

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

ADULT STUDENT,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: June 15, 2015

Hearing Officer: Peter B. Vaden

Case No: 2015-0113

Hearing Date: June 10, 2015

Office of Dispute Resolution, Room 2006
Washington, D.C.

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 Student), 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) has denied her a free appropriate public education (FAPE) by failing to implement her Individualized Education Program (IEP) during the 2014-2015 school year and for the summer 2014 Extended School Year (ESY) program.

Student, an AGE young woman, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on April 1, 2015, named DCPS as respondent. The undersigned Hearing Officer was appointed on April 2, 2015. The parties met for a resolution session on April 20, 2015 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on May 2, 2015. On May 1, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

On April 14, 2015, Petitioner, by counsel, made a motion for judgment on the pleadings which I denied by order entered April 24, 2015.

The due process hearing was held before the undersigned Impartial Hearing Officer on June 10, 2015 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.

Counsel for Petitioner made an opening statement. Petitioner called as witnesses MOTHER, FATHER, NONPUBLIC SCHOOL HEAD OF SCHOOL, and PRIVATE TUTOR. DCPS called CASE MANAGER as its only witness. Petitioner's Exhibits P-1 through P-32 were admitted into evidence, including Exhibits P-1 through P-5 and P-32 which were admitted over DCPS' objections. DCPS' Exhibits R-1 through R-38 were admitted into evidence, with the exceptions of Exhibits R-9 and R-28 which were withdrawn. Petitioner's objections to Exhibits, R-6, R-7, R-8, R-15, R-17, R-18 and R-29 through R-32 were overruled. Counsel for the respective parties made closing statements. Neither party requested leave to file post-hearing written argument.

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 May 1, 2015

Prehearing Order:

– Whether DCPS denied Student a FAPE by failing to fully implement her IEP during the 2014 summer and 2014-2015 school year because the student is not receiving any instruction in math despite the requirements of her IEP and is only receiving between fifteen and twenty hours of specialized instruction in the outside general education setting. Furthermore, the student allegedly missed approximately 50 percent of her 2014 summer ESY services due to DCPS' failure to provide transportation services; and

– Whether DCPS denied the student a FAPE by failing to identify a suitable location of services that is capable of implementing her IEP for the 2014-2015 school year.

For relief, Petitioner requests that the Hearing Officer order DCPS to fund her private placement, with transportation, at Nonpublic School. The Petitioner also seeks an award of 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 and legal memoranda of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where she resides with Mother. Testimony of Mother.

2. Student is eligible for special education and related services under the primary disability classification Specific Learning Disability (SLD). Exhibit P-14.

3. Student is currently enrolled in GRADE at CITY HIGH SCHOOL. Testimony of Mother.

4. In a December 30, 2011 Psychological Evaluation report, a DCPS school psychologist reported that Student's verbal reasoning abilities tested well below average (1st percentile) and her nonverbal reasoning abilities were within the low average range (10th percentile) and that overall Student's composite memory, which tested within the Borderline range, was equivalent with her overall intellectual functioning. Exhibit P-28.

5. Mother has brought several prior due process complaints on Student's behalf. In the last case, Case No. 2012-0832, Petitioner contended, *inter alia*, that Student's December 3, 2012 IEP was inappropriate because it did not contain an appropriate transition plan and that Student's placement at City High School was not suitable. In a Hearing Officer Determination issued on February 15, 2013, Hearing Officer Charles Carron concluded that DCPS had denied Student a FAPE by failing timely to authorize a vocational/transitional IEE evaluation requested by Mother, but that Mother had not established that Nonpublic School was unable to implement Student's IEP or otherwise was an inappropriate placement for Student. The hearing officer ordered DCPS to fund an Independent Educational Evaluation (IEE) to assess Student's post-secondary vocational and transition preparedness and needs. Exhibit R-6.

