

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
June 30, 2019

<i>Student</i> , ¹)	Case No.: 2019-0120
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 6/30/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 6/11/19
("DCPS"),)	ODR Hearing Room: 423
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because the requirement of a dedicated aide in Student's Individualized Education Programs ("IEPs") had not been fully implemented and records relating to the dedicated aides had not been provided. DCPS responded that the IEPs were adequately implemented and any failure to provide a dedicated aide was *de minimis*, and that there were no education records relating to Student's dedicated aide that were not provided.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

Following the filing of the due process complaint on 5/3/19, the case was assigned to the undersigned on 5/6/19. On 5/14/19, Respondent filed a response (a day late) and did not

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

Hearing Officer Determination

Case No. 2019-0120

challenge jurisdiction. On 5/16/19, Petitioner filed a Motion to Amend the Complaint to which Respondent consented, and which was granted by the undersigned on 5/27/19 in an Order Granting Leave to Amend Complaint. With the concurrence of the parties, in the discretion of the undersigned the timeline for the case was not modified. The resolution meeting was held on 5/23/19, but did not resolve the case or shorten the 30-day resolution period, which ended on 6/2/19. A final decision in 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 7/17/19.

Following the prehearing conference on 5/15/19 and issuance of the Prehearing Order on 5/27/19, the due process hearing took place on 6/11/19 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present for the hearing.

Petitioner’s Disclosures, submitted on 6/4/19, contained a cover letter and documents P1 through P27, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 6/4/19, contained a cover letter and documents R1 through R42, which were also admitted into evidence without objection.²

Petitioner’s counsel presented 3 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. Parent
2. *Sibling*
3. *Compensatory Education Expert* (qualified over objection as an expert in Compensatory Education Services)

Respondent’s counsel presented 1 witness in Respondent’s case (*see* Appendix A): *LEA Representative at Public School* (qualified without objection as an expert in Special Education Programming and Administration)

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

Issue 1: Whether DCPS denied Student a FAPE by not implementing Student’s IEP in (a) 2017/18³ when it failed to provide Student a dedicated aide on at least 30 school days, and/or (b) 2018/19 when it failed to provide Student a dedicated aide on at least 20 school days. *Petitioner has the burden of persuasion on this issue.*

² References herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, a hyphen, and the exhibit page (or pages, separated by commas). By contrast, Respondent’s documents are consecutively page numbered throughout, so are referenced by an “R” followed by the exhibit number, followed immediately by a “p” (for page) and the page number(s), omitting any leading zeros.

³ All dates in the format “2017/18” refer to school years.

Hearing Officer Determination

Case No. 2019-0120

Issue 2: Whether DCPS denied Student a FAPE by failing to provide Parent with education records relating to Student's dedicated aide, including service trackers and attendance logs for 2017/18 and/or 2018/19. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall provide Student with a dedicated aide in conformity with Student's IEP.
3. DCPS shall provide Parent all existing records pertaining to Student's dedicated aide, including service trackers and attendance logs.
4. DCPS shall keep, maintain, and provide to Parent all future records for Student's dedicated aide, including service trackers and attendance logs.
5. DCPS shall provide or fund compensatory education for any denial of FAPE⁴ or, in the alternative, fund a study to determine an appropriate award of compensatory education.
6. Any other appropriate relief.

On 5/24/19, Petitioner filed Petitioner's Motion for Partial Summary Judgment based on DCPS's alleged failure to provide records relating to Student's dedicated aide in 2017/18 and 2018/19. DCPS filed an opposition to the motion on 6/3/19 and Petitioner filed a reply on 6/5/19. The undersigned informed counsel on 6/10/19 for planning purposes prior to the due process hearing that the motion would likely be denied at the hearing. The undersigned did in fact deny the motion on the record at the due process hearing based on the fact that Petitioner failed to carry her burden of proving that education records of Student existed relating to Student's dedicated aide, as set forth in more detail below.

