OSSE
Office of Dispute Resolution
January 26, 2016

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,[1]	)	**Room: 2003**
Petitioner,	)	**Hearing: 1/11/16**
	)	**HOD Due: January 26, 2016**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2015-0363**
District of Columbia Public Schools,	)	
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a [redacted]-year-old student who is eligible for services as a student with Multiple Disabilities. (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 November 12, 2015 in regard to the Student. On November 23, 2015, Respondent filed a response. A resolution meeting was also held on November 23, 2014. The resolution period expired on December 12, 2015.

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 and 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 December 23, 2015, this Hearing Officer held a prehearing conference. Roberta Gambale, Esq., counsel for Petitioner, appeared. William Jaffe, Esq., counsel for Respondent, appeared. A prehearing conference order issued on December 30, 2015, summarizing the rules to be applied in this hearing and identifying the issue in the case.

The hearing was held on January 11, 2016. This was a closed proceeding. Petitioner was again represented by Roberta Gambale, Esq. Respondent was again represented by William Jaffe, Esq. Petitioner moved in Exhibits 1-18. Respondent objected to Exhibit 17 on relevance grounds. This objection was overruled. Exhibits 1-18 were admitted. Respondent moved into evidence Exhibits 1-6. There were no objections. Exhibits 1-6 were admitted. The parties presented oral closing statements at the end of the hearing on January 11, 2016.

Petitioner presented as witnesses: Petitioner; Witness A, an advocate (expert: special education programming). Respondent presented no witnesses.

IV. Credibility.

Both witnesses that were called in this case testified with candor. No material inconsistencies were found in the record with respect to either witness. DCPS did not present any witnesses to rebut these witnesses' testimony, and did not argue that the witnesses were not credible in closing argument.

V. Issue

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

Did DCPS fail to implement the Student's current IEPs during the 2014-2015 and 2015-2016 school years? If so, did DCPS violate 34 CFR Sect. 300.350, 34 CFR Sect. 323(a), and precedent such as Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007)? If so, did DCPS deny the Student a FAPE?

Petitioner contends that the Student did not receive mandated counseling services during the 2014-2015 school year. Petitioner also contends that the Student did not receive an educational placement for the first four weeks of the 2015-2016 school year.

As relief, Petitioner seeks compensatory counseling and tutoring services.

VI. Findings of Fact

1. The Student is a [redacted]-year old who is eligible for services as a student with multiple disabilities. On her IEP, those disabilities are listed as specific learning disability and other health impairment. She also has sickle cell anemia, which causes her to be ill frequently and to experience physical discomfort. Emotionally, she can have trouble getting along with other people. She has issues with being bullied, and sometimes will react violently to the bullying. (Testimony of Petitioner; P-1-1)

2. Psychological testing conducted on the Student in April, 2014 found that she functioned in the below average level in verbal and non-verbal intelligence, though with memory scores in the average range (on the Reynolds Intellectual Assessment System, or "RIAS"). Wechsler Individual Achievement Test- III (or, "WISC-III") testing showed that the Student was in the low range in all major academic domains except oral language, where she was below average. Her reading score was at the .2 percentile, the

written expression score was at the 1st percentile, and the mathematics score was at the 2nd percentile. Testing on the Behavioral Assessment for Children, Second Edition (or, "BASC-2") found that the Student was in the "clinically significant" range in externalizing problems, internalizing problems, behavioral symptoms, and school problems (according to her then-counselor). (P-3-4-11)

3. The Student's draft IEP dated July 7, 2014 called for twenty hours of specialized instruction per week outside general education, with sixty minutes per week of behavioral support services. Books on CD and a location with minimal distractions were also recommended. (P-2-12, 14)

4. For the 2014-2015, she attended School B. When she started at School B for the 2014-2015 school year, her counseling did not start until October, 2014. (Testimony of Petitioner; P-4-1)