6. Prior to the 2014-2015 school year, Student's IEP was last revised on March 11, 2014 at an annual review meeting at City High School. The March 11, 2014 IEP included Annual Goals for Mathematics, Reading, Written Expression, and Communication/Speech and Language. The IEP team stated that Student required Specialized Instruction to address deficits in Reading, Math and Written Language. The IEP team decided that Student would be provided 23 hours per week of Specialized Instruction, an additional three hours per week of Special Education Services in

remedial Reading and 120 minutes per month of Speech-Language Pathology. All of the services were to be provided outside general education. Exhibit P-14. This was a “full-time” IEP. Testimony of Case Manager.

7. On the March 11, 2014 IEP, Student’s IEP team reported for the Mathematics area of concern that, due to her deficiencies in overall areas of math fluency, applied problems, and calculation, Student’s level of disability significantly impacts her ability to comprehend and perform math at grade level. The annual goals for Mathematics in the March 11, 2014 IEP, included estimating sums and differences up to 1000, collecting and organizing data, creating a table with a linear pattern and solving and graphing linear equations. The annual goals for Mathematics in the March 11, 2014 IEP were repeated, without change, in Student’s November 14, 2014 IEP. Exhibits P-14, P-13.

8. The March 11, 2014 IEP provided that ESY Services were required for the provision of FAPE. The IEP also stated that Student required transportation services, but in a apparent error, stated that Student was not eligible for ESY related transportation services. Exhibit P-14. On July 7, 2014, SPECIAL EDUCATION COORDINATOR (SEC) informed Petitioner’s Counsel by email that Student’s IEP would be amended for ESY transportation. Exhibit P-4. Student did not receive school transportation at the beginning of the summer 2014 ESY session. When Mother contacted DCPS, she was informed that Student should have been provided transportation. Testimony of Mother.

9. Summer 2014 ESY ran from approximately July 8, 2014 to August 1, 2014 for five hours per day. School was closed on July 7, 2014 due to a power outage. Exhibit P-4, Hearing Officer Notice. Student missed the first two weeks of summer 2014 ESY

because DCPS did not provide transportation for Student to the ESY site. After two weeks, DCPS provided transportation. Student could not take public transportation to the ESY school because she was unable to independently use public transportation.

Testimony of Mother.

10. Student's class schedule for the 2014-2015 school year included 26 hours per week outside special education. This included physical education, which was co-taught by a special education certified teacher. For the last two quarters of the school year, Student's Spanish class was taught in an outside general education setting, with all special education students. The Spanish teacher was not certified in special education.

Testimony of Case Manager.

11. Student was not placed in a mathematics class for the 2014-2015 school year. Student needed a one semester math course this school year to meet her high school graduation requirement. She will be able to make up that class in the 2015-2016 school year and remain on track to graduate. Testimony of Case Manager.

12. Student's IEP Progress Report for the first reporting period of the 2014-2015 school year reported no progress in Mathematics. Exhibit P-7.

13. Student has been accepted by Nonpublic School for the 2015-2016 school year. Nonpublic School is a private day school in the District of Columbia, which specializes in serving students with disabilities, including SLD, Other Health Impairment, Multiple Disabilities and Speech-Language Disabilities. Nonpublic School also has a small population of general education students. Current enrollment at Nonpublic School is 30 students in grades 7 through 12. If she enrolled in Nonpublic School, Student would be assigned to a class of 7 students, all of whom are on the high school diploma track. The tuition charge at Nonpublic School is \$25,500 per year.

Testimony of Head of School. The school holds a full Certificate of Approval (COA) issued by the D.C. Office of the State Superintendent of Education. Hearing Officer Notice.

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, § 3030.14. *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 fully implement her IEP during the 2014 summer ESY program and during the 2014-2015 school year?