The parties made oral closing arguments at the end of the due process hearing and were invited to file by specified dates any legal citations they wished to provide, along with their computations of the days Student's dedicated aides were absent. Petitioner made such a filing, on 6/13/19, but Respondent did not.

⁴ Petitioner's counsel was put on notice that unless a compensatory education study were authorized, Petitioner would be expected to 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. Respondent was 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.

Hearing Officer Determination

Case No. 2019-0120

Findings of Fact

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

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age*, *Gender* and in *Grade* at Public School, where Student began in 2016/17.⁷ Student is considered kind and funny.⁸

2. Student has been eligible for special education and related services due to Autism Spectrum Disorder ("ASD" or "autism") from age 3, and has other serious medical conditions as well.⁹ Student must see the school nurse twice a day routinely, as well as when having an unexpected medical issue which comes up about once or twice a week.¹⁰ Student going alone to the nurse when having a medical issue is dangerous; Student's dedicated aide helps ensure there is no injury from Student fainting or lapsing into a coma on the way.¹¹ Student has a Medical Care Plan at school which requires Student to have access to an EpiPen and daily medications based on the severe medical conditions; teachers and staff are to look out for specified warning signs that Student may be going into shock.¹² Student brings an EpiPen to school each day, which Student gives to the dedicated aide; a teacher on each floor is trained to administer the device if needed.¹³

3. IEPs. Student's current IEP is dated 2/11/19 and provides for 8 hours/week of specialized instruction inside general education (divided into 4 hours/week in math and 2 hours/week in each reading and written expression), along with 120 minutes/month of Behavior Support Services outside general education and a dedicated aide 6 hours/day.¹⁴ On 11/27/18, an IEP amendment was agreed upon without a meeting in order to make a change in assistive technology and add a tablet with keyboard for Student's writing.¹⁵ The

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 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 P6-7.

⁹ Parent; P6-1; P13-1 (doctor's letter re school nursing care of Student); P15-1 (Student wearing continuous glucose monitor); P16-1,2.

¹⁰ Parent (once or twice a week); LEA Representative (once a week).

¹¹ Parent.

¹² P14-3 (2018/19 Plan); P14-1 (2016/17 Plan); P6-10; P5-13; Parent.

¹³ Parent.

¹⁴ P6-10,11.

¹⁵ R19p48.

Hearing Officer Determination

Case No. 2019-0120

Assistive Technology Implementation Plan stated that the special education and classroom teachers were responsible for implementation of the tablet.¹⁶ Student's 2/23/18 IEP provided the same specialized instruction and related services as the 2/11/19 IEP, except for 1 hours/week less in reading, and included a dedicated aide 6 hours/day.¹⁷ Student's 3/24/17 IEP provided the exact same specialized instruction and related services as the 2/11/19 IEP, with a dedicated aide 6 hours/day.¹⁸

4. Achievement. Student's 2/22/18 i-Ready for math showed that Student was on grade level for 1 domain and less than 1 level below on the other 3 domains.¹⁹ Student's 8/31/18 i-Ready for math showed that Student was 2 years below grade.²⁰ Student improved in math throughout 2018/19 and was almost on grade level according to Student's 2/11/19 IEP.²¹ The Reading Inventory showed that Student excels in reading.²² In 2016/17, Student was reading at a lexile level 5 years above Student's grade; in 2017/18, Student was reading 4 years above grade.²³

5. Grades. On Student's 2017/18 report card, Student's grades were higher for the 4th term than the 2nd and 3rd terms in English, math and science.²⁴ Compensatory Education Expert relied on Student's 4th term Progress Report for 2017/18, which showed 2 "Fs" in the 3rd term and decline in the second half of the year that is not shown on Student's formal report card.²⁵

6. Behavior. Student does not have behavioral issues; Student's behavior does not impede Student's learning or that of other children.²⁶

7. Dedicated Aides. Student's IEPs have required a dedicated aide since 2015/16.²⁷ Beyond making sure Student is safe and gets to the nurse as needed, the dedicated aide helps keep Student from being overwhelmed, assisting Student with executive functioning, with handwriting by assisting as a scribe, and with organization.²⁸ Parent considered the dedicated aide so important she urged that Public School have a back-up for Student whenever Student's regular dedicated aide was not available.²⁹

¹⁶ R20p50,52.

