

Hearing Officer Determination

Case No. 2024-0085

this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 7/14/24.

A prehearing conference was held on 5/20/24 and a Prehearing Order was issued that same day, addressing among many other things the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 6/20/24 and 6/21/24, and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present throughout the hearing.

Documents and Witnesses

Petitioner’s Disclosure, submitted on 6/12/24, contained documents P1 through P29, all of which were admitted into evidence without objection, except for P23 which was withdrawn. Respondent’s Disclosure, also submitted on 6/12/24, contained documents R1 through R41, all of which were admitted into evidence without objection, except for R20, R22, R23, R24 and R25, which were withdrawn.²

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Educational Advocate* (qualified without objection as an expert in Special Education Eligibility, Programming, Placement and Implementation)
2. *Special Education Advocate* (qualified without objection as an expert in Special Education)
3. *Class Parent*
4. Parent

Respondent’s counsel presented 2 witnesses in Respondent’s case (*see* Appendix A):

1. *Occupational Therapist* (qualified without objection as an expert in Occupational Therapy)
2. *Assistant Principal* (qualified without objection as an expert in Special Education Programming and Placement)

Petitioner’s counsel offered additional testimony of Parent as the only rebuttal evidence.

² Citations herein to the parties’ documents are identical except that Petitioner’s documents begin with a “P,” while Respondent’s documents begin with an “R,” followed by the exhibit number and then a “p” (for page) and the Bates page number or numbers (which are numbered consecutively through to the end of the exhibits), with any leading zeros omitted.

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Issues and Relief Requested

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

Issue 1: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP on or about 4/12/24 to present, where the IEP was not reviewed and revised at least annually and none of the IEP was timely updated. (*Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to fully implement Student's IEP during 2023/24³ when Student was not provided specialized instruction from 12/1/23 to present after the special education teacher left the school, and DCPS failed to provide a location of services ("LOS")/placement to implement Student's IEP. (*Petitioner has the burden of persuasion on this issue.*)

Relief Requested by Petitioner:

1. A finding that Student has been denied a FAPE.
2. DCPS shall update Student's IEP with comprehensive data.
3. DCPS shall provide an appropriate LOS that can implement Student's IEP, including placement in a nonpublic day school, if necessary.
4. DCPS shall provide or fund compensatory education for any denials of FAPE.⁴
5. Any other just and reasonable relief.

Findings of Fact

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

³ All dates in the format "2023/24" refer to school years.

⁴ Petitioner's counsel was put on notice at the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondents were invited to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under

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1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age, Gender, and in Grade* during 2023/24 at *Public School*.⁷

2. IEPs. Student's 4/12/23 IEP was prepared for 2023/24 and provided 26 hours/week of specialized instruction outside general education, along with 240 minutes/month of Speech Language Pathology ("SLP") outside general education and 120 minutes/month of Occupational Therapy ("OT") outside general education; Student's disability classification was autism.⁸ Student's Other Classroom Aids and Services noted that Student benefits from strategies rooted in the principles of Applied Behavior Analysis ("ABA") therapy.⁹ Petitioner's advocate asserted that Student's IEP expired on 4/12/24.¹⁰

3. IEP meetings concerning Student were held on 9/20/23 and 10/4/23.¹¹ The September 2023 meeting was not a full IEP meeting.¹² Student's IEP amendment on 1/11/24 revised Present Levels of Performance ("PLOPs"), Goals and Extended School Year ("ESY") and were made in writing without reconvening the IEP team for a meeting; the amendment was reportedly made to an 10/4/23 IEP; Student had mastered goals, so received new goals.¹³ Student's 5/15/24 IEP stated that the prior IEP annual review meeting date was 10/4/23.¹⁴

4. The 5/15/24 annual review of Student's IEP decreased specialized instruction to 20 hours/week outside general education, even though the setting remained the same, and 120 minutes/month of OT outside general education, but no SLP, despite Communication/Speech and Language being a goal area on the IEP.¹⁵ An annual IEP meeting was held on 5/20/24, with notes taken by Educational Advocate.¹⁶ The IEP team recommended 26 hours/week of specialized instruction, 240 minutes/month of SLP, and 120 minutes/month of OT.¹⁷

consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁶ Parent.

⁷ *Id.*

⁸ P13p153,162; Educational Advocate.

⁹ P13p162.

¹⁰ P22p283.

¹¹ P14; P15.

¹² P17p209.

¹³ R33p211; Educational Advocate.

¹⁴ P16p175 (5/15/24).

¹⁵ P16p185,194; P17p209; P22p287; Educational Advocate.

¹⁶ P17p209.