Petitioner's principal claim is that she was denied a FAPE over the 2014-2015 school year and in the summer of 2014 because DCPS did not fully implement her IEPs. Specifically, Petitioner alleges that City High School failed to provide her 26 hours per week of Specialized Instruction as required by her IEPs; did not provide her instruction in Mathematics to target her IEP annual goals; and did not provide her school transportation for the first two weeks of the summer 2014 ESY program. DCPS does not dispute that it did not provide Student a math class during the 2014-2015 school year, but denies that it failed to implement Student's IEP requirement for 26 hours per week

of Specialized Instruction. DCPS also did not rebut Mother's testimony that it failed to provide Student school transportation for the first two weeks of ESY.

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 (D.D.C.2013) (quoting *Bobby R.*, 200 F.3d at 349). Courts applying this 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. *Johnson, supra*.

Student has met her burden of proof to establish that DCPS failed to implement substantial and significant portions of her March 11, 2014 and November 14, 2014 IEPs. On the March 11, 2014 IEP, Student's IEP team reported for the Mathematics area of concern that, due to her deficiencies in overall areas of math fluency, applied problems, and calculation, Student's level of disability significantly impacts her ability to comprehend and perform math at grade level. The annual goals for Mathematics in the March 11, 2014 IEP included estimating sums and differences up to 1000, collecting and organizing data, creating a table with a linear pattern and solving and graphing linear equations. The IEP team stated that Student required Specialized Instruction, outside general education, to address her math deficits. The annual goals for Mathematics in

the March 11, 2014 IEP were repeated, without change, in Student's November 14, 2014 IEP.

As part of the IEP development process, a student's IEP team determines the special education and related services, and supplementary aids, services, and other supports that are needed for the student to advance appropriately toward meeting her annual goals. *See* 34 CFR § 300.320(a)(4). In this case, both the March 11 and November 14, 2014 IEP teams decided that Student needed 23 hours per week of Specialized Instruction (not including three additional hours per week of Specialized Instruction in remedial Reading). However, for the 2014-2015 school year, City High School failed to provide Student any special education services in math for her to advance toward meeting the IEP annual goals.² Unsurprisingly, Student's IEP Progress Report for the first reporting period of the 2014-2015 school year reported no progress in Mathematics. It is self-evident that City High School's not providing Student Specialized Instruction in Mathematics in the 2014-2015 school year was a failure to implement a substantial provision of her IEPs. Student was denied a FAPE as result.

With regard to the actual hours of Specialized Instruction provided to Student during the 2014-2015 school year, Mother testified that she did not know whether Student's classes were in special education or general education settings. However, Case Manager testified that for the first semester, Student was provided 26 hours per week of Specialized Instruction and all of Student's instruction was provided outside the general education setting. For the second semester, which began on January 26, 2015, Case Manager testified that all of Student's courses, except for Spanish, were taught by

² Case Manager testified that she believed the failure to place Student in a math class this school year was a "scheduling error."

special education teachers, outside general education. Student's daily Spanish class – about five hours per week – was taught by a general education teacher, but all of the students in the class were students with disabilities who had full time IEPs. Case Manager's testimony was not rebutted by the Petitioner. I find, therefore, that while Petitioner has established that since January 26, 2015, Student's Spanish language class was not taught by a teacher certified in special education, the class was provided in an outside of general education setting. I conclude that the failure to provided a special education teacher for the Spanish class was a *de minimis* failure to implement the IEP.

Lastly, Petitioner contends that DCPS denied Student a FAPE by failing to provide school transportation for the first two weeks of her ESY program in July 2014. The evidence at the due process hearing established that because of her disability, Student was unable to attend ESY without District-provided transportation. On June 26, 2014, Petitioner's attorney wrote SEC to inquire about transportation for Student to attend ESY. SEC replied on July 7, 2015 that school transportation would be provided. Mother's testimony was unrebutted that DCPS did not provide transportation for Student for the first two weeks of the four week ESY program. Because the first day of the ESY program was cancelled due to a power outage, Student actually missed 9 days of the four week program.