¹⁷ P5-13.

¹⁸ P1-9.

¹⁹ R7p19.

²⁰ R22p54.

²¹ P6-4.

²² R7p18.

²³ P17-5; P17-9.

²⁴ P17-7,8.

²⁵ P17-1,2,7,8.

²⁶ P6-3; P6-8 (behaviors not usually disruptive or distracting to others).

²⁷ Parent.

²⁸ *Id.*

²⁹ *Id.*

Hearing Officer Determination

Case No. 2019-0120

8. Dedicated Aide Absences. Student had the same dedicated aide in 2016/17 and 2017/18 who Student was close to and concerned about; in the 2nd semester of 2017/18, Student's dedicated aide had a death in his family so missed a week during which Student was not provided a substitute dedicated aide.³⁰ Student's dedicated aide then had a stroke near the end of 2nd semester 2017/18 and was gone for about a month; Student reported to Parent that no substitute was provided.³¹ Within a couple of weeks before the end of 2017/18, Student's dedicated aide was terminated for cause because he "inappropriately interacted" with another student, but no substitute dedicated aide was provided for Student.³² Parent spoke with LEA Representative and asked why Student had no dedicated aide and what the plan was.³³ The official DCPS school calendar for 2017/18 indicates that there were 90 school days 2nd semester.³⁴

9. In 2018/19, Student's dedicated aide missed about 23 days of school, which Parent documented in emails and Compensatory Education Expert confirmed.³⁵ Analyzing the period from February through April 2019, when the problem was greatest, the undersigned concludes that based on the record there were 13 days when Student did not have a dedicated aide: February 7, 14, 25, 26, March 4, 5, 18, 19, 20, 28, April 3, 22, 23, 24, 25.³⁶ The official DCPS school calendar for 2018/19 indicates there were a total of 50 school days in February, March and April.³⁷

10. Parent had various complaints about Student's dedicated aides; on 12/3/18, Parent complained that Student's dedicated aide "comes late, leaves early, doesn't show up and when he does he isn't doing anything."³⁸ On 2/15/19, Student's dedicated aide was removed from his position; as of 3/5/19 the outside agency which provided aides for Public School was still locating a permanent dedicated aide for Student.³⁹ Parent referred to a new dedicated aide on 3/28/19, when Student was sent alone to the nurse with an allergic reaction and almost passed out on the stairs; Student reported to Parent that the dedicated aide was not there at that time because he comes at 2nd period and usually leaves at 4th period.⁴⁰ Parent sought to remove Student's dedicated aide, reiterating on 3/29/19 that she had sought to replace a dedicated aide for numerous reasons, including Student going solo to the nurse.⁴¹ On 4/29/19, Public School informed Parent that Student had a new and

³⁰ *Id.*

³¹ *Id.*

³² Parent; P26-4 (Parent noted in email to Public School that Student's dedicated aide was "removed for cause").

³³ Parent.

³⁴ Administrative Notice.

³⁵ Parent; Compensatory Education Expert; P24-1.

³⁶ Administrative Notice.

³⁷ *Id.*

³⁸ P26-8; P7-2 (team seeing if dedicated aide could be removed on 2/11/19).

³⁹ P26-16.

⁴⁰ P11-6; P26-20 (email added to Public School contact log).

⁴¹ P11-6.

