

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

OSSE
Office of Dispute Resolution
March 14, 2016

STUDENT, ¹)	
through the PARENTS,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>)	
)	Case No: 2015-0414
v.)	
)	Date Issued: March 14, 2016
District of Columbia Public Schools,)	
<i>Respondent.</i>)	

Hearing Officer Determination

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed on December 30, 2015 by Petitioners (Student’s parents), residents of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On January 8, 2016, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”).

The parties convened a Resolution Session Meeting (“RSM”) in this matter on January 13, 2015. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on January 31, 2016, and 45-day period concludes on March 14, 2016

The undersigned Impartial Hearing Officer (“Hearing Officer”) held a Pre-hearing Conference (“PHC”) on February 9, 2016, during which the parties discussed and clarified the issue and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by February 17, 2016 and that the DPH would be held on February 24, 2016. The PHC was

¹ Personal identification information is provided in Appendix A.

summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on February 9, 2016.

The DPH was held on February 24, 2016 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioners elected for the hearing to be closed. Petitioners were represented by [PETITIONERS’ COUNSEL] and DCPS was represented by [RESPONDENT’S COUNSEL].

Petitioners’ and Respondent’s disclosures were timely filed. At the DPH, Petitioners’ exhibits P-1 through P-23 were admitted without objection. Respondent’s exhibits R-1 through R-9 were admitted without objection.

Petitioners called the following witnesses at the DPH:

- (a) Education Consultant
- (b) Parent²

Respondent called the following witnesses at the DPH:

- (c) Special Education Coordinator
- (d) Resolution Specialist

Petitioners and Respondent gave oral closing arguments.

ISSUE

As discussed at the PHC and reflected in the PHO, the following issue was presented for determination at the DPH.

- (a) Whether DCPS denied Student a FAPE by failing to propose an appropriate placement/location of services for the 2015-2016 school year, in that the proposed placement/location: fails to provide all of Student’s hours outside the general education setting; does not use the specific type of research based reading interventions Student needs due to his severe dyslexia; would place Student in a non-categorical classroom containing students with a variety of disabilities, some of whom have behaviors that are not compatible with Student’s; and in that Student would lack an appropriate peer group in this classroom.

RELIEF REQUESTED

Petitioners requested the following relief:

- (a) an Order that DCPS reimburse Parents for their educational expenses related to Student’s continued placement at Nonpublic School for the 2015-2016 school year;
- (b) an Order that DCPS continue Student’s placement at Nonpublic School until such time as DCPS makes available an appropriate placement for Student, including at least through the end of the 2015-2016 school year.

² “Parent” refers to Student’s mother, who testified at the DPH. “Parents” refers to Student’s mother and father, Petitioners in this matter.

FINDINGS OF FACT

1. Student is [AGE] years old, is a [GRADE] grade student, and resides with his parents (“Petitioners”/”Parents”) in Washington, D.C.³
2. Student is eligible for special education and related services under the disability classification “Specific Learning Disability.”⁴
3. Student is bright, but has a challenging time coding sounds with letters and putting them in the correct order. He has delays in syntax, semantic knowledge, auditory memory, word retrieval, contextual language and articulation.⁵ As a result, he struggles significantly in writing, mathematics, and particularly in reading.⁶ He has auditory processing issues that impede his ability to use text-to-speech software effectively.⁷
4. Student is easily distracted and easily distracts himself. He has difficulty sustaining attention and struggles with low frustration tolerance. Student is a good listener, can speak clearly, can remember what he hears, has good peer relationships, and is open to feedback.⁸
5. Student requires small group instruction in mathematics, reading and writing in order to learn effectively.⁹ Student “requires a full-time placement due to his severe deficits in reading, writing and his inability to focus in any setting other than a very small one with a low student to teacher ratio.”¹⁰
6. Student’s May 11, 2015 IEP calls for him to receive 25 hours per week of specialized instruction outside the general education setting, 4 hours per month of speech-language pathology outside the general education setting, 120 minutes per month of behavioral support services outside the general education setting, and 4 hours per month of occupational therapy services outside the general education setting, for a total of 27.5 hours per week outside the general education setting.¹¹
7. Student’s May 11, 2015 IEP includes a broad array of goals in mathematics; reading; written expression; communication/speech and language; emotional, social and behavioral development; and motor skills/physical development. The IEP is largely based on a May 1, 2015 draft IEP prepared by Nonpublic School.¹²

³ Testimony of Parent.

⁴ P-2-1.

⁵ P-2-2.

⁶ Testimony of Education Consultant; testimony of Parent.

⁷ Testimony of Education Consultant.

⁸ Testimony of Education Consultant; testimony of Compliance Case Manager.

⁹ P-2-21.

¹⁰ R-4-3.

¹¹ P-2-19.

¹² P-2.