In *Wilson v. District of Columbia*, 770 F.Supp.2d 270 (D.D.C.2011), the Court held that DCPS' failure to provide transportation for three of four weeks of a child's ESY program was a denial of FAPE. ("Because DCPS almost entirely failed to provide a service that A.W.'s IEP team determined was necessary for his educational development, it denied him the education that the law requires." *Id.* at 277.) Here, due to DCPS' not providing transportation, Student missed almost half of the four week program. This

was a failure to provide a substantial part of the ESY program which the March 11, 2014 IEP team had determined Student needed. Like the Court in *Wilson*, I find that this was a denial of FAPE.

In summary, I find that Petitioner has established that she was denied a FAPE in the 2014-2015 school year by DCPS' failing to provide Specialized Instruction in Mathematics, and that DCPS also denied Student a FAPE by failing to provide school transportation for her to attend the first two weeks of the ESY program in July 2014. Petitioner did not establish that DCPS failed to implement the IEP requirement for 26 hours of Specialized Instruction except for the *de minimis* failure to provide a special education certified teacher for Student's out of general education Spanish class.

B.

Did DCPS deny Student a FAPE by failing to identify a suitable location of services that was capable of implementing Student's IEP for the 2014-2015 school year?

Student has attended City High School since the 2012-2013 school year. DCPS has designated City High School as the school location to implement Student's November 14, 2014 IEP for the 2015-2016 school year. Student contends that because City High School failed to implement portions of Student's IEP for the 2014-2015 school, notably Specialized Instruction in Mathematics, it was not a suitable location of services. DCPS maintains that notwithstanding its failure to implement portions of Student's IEP over the 2014-2015 school year, City High School was and is a suitable placement for Student.

Under the IDEA, DCPS is obligated to match a student with a school capable of fulfilling the student's goals and requirements in light of her disabilities. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C.Cir.1991). The IDEA further requires that the

educational placement be “reasonably calculated to enable the child to receive educational benefits,” that is, “sufficient to confer some educational benefit upon the handicapped child.” See *Dawkins by Dawkins v. District of Columbia*, 1989 WL 40280, 3 (D.C.Cir. Apr. 24, 1989), quoting *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 200, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Here, Student offered no evidence that City High School is not capable of implementing her IEP. Case Manager testified that City High School is able to provide Student all of the hours of Specialized Instruction Services specified in her November 14, 2014 IEP, including Specialized Instruction in Mathematics. She explained that the school’s failure to place Student in a math class for the 2014-2015 school year was a scheduling error.

Petitioner’s Counsel argued that City High School’s failure to provide Student mathematics instruction showed a “willful” failure to implement her IEP. She maintained that the U.S. District Court in *Hinson v. Merritt Educational Ctr.*, 579 F.Supp.2d 89 (D.D.C. 2008), held that a location of services is inappropriate where the school “cannot or will not” implement the student’s IEP. See Administrative Due Process Complaint Notice, p. 9. This is a misreading of the *Hinson* decision. The Court in *Hinson* wrote that, to show that the placement was inappropriate, the parent had to show that the school was “unable to implement the IEP as written.” *Id.* at 104. The Court found against the parent because she did not provide any argument that the school “cannot appropriately implement” the child’s IEP. *Id.* at 105 (emphasis supplied). The *Hinson* decision does not address possible consequences when a school “will not” implement an IEP. I find that here, as in *Hinson*, Petitioner has not shown that City High School was unable to implement Student’s IEP or that City High School was an unsuitable placement for the 2014-2015 school year. Neither has Petitioner

shown that City High School is unable or unwilling to fully implement her IEP for the 2015-2016 school year. Petitioner has not met her burden of proof on this issue.

Remedy

For relief in this case, Petitioner seeks an order for DCPS to fund Student's prospective placement at Nonpublic School. In *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991), the D.C. Circuit Court of Appeals explained that "[i]f no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an "appropriate" public school program available, *i.e.*, one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *Id.* at 305 (internal citations and quotations omitted). Here Petitioner has not shown that City High School is not appropriate for Student and I find that an award of private school placement is not warranted.

