 12, 2017, IEP. The Student's progress report for the fourth term of the 2016-2017 school year indicated that the transition goals from the April, 2017, IEP were not introduced during the 2016-2017 school year. Then, during the meeting on November 15, 2017, Witness A admitted that no transition services had been provided for the Student during the first term of the 2017-2018 school year. The Student's progress report for the second term does indicate that the Student received

[2]Witness A expressed concern about School B's ability to fulfill the IEP mandate. At the hearing, Witness A testified that that she had a very difficult caseload, and Petitioner testified without rebuttal that Witness A told her that she was not sure she could meet the mandate of ten hours per week of services.

some transition services during the second term. Still, the progress report suggested that little work had been done with the student. One goal in the progress report, relating to job training, had just been introduced. Another goal, relating to employment, had still not been introduced. A third goal, relating to creating and saving computer documents as well as "comparing prices" when shopping, was listed as "progressing." However, the parenthetical corresponding to this goal did not mention anything about comparing prices and indicated that the Student was already able to work on a computer. Other than a Casey Life Skills Assessment, the Student appears to have received virtually no transition services corresponding to the April, 2017, IEP.

Respondent argued that it has until April 11, 2018, to deliver the services, and that the claim is therefore not ripe. However, Respondent did not explain how it could possibly provide the Student with so many minutes of transition services in the next two or so months. It is important to underscore that Witness A thought that the Student was only due 160 minutes of transition services in the April, 2017, IEP. However, the IEP stated that the Student was due 480 minutes per year of transition services: 160 for career readiness, 160 for employment, and 160 for independent living. Applying the "proportionality" approach, Petitioner has met the burden to show that the Student's IEP was not implemented with respect to transition services.

Summary

In sum, as a result of Respondent's failure to deliver to the Student specialized instruction outside general education during the 2017-2018 school year, and Respondent's failure to deliver transition services to the Student in the 2016-2017 and 2017-2018 school years, Respondent denied the Student a FAPE.

VIII. Relief

Petitioner requested compensatory education in the form of fifty hours of tutoring, ten hours of behavioral support services, and ten hours of transition counseling. 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 the special education services that 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.

Recently, the Circuit clarified the scope of FAPE deprivation in the context of FAPE denial. In B.D. v. District of Columbia, 817 F.3d 792, 797 (D.C. Cir. 2016), Judge Tatel explained that students should not only be compensated for the FAPE denial's

"affirmative harm" but should also be compensated for "lost progress" that the student would have made.

Petitioner presented a compensatory education plan (P-24), which recommends fifty hours of academic tutoring (five hours weekly for ten weeks), ten hours of behavioral support services (one hour weekly for ten weeks), and ten hours of transition counseling (one hour weekly for ten weeks). Petitioner assessed the Student's needs in consideration of Reid, and premised her calculation on a finding that the Student missed accommodations, behavioral support services, specialized instruction, and transition services for the 2016-2017 and 2017-2018 school years.

This Hearing Officer Determination ("HOD") determined that Respondent failed to implement the specialized instruction requirement in the April, 2017, IEP solely for the 2017-2018 school year. This HOD also determined that Respondent did not fail to provide the Student with the accommodations listed in the April, 2017, IEP and did not fail to deliver behavioral support services. As a result, it is appropriate to modify the proposal from Witness C. Accordingly, Respondent shall provide the Student with forty hours of compensatory tutoring, delivered four hours per week for ten weeks, by a certified special education teacher. Additionally, Respondent shall provide the Student with ten hours of transition counseling. The request for compensatory behavioral support services is denied.

IX. Order

As a result of the foregoing:

1. Respondent shall pay for and/or reimburse Petitioner for forty hours of tutoring services from a certified special education teacher, to be provided for four hours per week for ten weeks;

2. Respondent shall pay for and/or reimburse Petitioner for ten hours of transition counseling, to be provided for one hour per week for ten weeks;

3. All services shall be provided at rates that are usual and customary in the community;

4. All other requests for relief are denied.

Dated: February 14, 2018

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov

X. Notice of Appeal Rights

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: February 14, 2018

Michael Lazan
Impartial Hearing Officer