8. Student's May 11, 2015 IEP includes four reading goals, including that Student will: (1) accurately apply learned phonics skills to decode words in 9 of 10 trials; (2) demonstrate increased fluency while reading in 4 of 5 trials, as compared to baseline data obtained at the beginning of the year; (3) read lists of words with 90% accuracy given list of words of 10 learned phonics patterns; (4) correctly name the corresponding sounds with 80% accuracy, given a list of sounds and explicit instruction in producing those sounds.

9. Student's May 11, 2015 IEP indicates that Student's "ability to successfully read literature and content area materials, require specialized intervention, and interfere with the ability to access and make progress in the general education curriculum."¹³ The IEP does not specify particular reading interventions that Student requires.¹⁴

10. Following the May 11, 2015 IEP team meeting, DCPS selected District School as the location where Student's IEP would be implemented for the 2015-2016 school year. At District School, Student would have been a part of the Specific Learning Supports ("SLS") classroom.

11. Students in the SLS classroom eat lunch outside the general education setting, in their classroom.¹⁵ While some amount of science and social studies instruction is at times incorporated with mathematics and reading in the SLS classroom, Student would have had his primary science instruction inside the general education setting in a classroom of approximately 22 students, as would have been the case for specials such as physical education. As a result, at District School Student would have received at least 2.5 hours per week of the instruction his IEP mandates to occur outside the general education setting inside the general education setting instead. Student would have received his related services outside the general education setting, consistent with his IEP.¹⁶

12. There would have been no students in the SLS classroom of Student's same grade for the 2015-2016 school year. All the other students in the SLS class would have been in a lower grade level than Student.¹⁷ Student's May 11, 2015 IEP does not mandate a particular peer group.¹⁸

13. As of the May 11, 2015 IEP meeting, DCPS anticipated having a school assignment for Student within a week of the meeting's conclusion; however, Parents did not learn the school assignment until mid-July 2015.¹⁹ Though Parents were not able to observe the classroom in session (both because school was in summer recess, and because the 2015-2016 school year was the first year for the SLS classroom at District School), Parents sought and

¹³ P-2-9.

¹⁴ Testimony of Educational Consultant.

¹⁵ Testimony of Assistant Principal.

¹⁶ Testimony of Educational Consultant; testimony of Assistant Principal; P-8.

¹⁷ Testimony of Assistant Principal.

¹⁸ Testimony of Educational Consultant.

¹⁹ R-4-; P-3.

obtained additional information from DCPS about the SLS classroom at District School, prior to the start of the 2015-2016 school year.²⁰

14. Rather than enrolling Student at District School for the 2015-2016 school year, Parents maintained Student at Nonpublic School (where he has attended since the 2012-2013 school year as a result of settlement agreements between Parents and DCPS). Parents arranged for Educational Consultant to observe the SLS classroom at District School in November and December 2015.²¹

15. In a Prior Written Notice (“PWN”) letter dated December 3, 2015, DCPS indicated that it was closing Student’s special education file, due to Parents’ rejection of DCPS’ offer of FAPE.²² On December 11, 2015, Parents provided a written response to DCPS’ December 3, 2015 PWN, indicating Parents’ position that District School was not appropriate for Student, including because it could not implement Student’s IEP, and that Parents intended to maintain Student at Nonpublic School with the expectation that DCPS would fund Student’s attendance there for the 2015-2016 school year. DCPS responded by way of a letter dated December 21, 2015 that it would not fund Student at Nonpublic School for the 2015-2016 school year, as a result of its position that it had made a FAPE available to Student.

16. Should the Hearing Officer find a denial of FAPE, Nonpublic School is proper and appropriate for reimbursement pursuant to *Leggett v. District of Columbia*, 793 F.3d 59 (D.C. 2015).²³

CONCLUSIONS OF LAW

“Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence 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 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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 student’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).

²⁰ Testimony of Parent; P-4; R-6.

²¹ P-8.

²² P-5-1. The December 3, 2015 PWN makes reference to information that does not pertain to Student; however, given the totality of the circumstances, including testimony from Resolution Specialist, the Hearing Officer concludes that the PWN was intended to relate to Student.

²³ Stipulation of the parties.

- (a) **Whether DCPS denied Student a FAPE by failing to propose an appropriate placement/location of services for the 2015-2016 school year, in that the proposed placement/location: fails to provide all of Student's hours outside the general education setting; does not use the specific type of research based reading interventions Student needs due to his severe dyslexia; would place Student in a non-categorical classroom containing students with a variety of disabilities, some of whom have behaviors that are not compatible with Student's; and in that Student would lack an appropriate peer group in this classroom.**

In reviewing failure-to-implement claims, a hearing officer must ascertain whether the aspects of the IEP that were not followed were “substantial or significant,” or, in other words, whether the deviations from the IEP’s stated requirements were “material.” *See Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff’d sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir. Sept. 11, 2007). Where an LEA’s failure to implement is material (not merely *de minimus*), courts have held that the standard for determining whether there has been a denial of FAPE is not tied to whether the student has suffered educational harm. *See Wilson v. District of Columbia*, 770 F. Supp. 2d 270 (D.D.C. 2011) (finding a student had been denied a FAPE, even where the student made academic progress despite the LEA’s material failure to implement part of the student’s IEP). Rather, “it is the proportion of services mandated to those provided that is the crucial measure for determining whether there has been a material failure to implement.” *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013).