Hearing Officer Determination

Case No. 2019-0120

permanent dedicated aide for the rest of 2018/19.⁴² Student began with a new dedicated aide on 4/30/19, but LEA Representative explained the need to shift and adjust staffing in order to support all students, including Student.⁴³

11. Dedicated Aide Coverage. When Student's dedicated aide was absent, teachers filled in and watched out for Student throughout the day (as required by the Medical Care Plan in any case); LEA Representative supported Student during lunch and at other times; the special education teachers pick up what the dedicated aide was doing with assistive technology, scribed for Student, and provided prompts and accommodations.⁴⁴ In the absence of the dedicated aide, Student was sent to the nurse on routine visits with another student or by self.⁴⁵

12. Dedicated aides were provided to Public School by an outside agency; when Student's dedicated aide was not available, the agency would try to send a substitute; Public School sometimes would pair Student with another aide in the meantime.⁴⁶ Parent sometimes kept Student home to see if a substitute dedicated aide would be provided before taking Student to school.⁴⁷ Other times, the dedicated aide was present but left if Student was absent or extremely tardy.⁴⁸ As of 2/11/19, Student had 10 full day absences in 2018/19.⁴⁹ In 2018/19, Sibling generally walked Student to school and left Student with friends outside the building; Sibling never saw Student's dedicated aide.⁵⁰ Student and Sibling were late a few times, but usually just 5 minutes late and only once as late as 15 minutes.⁵¹

13. Role of Dedicated Aide. Parent's key concern was with the dedicated aide and medical care, as there could be a "catastrophic" event.⁵² On 3/19/19, Student texted Parent to inquire about medical symptoms, even though dedicated aide was present.⁵³ On 3/28/19,

⁴² P26-23.

⁴³ P11-1.

⁴⁴ LEA Representative; P26-18 (on 3/20/19, "All of [Student's] teachers are aware of condition and will continue to keep an eye on Student "whether or not an aide is present"); P11-4 (on 4/22/19, dedicated aide absent but "we all kept an eye on [Student] today"); P14-3.

⁴⁵ LEA Representative.

⁴⁶ P11-23; LEA Representative.

⁴⁷ P11-25 (10/23/18).

⁴⁸ P11-5 (on 4/3/19, "aide was here, but departed at 10:30 am because [Student] was not here"); P26-37 (dedicated aide on 4/3/19 remained in the building until 11 AM).

⁴⁹ P6-8.

⁵⁰ Sibling.

⁵¹ *Id.*

⁵² P7-2; P11-7 (seeking dedicated aide to monitor medical condition and seeking notice when there was no dedicated aide); P11-15 (needs aide to monitor Student and get Student to nurse when needed).

⁵³ P12-13,14,15; P26-17 (dedicated aide arrived that morning).

Hearing Officer Determination

Case No. 2019-0120

Student was sent to the nurse alone with an allergic reaction and almost passed out on the stairs on the way (as noted above).⁵⁴

14. Student's IEPs and related dedicated aide documents provide little guidance on the plan or tasks of the dedicated aide; the IEP Plan for Dedicated Aide states only that the dedicated aide is required 6 hours/day and will be in general education.⁵⁵ The separate Justification and Plan for Dedicated Aide stated that a dedicated aide was needed for Student to access general education, but provided no information beyond stating 6 hours/day, which was "Full Time Support," and the location in general education.⁵⁶ Student's IEPs provided for human scribes, but did not specify that dedicated aides were required, as teachers could also act as scribes.⁵⁷ The Other Classroom Aids and Services section in the 2/11/19 IEP did note that the dedicated aide was to record any unfinished class assignments and homework assignments for Student to take home.⁵⁸

15. Independence of Student. At Student's age, children often do not want to be seen with dedicated aides; Student did not like being followed by the dedicated aide, so the dedicated aide often took another route to the next class, giving Student an opportunity to socially engage peers without the presence of the dedicated aide.⁵⁹

16. Student's 2/11/19 IEP contained a goal for Student to decrease reliance on Parent and dedicated aide advocacy, with a baseline of having increased ability to manage self and responsibilities such as going to the nurse daily.⁶⁰ Student's 2/23/18 IEP contained the same goal of decreasing reliance on Parent and dedicated aide advocacy.⁶¹ The IEP language on assistive technology noted that Student may benefit from a tablet with keyboard as a way of becoming more independent from people who Student had to rely on in the past to be Student's scribe.⁶² Parent favored the tablet so Student could learn to type and be independent.⁶³

17. Student's 6/11/18 IEP Progress Report comment by the Public School social worker noted that Student "was required to become more independent due to [Student's] regular aide being out" and so "required to navigate being with others."⁶⁴ When dedicated aide was not available, teachers noticed Student "blossom."⁶⁵ The Public School social worker reported in her 10/26/18 IEP Progress Report comment that Student performed better when

⁵⁴ P11-6.