Petitioner seeks, in addition, an award of compensatory education for the denials of FAPE in this case. Compensatory education is educational service that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA. *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005)). The proper amount of compensatory education, if any, depends upon how much more progress a student might have shown if he had received the required special education services, and upon the type and amount of services that would place the student in the same position he would have occupied but for the LEA's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid*,

supra. The burden of proof is on the Petitioner to produce sufficient evidence demonstrating the type and quantum of compensatory education that is appropriate. See *Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012).

In this decision, I have found that DCPS denied Student a FAPE by failing to fully implement her March 11, 2014 and November 14, 2014 IEPs. Most concerning is that City High School did not offer Student Specialized Instruction in Mathematics for the entire 2014-2015 school year. In addition, DCPS did not provide transportation for Student to attend the first nine days of ESY in July 2014. Turning to how much more progress Student might have shown if she had received Specialized Instruction in math, the annual goals for Mathematics in the March 11, 2014 IEP included estimating sums and differences up to 1000, collecting and organizing data, creating a table with a linear pattern and solving and graphing linear equations. However, Student was not provided instruction in math and, as of the due process hearing date, she had not progressed toward her math goals. In fact, according to Mother, Student does not yet know how to count money.

Petitioner has proposed a compensatory education plan for Student (Exhibit P-32) devised by Private Tutor, who previously provided compensatory education tutoring to Student from 2011 to 2013. Private Tutor recommends that Student receive hour for hour 1:1 academic tutoring for each hour of Specialized Instruction and ESY services she was not provided from July 2014 forward. In *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, (D.C.Cir.2005) the District of Columbia Court of Appeals rejected “mechanical hour-counting,” and emphasized that an award must be designed to meet the student’s unique needs. *Reid*, 401 F.3d at 524. However an award created with the aid of a formula is not *per se* invalid, so long as the evidence provides a “sufficient basis

for an individually-tailored assessment.” *See Stanton ex rel. K.T. v. District of Columbia*, 680 F.Supp.2d 201, 206 -207 (D.D.C.2010).

In her testimony, Private Tutor justified her recommendation for hour for hour compensation because of Student’s difficulty retaining information and her inability to function at her grade level. Private Tutor testified that Student was able to make slow and marked progress with extensive drills and coaching, but that she did not retain information very well. Although Private Tutor has not worked with Student since 2013, I found that, based upon her prior tutoring services to Student, Private Tutor’s insights to Student’s needs were credible. I am persuaded that at least for the District’s failure to provide math instruction to Student, hour for hour compensation is warranted. The DCPS regular school year calendar provides for approximately 180 instruction days. Assuming during the 2014-2015 school year, Student would have been provided one mathematics class each school day to implement her IEP Mathematics goals, DCPS failed to provide Student some 180 hours of Specialized Instruction in Mathematics. I will order DCPS to provide or fund 180 hours of 1:1 tutoring for Student as compensatory education.

Besides not receiving Specialized Instruction in Mathematics, Student also was not provided some 45 hours of ESY instruction in July 2004 (nine days missed due to failure to provide transportation). The evidence does not establish the quantum of harm, if any, to Student from missing the first 9 days of ESY classes. However, I find that the 180 hours of tutoring to be ordered for failure to provide Student math instruction also suffices to compensate Student for the harm, if any, resulting from DCPS’ failure to implement the ESY transportation requirement of the March 11, 2014 IEP. I decline, therefore, to award additional compensatory education.

ORDER

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

ORDERED:

1. As compensatory education for denials of FAPE in this case, including its failure to provide Student Specialized Instruction in Mathematics in the 2014-2015 school year, DCPS shall provide Student 180 hours of one-on-one academic tutoring in Mathematics and such other academic subjects, and on a schedule, as may be reasonably agreed upon between the Student and DCPS. DCPS may provide the tutoring services through a qualified DCPS employee or a private provider. The tutoring services must be used by the end of the first semester of the 2015-2016 regular school year or shall be forfeited.

2. All other relief requested by the Petitioner herein is denied.

Date: June 15, 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 Division of Specialized Education
DCPS Resolution Team