5. Service trackers indicate that the Student received counseling **1) for October, 2014**: October 8, 2014 (sixty minutes, individual); October 16, 2014 (sixty minutes, group of four to eight); October 23, 2014 (sixty minutes, individual). On October 3, 2014, the Student was not available because of suspension. On October 30, 2014, the provider was not available; **2) for November, 2014**: November 6, 2014 (sixty minutes, individual); November 13, 2014 (sixty minutes, group of four to eight); November 20, 2014 (thirty minutes, individual); November 24, 2014 (sixty minutes, individual); **3) December, 2014**: December 4, 2014 (sixty minutes, group of four to eight); December 10, 2014 (sixty minutes, group of four to eight); the Student was absent from ninety minutes of group and individual counseling on December 18, 2014; **4) January, 2015**: January 7, 2015 (thirty minutes, individual); January 26, 2015 (ninety

minutes, individual); January 29, 2015 (sixty minutes, group of 4-8); the Student did not attend counseling on January 15, 2015 because her teacher would not let her out of class; **5) February, 2015**: February 5, 2015 (120 minutes, individual); February 19, 2015 (sixty minutes, group of four to eight); sessions were missed on February 12, 2015 (teacher refused to let her out of class) and February 26, 2015 (inclement weather); **6) March, 2015**: March 12, 2015 (sixty minutes, group of four to eight); she did not attend counseling on March 5, 2015 (inclement weather) and March 19, 2015 (unavailable because of PARCC testing); **7) April, 2015**: April 23, 2015 (sixty minutes, group of 4-8); April 29, 2015 (60 minutes, group of 2-3)("meeting with student during her IEP meeting"); the Student was unavailable because of a field trip on April 9, 2015; the school was closed on April 16, 2015 because of spring break; **8) May, 2015:** May 5, 2015 (sixty minutes, individual); May 14, 2015 (sixty minutes, group of four to eight); May 21, 2015 (sixty minutes, group of four to eight); May 29, 2015 (thirty minutes, individual); the provider was unavailable for a session on May 7, 2015; the Student was unavailable for half the session on May 29, 2015 due to testing; **9) June, 2015:** June 2, 2015 (sixty minutes, individual); the Student was unavailable from sessions on June 12, 2015 and June 15, 2015 because she graduated. (P-4)

6. During the 2014-2015 school year, the Student had an "attitude problem." According to her counselor, she was disrespectful and untruthful. Her academic performance in math was at about the fourth grade level, but her reading was at about the first grade level. She was often lethargic in english/language arts class, very difficult to engage in science, and did not participate or attend well in mathematics. (P-3-3; P-14-2)

7. Her IEP dated April 29, 2015 called for twenty hours of specialized instruction per week outside general education, with 240 minutes per month of behavioral support services. The team "agreed to continue" with 240 minutes per month of behavioral support services. Books on CD and a location with minimal distractions were also recommended. The Student was deemed eligible for ESY services at the April 29, 2015 review because she loses critical skills over breaks in schooling. (P-14-1-3; P-1-9, 11)

8. The Student was reported to have mastered four of her goals for the 2014-2015 school year. These mastered goals were in reading fluency, reading comprehension, writing a topic sentence and a conclusion sentence that repeats her ideas from her topic sentence on 4 of 5 trials, and including transition words into a paragraph. (R-6-1-4)

9. For the 2015-2016 school year, the Student continued to attend B. The Student attended counseling at School B on August 24, 2015 for thirty minutes, individual. Then there was an incident in the first week whereby girls threatened physical harm to the Student. The girls who threatened the harm were arrested. After the incident, the assistant principal of the school suggested that the student should go to another school because School B was not safe for her, which the parent agreed with. As a result, the Student stayed home from the school after the first week. (Testimony of Petitioner)

10. The Student did not do any work at home. She was not given any work packages for home studies. She asked to go to School B in the interim but she was told it was not safe. (Testimony of Petitioner)

11. DCPS notified the parent that the Student could attend school at Student School A on or about September 15, 2015. The parent promptly registered the student, and transportation was provided on September 19, 2015. The Student began attending on that date. (Testimony of Petitioner; P-4-20)