⁵⁵ P6-11.

⁵⁶ P5-1.

⁵⁷ Compensatory Education Expert; P6-13; P5-16.

⁵⁸ P6-10.

⁵⁹ LEA Representative.

⁶⁰ P6-9.

⁶¹ P5-11 (different baseline); P7-2 (decreased reliance on dedicated aide and Parent).

⁶² P6-3,10 (2/11/19 IEP); P5-6,13 (2/23/18 IEP).

⁶³ Parent.

⁶⁴ R42p200.

⁶⁵ P26-3 (9/18/18).

Hearing Officer Determination

Case No. 2019-0120

permitted to work independently without the assistance of the dedicated aide, according to the teacher and Student; Student verbalized feeling confident in own ability to complete work and so was less reliant on the dedicated aide this school year.⁶⁶

18. On 1/24/19, the social worker commented in Student's IEP Progress Report that Student continued to demonstrate the ability to complete work and function independently of the dedicated aide and was able to maintain good grades in most classes; Student was able to get self to the nurse daily without assistance, but continued to benefit from assistance in improving organization to increase timeliness in submitting assignments.⁶⁷ On 4/4/19, the social worker commented on the IEP Progress Report that Student continued to demonstrate skills to maintain organization and submit assignments, as evidenced by grades and not missing more than 3 assignments in classes; Student also got self to nurse without assistance from the dedicated aide.⁶⁸

19. Education Records. Petitioner's counsel sought all of Student's education records from Public School on 1/18/19.⁶⁹ On 3/27/19 and 3/29/19 Petitioner's counsel specifically sought all records and documentation related to Student's dedicated aides for 2017/18 and 2018/19, including all service trackers and attendance logs of the dedicated aides, and documents reflecting the purpose of Student's dedicated aide.⁷⁰ On 5/31/19, Petitioner's counsel sought a copy of sign-in sheets for Student's dedicated aides for 2017/18 and 2018/19.⁷¹

20. LEA Representative provided numerous education records from the past 2 school years to Petitioner's counsel on 1/28/19.⁷² Dedicated aides do not complete service trackers or any other documents that are routinely included in SEDS; service trackers are tied to progress on IEP goals, but dedicated aides do not work on goals.⁷³ All SEDS files were provided to Petitioner's counsel, along with Aspen files, Student Behavior Trackers and any physical files transferred from another school.⁷⁴

21. Parent did not receive any records of Student's dedicated aides being at school or absent apart from emails when they were out for the day.⁷⁵ DCPS does not have a comprehensive list of the days missed by Student's dedicated aides.⁷⁶ Parent learned that there were attendance logs in which the dedicated aides would sign in and out for the day.⁷⁷

⁶⁶ R42p206.

⁶⁷ R42p212.

⁶⁸ R42p217.

⁶⁹ P19-1.

⁷⁰ P20-1,2.

⁷¹ *Id.*

⁷² P26-32.

⁷³ LEA Representative.

⁷⁴ *Id.*

⁷⁵ Parent.

⁷⁶ LEA Representative.

⁷⁷ Parent.