In this instance, Student would have received at least 2.5 fewer hours of specialized instruction outside the general education setting than his IEP requires. This is a significant proportion of the 25 total hours of specialized instruction his IEP calls for him to receive, particularly because Student would have been placed in the general education setting for at least one academic class (science). “In deciding if [a] failure was material, [c]ourts ... 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*.” *Turner* at 40, citing *Wilson* at 275 (emphasis added). Due to his particular academic deficits and high level of distractibility, this amount of regular exposure to the general education setting, particularly for an academic course, would have been a material deviation from Student’s IEP. Therefore, the determination of whether the deviation denied Student a FAPE does not turn on whether the reduced amount of specialized instruction caused Student educational harm. Even if, however, the reduced hours of specialized instruction outside the general education setting had been *de minimus*, given Student’s severe academic challenges and high levels of distractibility, having him to go into the general education setting on a regular basis for science instruction in particular could likely have cause him educational harm. As the SLS classroom at District School could not have implemented Student’s IEP, it was not an appropriate educational setting for Student and would have impeded Student’s right to a FAPE and caused a deprivation of educational benefit.

Petitioners met the burden of proving that DCPS denied Student a FAPE by failing to propose an appropriate educational setting (school placement/location of services) for Student.²⁴

REQUESTS FOR REIMBURSEMENT

Petitioners seek reimbursement for Student's tuition at Nonpublic School for the 2015-2016 school year. Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, "do so at their own financial risk." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). Parents may receive tuition reimbursement only upon a finding that the LEA "violated the IDEA, that the private school placement was an appropriate placement, and that [the] cost of the private education was reasonable[.]" *Holland v. District of Columbia*, 71 F.3d 417, 425 (D.C.Cir.1995) (citing *Florence County School District Four v. Carter*, 510 U.S. at 15, 114 S.Ct. 361).

As discussed above, the Hearing Officer has found that DCPS denied Student a FAPE by failing to propose an appropriate educational setting (school placement/location of services) for Student. The parties have stipulated that should the Hearing Officer find a denial of FAPE, Nonpublic School is proper and appropriate for reimbursement pursuant to *Leggett v. District of Columbia*, 793 F.3d 59 (D.C. 2015). "[T]he IDEA allows a district court to 'reduce[] or den[y]' reimbursement – even if the placement meets all of the Act's other requirements – based 'upon a . . . finding of unreasonableness with respect to actions taken by parents.'" *Leggett* at 73, citing 20 U.S.C. §1412(10)(C)(iii)(III); see also *Carter By and Through Carter v. Florence County School District Four*, 510 U.S. 7, 16 (1993). Respondent argues that any award should be reduced due to equitable factors. However, the Hearing officer does not find Parents' actions to have been unreasonable. The location DCPS proposed would not have implemented the service hours on Student's IEP, which was information DCPS had access to at all relevant time periods and that Parents sought to discover and gain a clear understanding of during the summer and fall of 2015.

ORDER

Based on the Findings of Fact and Conclusion of Law above, it is hereby **ORDERED** that:

- (a) DCPS shall reimburse Parents for their out-of-pocket educational expenses related to Student's attendance at Nonpublic School for the 2015-2016 school year;
- (b) To the extent that such expenses are not addressed by Order (a) above, DCPS shall fund Student's educational expenses related to his attendance at Nonpublic School until at least the end of the 2015-2016 school year;

²⁴ Petitioners also argue that the proposed school setting was inappropriate in that it would not have provided the specific type of research based reading interventions Student needs due to his severe dyslexia; would have placed Student in a non-categorical classroom containing students with a variety of disabilities, some of whom have behaviors that are not compatible with Student's; and in that Student would have lacked an appropriate peer group in this classroom. Student's May 2015 IEP does not specify these parameters, and the appropriateness of the IEP is not challenged in this action. Therefore, the Hearing Officer does not find a denial of FAPE on these grounds.

2015-0414
Hearing Officer Determination

- (c) Within 60 calendar days of this Order, DCPS shall reconvene Student's IEP team to revise his IEP as appropriate, unless Parents and DCPS mutually agree to waive this meeting.

All other relief Petitioners requested in the complaint is **DENIED**.

IT IS SO ORDERED.

Date: March 14, 2016

/s/ NaKeisha Sylver Blount
Impartial Hearing Officer

Copies to:
Petitioners (by U.S. mail)
Petitioners' Attorney (electronically)
Respondent's Attorney (electronically)
Chief Hearing Officer Virginia Dietrich, Esq. (electronically)
OSSE-SPED (electronically)
ODR (electronically)

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).