12. The delay in receipt of educational services had an impact on the Student. At the October 20, 2015 meeting to review her IEP, there was a discussion that some of the teachers were unable to give her a grade due to her late entry to the school. (Testimony of Witness A)

13. All four of the goals that had been "mastered" in the 2014-2015 school year were then repeated for the 2015-2016 school year. By the end of the first term of the year, the Student was reported to be "progressing" on all four of the goals that she had mastered the previous year. Counseling restarted at School A on October 6, 2015, with a ninety-minute session, group size of one. (R-1-3; R-2-1-3)

VII. Conclusions of Law

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

The burden of proof in a special education due process hearing lies with the party seeking relief. 5-EDCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005). However, in reviewing a decision with respect to the manifestation determination, the hearing officer must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability. 5 DCMR Sect. 2510.16

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

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 CFR Sect. 300.513(a).

Did DCPS fail to implement the Student's current IEPs during the 2014-2015 and 2015-2016 school years? If so, did DCPS violate 34 CFR Sect. 300.350, 34 CFR Sect. 323(a), and precedent such as Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (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 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).

The record is clear that the Student missed a substantial amount of counseling for the 2014-2015 school year. This is true whether the mandate is 60 minutes per week, as is written on the draft IEP, or 240 minutes per month, as written on the meeting notes for the April, 2015 IEP meeting.

The inference that can be reasonably drawn from the record is that the service trackers in Exhibit 4 accurately reflect the student's counseling during the school year. According to those records, the Student had no counseling in September. She had counseling for only 180 minutes in October, missing two weeks. In November, 2014, she had counseling for 210 minutes, with only thirty minutes in the third week. In December, 2014, she had 120 minutes of counseling, missing counseling in the third and fourth weeks. In January, 2015, she had 180 minutes of counseling, missing thirty minutes of counseling in the first week and receiving no counseling in the second week and the third week. In February, 2015, she received 180 minutes of counseling, with no counseling in the second and fourth weeks. In March, 2015, she had only sixty minutes of counseling, with no counseling for all but one week. In April, 2015, she had 120 minutes of counseling, missing counseling for the first two and one half weeks. In May, 2015, she received 210 minutes of counseling, with no counseling in the final week. In June, 2015, she received sixty minutes of counseling, with no counseling in the final three weeks.

Where the student is absent from school because of illness, the general rule is that the school district *cannot* be held accountable unless there is an extended period of

illness. Letter to Balkman, 23 IDELR 646 (OSEP, April 10, 1995) This would account, however, for only one missed ninety-minute session. It is also noted that the general rule is that the school district is held accountable if the student misses sessions because of school related activities such as testing or because the therapist is not available. Id. A number of sessions were missed because teachers would not let her out of class or her therapist was not available. A number of sessions were also missed because of no apparent reason at all, such as all the sessions in September, 2014. DCPS presents no witnesses in response to these contentions by Petitioner. The record shows that the bulk of the missed counseling was because of the school district.

In regard to the 2015-2016 school year, the record is clear that the student missed three weeks of school because of safety issues. Petitioner testified that she asked for a supplemental program during this time, but that no program was provided. Petitioner also asked that the Student remain at School B pending the transfer to School A, but this request was denied. The Student ended up receiving no instruction for three weeks of time, and no counseling for the entire month of September, 2015.

Petitioner argues that the Student was not harmed by this lack of instruction in 2015-2016, pointing to the fact that the Student had to repeat goals that had been mastered during the previous year. Respondent argues that there is evidence of the Student's progress in the record, pointing to the 2015-2016 progress reports. However, harm is not the relevant area of focus on here. A Petitioner need not make a showing of harm to prevail on a failure to implement claim. Turner v. District of Columbia, 952 F.Supp.2d 31, 42 (D.D.C.,2013) The relevant inquiry is the whether the failure to deliver the ordered services was "material." Turner, 952 F.Supp.2d at 40. Here, where

the Student missed at least fifteen different weeks of counseling during the 2014-2015 school year, and three full weeks of instruction during the 2015-2016 school year, I find the deprivation material.