Hearing Officer Determination

Case No. 2019-0120

Dedicated aides and related service providers do sign in to the school building, along with parents and other adults, but there are no student names associated with the providers and the sign-in sheets are not included in student records.⁷⁸

22. Compensatory Education. Compensatory Education Expert prepared a Compensatory Education Plan that concluded Student should receive 52 hours of support in executive functioning and writing to make up for 30 days of missed dedicated aide services in 2017/18 and another 40 hours of support due to 23 days of missed dedicated aide services in 2018/19.⁷⁹ Compensatory Education Expert calculated the 2017/18 compensatory education hours based on purported reduction in grades the second half of the year.⁸⁰ Compensatory Education Expert calculated the 2018/19 compensatory education hours based on Parent's understanding of a purported decline in grades the second half of that year and refusal of the dedicated aide to act as scribe or support Student's executive functioning needs.⁸¹ A 12/3/18 email from Parent to Public School stated that the dedicated aide had not been performing his duties at all and that Student's grades were proof.⁸²

23. Student experiences anxiety from being evaluated, so Parent refused consent for Student to be re-evaluated, despite Public School's efforts to determine Student's growth with a Woodcock-Johnson assessment.⁸³ Instead, a 1/15/19 Evaluation Summary Report noted that areas of concern in math were shown by the beginning-of-year i-Ready assessment and classroom assignments; Student also needed to independently edit written work with minimal support from a teacher, rubric or checklist.⁸⁴

24. When Student's dedicated aide was absent, the team picked up the slack, so there was little loss to Student's education, esp. since dedicated aides are not teachers.⁸⁵ LEA Representative considered there to be no educational harm from the dedicated aide's absences since Student was high functioning; a dedicated aide might have helped a low function child on the autism spectrum more.⁸⁶ Student made academic progress in both school years.⁸⁷

25. Compensatory Education Expert testified that to get Student to where Student should have been, efforts should focus on writing, including spelling, capitalization, punctuation, and grammar, and executive functioning, especially planning and organizing.⁸⁸

⁷⁸ LEA Representative.

⁷⁹ P24-2,3.

⁸⁰ P24-2; P17-1,2.

⁸¹ Compensatory Education Expert; P24-1,2.

⁸² P24-2; P26-7,8.

⁸³ LEA Representative; R24p94; R26p97 (Parent declined to consent to evaluation on 1/15/19); R27p98 (1/15/19 PWN noting refusal of educational evaluation).

⁸⁴ R28p100,101,103.

⁸⁵ LEA Representative.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Compensatory Education Expert.

Hearing Officer Determination

Case No. 2019-0120

Compensatory Education Expert sought to assess Student's cognitive profile and recommended 1:1 tutoring of Student and having Parent determine the amount of time per week that would be best for Student, which may depend on whether hours are completed during the summer or during the school year.⁸⁹

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.'" *Endrew 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." *Endrew 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(a)(14); *Endrew F.*, 137 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

⁸⁹ *Id.*

Hearing Officer Determination

Case No. 2019-0120

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.

In addition, the 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 ex rel. A.M. v. Dist. of Columbia*, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

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). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by not implementing Student’s IEP in (a) 2017/18 when it failed to provide Student a dedicated aide on at least 30 school days, and/or (b) 2018/19 when it failed to provide Student a dedicated aide on at least 20 school days. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on the issue of lack of implementation of Student’s IEPs during portions of 2017/18 and 2018/19 when dedicated aides were not provided for Student for significant numbers of days.

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 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*

Hearing Officer Determination

Case No. 2019-0120

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, the central disputes are whether Student was consistently provided a dedicated aide as required by Student’s IEPs and whether in the absence of a dedicated aide it was sufficient for Public School to rely on teachers and other staff to carry out the functions of the dedicated aide.

Parent testified without meaningful rebuttal that the 2nd semester of 2017/18 was a difficult time for Student’s dedicated aide, who first had a death in his family and missed a week of work with Student. The dedicated aide then had a stroke near the end of the 2nd semester and was gone for about a month. Finally, within a couple of weeks before the end of 2017/18, the dedicated aide was terminated for cause. Significantly, Parent’s un rebutted testimony was that all those weeks were not covered by a replacement or substitute dedicated aide, although teachers may have stepped in to assist Student when needed. But teachers or others stepping in to assist from time to time cannot be considered a replacement for the required full-time attention of the dedicated aide, either for monitoring Student’s physical condition to ensure Student got to the nurse as needed, or for providing attention to Student for executive functioning and academics throughout the rest of the school day. Importantly, Student’s Medical Care Plan required teachers and staff to watch for warning signs that Student was going into shock even when the dedicated aide was present, so the aide’s absence clearly reduced the protections designed to be in place for Student.