¹⁷ P17p210; Educational Advocate (sought to correct draft IEP).

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5. Assessments. A Qualitative Speech and Language Reevaluation was dated 7/31/23; Student demonstrated more skills than in a prior 5/29/20 evaluation.¹⁸ DCPS conducted a Comprehensive OT Reevaluation on 6/30/23, which included observations of Student and found impacts on Student's learning and participation.¹⁹ A draft Evaluation Summary Report was sent on 7/28/23.²⁰ DCPS authorized payment of \$2,500 on 4/13/23 for a psychological evaluation of Student that was not conducted.²¹

6. Specialized Instruction. Early in 2023/24 there were 7 children in Student's class in the *younger grade band*; the *older grade band* had 4 students at the beginning of 2023/24; one student left and there were about 9-10 students total when the *joint grade band* was merged.²² Student received little to no specialized instruction from November or December 2023 to the end of the school year.²³ One teacher for Student left Public School on 10/27/23.²⁴ A replacement teacher for Student left on 1/18/24; early in 2024 the younger grade band was merged with the older band to create a larger joint grade band.²⁵ There were 3 aides in the classroom, but no teachers and "not a lot of learning" going on.²⁶ Aides can provide services under the supervision of a teacher, if the teacher is in close proximity.²⁷ Two Public School teachers were providing some plans for aides to follow, but the teachers were not in the classroom and provided no direct instruction to Student or the other children.²⁸

7. Student's class did not have an assigned classroom teacher; Student was pulled out for 30 minutes of specialized instruction once or twice a day for 2 months, but there was no clear schedule.²⁹ In 2023/24, Student regressed in the absence of a classroom teacher for months.³⁰ DCPS acknowledged that Student had been without a "licensed teacher."³¹ DCPS suggested moving Student to Proposed Public School, but Petitioner was concerned there might not be room for Student.³² Proposed Public School was to have a maximum of 8 children in Student's class and Student would have been the ninth.³³ Student has autism

¹⁸ P7p75.

¹⁹ P5p43,46,52.

²⁰ P6p57.

²¹ R15p144.

²² Special Education Advocate; Parent.

²³ Educational Advocate; Parent.

²⁴ P26p312.

²⁵ Special Education Advocate; P26p311; Class Parent (teacher was gone 2 weeks earlier, i.e., 1/4/24).

²⁶ Special Education Advocate.

²⁷ *Id.*

²⁸ *Id.*

²⁹ P17p210; Parent.

³⁰ P17p210; Educational Advocate.

³¹ P17p211.

³² *Id.*

³³ Parent.

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and is sensitive to changes and disruptions.³⁴ Parent was concerned about the transition of Student.³⁵ A transition meeting was scheduled for 6/17/24, prior to the end of 2023/24.³⁶

8. Compensatory Education. Public School had not provided specialized instruction to Student since about November 2023, which resulted in Student regressing in academic skills.³⁷ Assistant Principal testified that the proposed 572 hours of compensatory education tutoring should be reduced by half.³⁸ Educational Advocate proposed 100 hours of ABA therapy based on DCPS proposing ABA as needed by Student.³⁹ In a 2023 settlement with DCPS, Student was authorized to receive 150 hours of tutoring, which has been going well for Student and with which Student had made progress.⁴⁰ Educational Advocate credibly testified that her compensatory education proposed would put Student where Student should have been but for the denial of FAPE found in this case.⁴¹

Conclusions of Law

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

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

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

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(14); *Andrew F.*, 137

³⁴ Educational Advocate.

³⁵ Parent.

³⁶ Educational Advocate.

³⁷ Parent; Educational Advocate; Special Education Advocate.

³⁸ Assistant Principal.

³⁹ Educational Advocate.

⁴⁰ Educational Advocate; R1.

⁴¹ Educational Advocate.

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S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

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

Importantly, the local education agency (“LEA”) must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori v. Dist. of Columbia*, No. 17-cv-2455 (CKK), 2018 WL 4623572, at *3 (D.D.C. 2018).

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

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a *prima facie* case. D.C. Code Ann. § 38-2571.03(6); *Z. B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

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annually and none of the IEP was timely updated. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)

Petitioner failed to establish a *prima facie* case and show that Student's 4/12/23 IEP was not revised and updated during the following year as required. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 527, 113 S. Ct. 2742, 2758, 125 L. Ed. 2d 407 (1993) (a *prima facie* case requires enough evidence to raise an issue for the trier of fact). Review of the steps taken to update Student's IEP and underlying assessments reveal that there was no failure by DCPS. *See* 34 C.F.R. § 300.324(b)⁴²; *Z. B. v. Dist. of Columbia*, 888 F.3d 515, 523-525 (D.C. Cir. 2018); *Suggs v. Dist. of Columbia*, 679 F. Supp. 2d 43, 51-52 (D.D.C. 2010).