Parenthetically, as noted by Petitioner, this low-functioning Student *does* regress when she does not receive regular instruction. This is why she was recommended to receive ESY services over the summer. Moreover, as also noted by Petitioner, the Student ended up repeating goals from the 2014-2015 school year, which also points to regression. For the 2015-2016 school year, she worked on four different goals that she actually mastered during the 2014-2015 school year. Even so, during the 2015-2016 school year, the Student was determined only to be "progressing" on the goals according to her progress reports.

I find Respondent denied the Student educational benefit, and therefore a FAPE, when they failed to implement the Student's IEPs for the 2014-2015 and 2015-16 school years.

VIII. Relief

As a remedy, Petitioner asserts that appropriate relief in this matter is to order compensatory education in the form of twenty-two hours of counseling, ten hours of mentoring, and eighty hours of tutoring.

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

> The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confer broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in

> light of the purpose of the Act. As already noted, this is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.

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

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

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner has submitted a compensatory education plan from an expert in special education programming, and supporting testimony from that expert.

Petitioner's plan for counseling is reasonable. Respondent contends that the witness did not go through the record thoroughly, but the plan and the testimony show that the witness reviewed the record, particularly the service trackers, and then made a considered judgment on the amount of harm that the Student experienced. I find the request for twenty-two hours to be reasonable and consistent with the standard enunciated in Reid. Per the expert's suggestion, Petitioner may use a qualified, licensed provider of her choosing.

Similarly, in regard to mentoring, I find that Petitioner's proposal is reasonable. The ten hours of mentoring are appropriately viewed as a behavioral support service. Though the Student was not entitled to any mentoring in the IEPs, I will note that DCPS's proposed compensatory education award was fifty hours of counseling, which totals more than the amount of hours of counseling *and* mentoring requested by Witness A. I am, however, concerned that there may be no licensing requirements for "mentors." Accordingly, I will require that the mentor have at least five years of experience, and I will limit the rate for mentoring to the $65 per hour that was suggested by DCPS in its proposed award.

Petitioner also seeks eighty hours of individualized tutoring, but the plan does not indicate that the tutoring is academic. Instead, the plan indicated that the tutoring is to develop a "treatment plan" for the student to teach social and life skills. The plan also indicates that the tutoring is to work on coping strategies for this student.

This is not in sync with the services that were missed, which amounted to three weeks of academics at the beginning of the 2015-2016 school year. There is nothing in the record to suggest that the Student was attending a "life skills" program. Moreover, in assessing the proposed tutoring award, Petitioner's witness based the award in part on missed ESY services – even though such missed services were not the subject of the Due Process Complaint. DCPS proposed that the Student receive twenty hours of compensatory tutoring at the resolution meeting. Given the deprivation, I find that this is a more reasonable proposal and more in line with the standards in Reid. Accordingly, I will award the Student twenty hours of independent academic tutoring, by an independent, qualified, licensed provider, at a reasonable and customary rate in the community.

IX. Order

As a result of the foregoing:

1. Respondent is hereby ordered to pay for twenty hours of individualized tutoring services for the Student, to be used by December 31, 2016;

2. All tutoring shall be directly provided by a certified teacher (selected by Petitioner) who shall be paid at a reasonable and customary rate in the community;

3. Respondent is hereby ordered to pay for twenty-two hours of compensatory counseling for the Student, to be used by December 31, 2016;

4. All counseling shall be provided by a qualified, licensed, experienced counselor (selected by Petitioner) who shall be paid at a reasonable and customary rate in the community;

5. Respondent is hereby ordered to pay for ten hours of compensatory mentoring for the Student, to be used by December 31, 2016;

6. All counseling shall be provided by a qualified, experienced mentor (with five years of experience and selected by Petitioner) who shall be paid at the rate of $65 per hour.

7. Petitioner's other requests for relief are hereby denied.

Dated: January 26, 2016

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Roberta Gambale, Esq.
William Jaffe, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov
Chief Hearing Officer

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: January 26, 2016

Michael Lazan
Impartial Hearing Officer