This Hearing Officer is persuaded that Public School failed to provide a dedicated aide to Student on no fewer than 30 days in the 2nd semester of 2017/18, as alleged by the complaint and supported by Parent’s testimony and the Compensatory Education Plan by Compensatory Education Expert. With 90 school days in that semester, Student lacked a dedicated aide for 33% of the time, which is a material violation. The District Court was unambiguous in *Middleton*, 312 F. Supp. 3d at 145, that a 20% deviation from an IEP’s requirements was material and could not be excused as *de minimis*. See also *Wade v. Dist. of Columbia*, 322 F. Supp. 3d 123, 133 (D.D.C. 2018) (27% deviation was material).

As for 2018/19, according to documentation in the case, Student lacked a dedicated aide on at least 13 days in February, March and April 2019 when there were 50 school days. This was a failure to provide a dedicated aide at least 26% of the time, which again is a material violation pursuant to *Middleton*, 312 F. Supp. 3d at 145, and *Wade*, 322 F. Supp. 3d at 133.

While teachers and staff may have taken more care to look out for Student when the

Hearing Officer Determination

Case No. 2019-0120

dedicated aide was absent, that does not eliminate the IEP requirement to provide actual dedicated aides to focus their full attention on Student, particularly with the need to monitor Student's health and ensure Student arrived safely to the school nurse when needing medical attention. The most critical need for a dedicated aide related to Student's health, but if Student's health could not be maintained Student clearly could not access the general education curriculum.

Further, attention was focused on trying to help Student become more independent and, in a lemons-into-lemonade effort, the Public School social worker noted that Student had to become more independent due to Student's regular aide being absent. But greater independence is not an excuse for not implementing Student's IEP as written. If Student was ready for the IEP to be adjusted to provide more independence an IEP team meeting should have been convened and appropriate changes made with input from Parent and the rest of Student's team. As it was, the undersigned simply relies on the IEP Progress Report statement about Student's dedicated aide being out as corroborating Parent's testimony about the many weeks the dedicated aide was absent in 2017/18.

These material deviations from Student's IEPs in 2017/18 and 2018/19 are the basis for the compensatory education awarded below.

Issue 2: *Whether DCPS denied Student a FAPE by failing to provide Parent with education records relating to Student's dedicated aide, including service trackers and attendance logs for 2017/18 and/or 2018/19. (Petitioner has the burden of persuasion on this issue.)*

Parent did not meet her burden on the issue of education records. As a general matter, parents of a child with a disability have the right to examine all education records that pertain to the identification, evaluation, and educational placement of the child, and provision of a FAPE. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a); 34 C.F.R. § 300.613(a) (parents must be permitted to inspect and review any education records relating to their child that are collected, maintained, or used by an agency). *See also Jalloh ex rel. R.H. v. Dist. of Columbia*, 535 F. Supp. 2d 13, 21 (D.D.C. 2008) ("parents have the right to examine records and DCPS must give parents the opportunity to inspect, review, and copy records").

An "education record" under IDEA is defined by the regulations implementing the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 300.611(b). Under FERPA, an education record includes records, files, documents, and other materials which "(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. Part 99.

Here, Public School provided Petitioner with numerous education records from the past 2 school years, including all SEDS files, along with Aspen files and Student Behavior Trackers. Public School did not provide dedicated aide service trackers for the simple reason that none exist. Dedicated aides do not complete service trackers or any other

Hearing Officer Determination

Case No. 2019-0120

documents that are regularly included in SEDS. Nor does DCPS have a comprehensive list of the school days Student's dedicated aides missed. While dedicated aides and related service providers do sign in to the school building, along with parents and other adults, there are no student names associated with the providers and the sign-in sheets are not included in student records, so are not education records that must be disclosed to parents or examined by them. Petitioner failed to establish a violation as Public School turned over all documents it "maintained" as part of Student's education records. *Burnett v. San Mateo Foster City Sch. Dist.*, 739 Fed. Appx. 870, 873-74 (9th Cir. 2018); *Jacobson v. Ithaca City Sch. Dist.*, 53 Misc. 3d 1091, 1093-94, 39 N.Y.S.3d 904, 907-08 (N.Y. Sup. Ct. 2016) (the "mere fact that information may be held by an educational agency is insufficient to make it an educational record").