Following the 4/12/23 IEP, IEP meetings concerning Student were held on 9/20/23 and 10/4/23. Student's IEP was amended on 1/11/24 to revise and address Student's PLOPs, goals and ESY. The January amendment was made without reconvening the IEP team and the documents indicate that the amendment was made to Student's 10/4/23 IEP. Further, Student had mastered goals, so received new goals, and Student's 5/15/24 IEP also stated that the prior IEP annual review meeting date was 10/4/23. Following the 4/12/23 IEP, a Qualitative Speech and Language Reevaluation was conducted on 7/31/23 and a Comprehensive OT Reevaluation was conducted on 6/30/23. Significantly, DCPS authorized payment of \$2,500 on 4/13/23 for a psychological evaluation of Student that has not yet been conducted.

In short, DCPS did not fail to take steps to update Student's 4/12/23 IEP in the year following the IEP, including assessing Student. There is no denial of FAPE here and any delay from mid-April 2024 to mid-May would have been *de minimis*.

Issue 2: *Whether DCPS denied Student a FAPE by failing to fully implement Student's IEP during 2023/24 when Student was not provided specialized instruction from 12/1/23 to present after the special education teacher left the school, and DCPS failed to provide an LOS/placement to implement Student's IEP. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did meet her burden of persuasion on IEP implementation. With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a "*de*

⁴² The IDEA requires that the Local Education Agency ("LEA") ensure that the IEP team (i) reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) revises the IEP, as appropriate, to address any lack of expected progress toward annual goals and in the general curriculum, the results of any reevaluation, information about the student provided by the parents, the student's anticipated needs and other matters. 34 C.F.R. § 300.324(b).

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

Here, Student was to receive 26 hours/week of specialized instruction in 2023/24. But due to teachers quitting, Public School had not been able to provide specialized instruction to Student since November 2023 for much of the remainder of 2023/24, which resulted in Student's academic regression. There were 3 aides in Student's class, but no teachers and thus no specialized instruction. While aides can be supervised by a teacher to provide services as long as the teacher is in close proximity, that was not the case here. Two Public School teachers provided some plans for the aides, but the teachers were not in Student's classroom and did not provide direct instruction to Student or other students.

At times, Student may have been pulled out for 30 minutes of specialized instruction once or twice a day, which at most amounted to 5 of the 26 hours/week that Student was due. Nor did such support occur for more than a couple of months during 2023/24, resulting in academic regression. DCPS argued that Proposed Public School could have provided a teacher for Student had Parent been willing to move Student to Proposed Public School at the end of 2023/24. However, Parent clearly articulated her concerns based on Student's autism and sensitivity to change, and the disruption that could have resulted from transition in the final weeks of the school year.

The undersigned is persuaded that Petitioner did meet her burden of persuasion on IEP implementation as Student clearly needed to have teachers in place who could consistently provide the 26 hours/week of specialized instruction set forth on Student's IEP. This results in the significant award of compensatory education discussed next.

Remedy

Having analyzed and resolved the issues in this case, what remains is to consider the compensatory education necessary to make up for the denial of FAPE found above. In determining the amount of compensatory education for denials of FAPE, there is often “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

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Here, Educational Advocate testified that the compensatory education sought in her detailed plan would put Student in the position Student would have been but for the denials of FAPE. But that plan must be adjusted to match the denial of FAPE actually found herein, which was the lack of specialized instruction for a large part of 2023/24 as discussed in Issue 2.

Based on experience and careful analysis, the undersigned awards 300 hours of 1:1 academic tutoring in the Order below, along with 100 hours of ABA therapy. This determination by the undersigned has been specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 24 months to avoid administrative burdens on Respondent, although the undersigned encourages Parent to get Student engaged as quickly as possible to ensure that the remedial services that Student needs are obtained without delay.

ORDER

Petitioner has prevailed on Issue 2, as set forth above. Accordingly, **it is hereby ordered that:**

As compensatory education for the denial of FAPE found herein, within 10 business days after request by Petitioner, DCPS shall provide a letter(s) of authorization for (1) 300 hours of 1:1 academic tutoring, and (2) 100 hours of ABA therapy, both from independent providers chosen by Petitioner; all hours are to be used within 24 months and any unused hours shall be forfeited.

Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

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Copies to:

Counsel of Record (Appendix A, by email)

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