Remedy

In determining compensatory education for a denial 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).

Here, educational harm did not need to be shown in order to establish an implementation violation, *James*, 194 F. Supp. 3d at 139, but the compensatory education remedy that results does of course depend on the extent of educational harm. The Compensatory Education Plan prepared by Compensatory Education Expert concluded that Student should receive 52 hours of support in executive functioning and writing to make up for 30 days of missed dedicated aide services in 2017/18 and 40 more hours due to 23 days of missed dedicated aide services in 2018/19. This conclusion must be analyzed and modified appropriately, but the undersigned is clear that ordering a detailed compensatory education assessment would not add sufficient value to justify the delay and cost, if indeed it added any value.

As an initial matter, Compensatory Education Expert's compensatory education conclusion needs to be adjusted because Compensatory Education Expert based the 2017/18 compensatory education hours on a purported reduction in Student's grades the second half of the year, which was not in fact shown by Student's report card for 2017/18, which instead showed an improvement in grades as laid out above. Student's full grades for 2018/19 were not available in the record, but comments in the IEP Progress Reports suggested that Student's grades did not suffer from missed dedicated aide days. Compensatory Education Expert also relied on input from Parent about the refusal of the 2018/19 dedicated aide to assist Student by scribing and supporting Student's executive functioning needs, the scope of which was quite uncertain and not clarified at the due process hearing.

Hearing Officer Determination

Case No. 2019-0120

Further, Compensatory Education Expert's analysis failed to credit any effort of teachers and staff to step in and make up the services needed when Student's dedicated aide was absent. LEA Representative testified that such efforts were regularly made, although it is difficult to determine the scope. But while LEA Representative considered there to be no educational harm to Student as a result – especially since dedicated aides are not teachers – the undersigned is persuaded that a dedicated aide would have provided more consistent attention throughout the school day, resulting in some loss of educational benefit that compensatory education should remedy.

Based on his expertise, Compensatory Education Expert credibly testified that the deficits which need work to place Student where Student should have been include (a) writing, including spelling, capitalization, punctuation, and grammar, and (b) executive functioning, especially planning and organizing. Compensatory Education Expert assessed Student's cognitive profile and recommended 1:1 tutoring of Student and having Parent determine the amount of time per week that would be best for Student, which may depend on whether hours are completed during the summer or the school year.

Based on all the evidence and the various factors discussed in this case, and carefully considering the totality of the circumstances, this Hearing Officer has determined that a total of 40 hours of tutoring with independent tutor(s) focusing on writing and executive functioning would be an appropriate remedy to restore Student to the place Student should have been but for the denial of FAPE.

These determinations by the undersigned are 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 12 months in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent which may result from compensatory education awards stretching over excessively long timeframes.

ORDER

Petitioner has prevailed on one claim in this case, as set forth above. Accordingly, **it is hereby ordered that:**

As compensatory education for the denial of FAPE found herein, DCPS shall provide letter(s) of authorization within 10 business days after Petitioner's request(s) for a total of 40 hours of tutoring from independent providers chosen by Petitioner focusing on writing and executive functioning. All hours are to be provided and used within 12 months; any unused hours shall be forfeited.

Hearing Officer Determination

Case No. 2019-0120

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).

Copies to:

Counsel of Record (Appendix A, by email)

OSSE-SPED (due.process@dc.gov)

ODR (hearing.office@dc.gov)

██████████@k12.dc.gov

██████████@k12.dc.gov