

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parent, through Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	<b>Room: 112</b>
	)	<b>Hearing: April 27, 2018</b>
<b>v.</b>	)	<b>Hearing Officer: Michael Lazan</b>
	)	<b>Case No.: 2018-0050</b>
<b>DCPS,</b>	)	<b>Issue Date: May 13, 2018</b>
<b>Respondent.</b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case brought by the Petitioner, who is the parent of the student (the “Student”). A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on February 27, 2018. A response was filed by Respondent on March 12, 2018. The resolution period ended on March 29, 2018.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

**III. Procedural History**

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<sup>1</sup> Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

On April 12, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, counsel for Respondent, appeared. A prehearing conference order was issued on April 18, 2018, summarizing the rules to be applied in this hearing and identifying the issue in the case.

There was one hearing date: April 27, 2018. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-29. There were no objections. Exhibits 1-29 were admitted. Respondent moved into evidence Exhibits 1-3. There were no objections. Exhibits 1-3 were admitted. Petitioner presented as witnesses: Witness A, a legal assistant; Witness B, an advocate; Witness C, a consultant. Respondent presented no witnesses. At the close of testimony, both sides presented oral closing statements.

#### **IV. Credibility.**

The witnesses for Petitioner presented credible testimony that was consistent with documentation in the record and was not disputed by Respondent.

#### **V. Issues**

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

Did DCPS fail to implement the Student's Individualized Education Program ("IEP") dated November 29, 2017? If so, did DCPS violate the principles in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did DCPS deny the Student a Free Appropriate Public Education ("FAPE")?

Petitioner contended that the IEP has not been implemented in terms of specialized instruction hours.

## **VI. Findings of Fact**

1. The Student is an X-year-old who is eligible for services as a Student with a Specific Learning Disability. The Student currently attends Z school, a DCPS elementary school. (P-5)

2. The Student is “severely” behind in reading, which impacts the Student in every area of study. If a teacher sits next to the Student and breaks schoolwork down, the Student may be able to understand it. Otherwise, the Student will have difficulties in academic subjects. (Testimony of Witness A)

3. According to recent testing and teacher reports, the Student’s reading is in the very low range. Testing on the DIBELS scale reveals that the Student reads only twenty-one words per minute, though the goal for this Student is to read eighty-six words per minute. Other testing and reports reveal issues with basic reading skills such as letter-word identification, word attack, fluency, comprehension, and oral reading. Among other interventions for reading, the Student requires visual organizers, activating prior knowledge before reading, using “letter tiles” and other manipulatives, and having multiple comprehension checks. (P-5; P-23)

4. According to recent testing and teacher reports, the Student’s writing skills are in the low range. The testing and reports indicate that the Student lacks basic writing skills, has issues with spelling and fluency, and cannot write multiple simple short sentences. (P-5; P-23)

5. According to recent testing and teacher reports, the Student’s math skills are in the low average range. The testing and reports indicate that the Student can

complete basic math operations of addition, subtraction, and “one-digit” multiplication, but has difficult with math fluency and math problems with words in them. (P-5; P-23)

6. In the Student’s IEP dated November 29, 2017, the Student received goals in math, reading, writing, and communication/speech and language. The Student was recommended for fifteen hours per week of specialized instruction outside general education, with 120 minutes per month of speech-language pathology. (P-5)

7. A meeting was conducted in or about February, 2018. Attending this meeting were the Student’s parent, the parent’s legal representatives, school personnel, and their legal representative. At this meeting, the Student’s two special education teachers said they were giving the Student specialized instruction three days a week, 2.5 hours per day, for a total of 7.5 hours per week. (Testimony of Witness B; P-12)

8. On March 14, 2018, the Student began to receive additional specialized instructional services, from 11:45 a.m. to 1:15 p.m., on Tuesday only. (P-13)

9. There was another meeting between the parties in April, 2018. Again, school representatives indicated that the Student was not receiving all of the specialized instruction required by the IEP. The school representatives indicated that the Student was receiving about 12.5 hours of specialized instruction per week by April, 2018. They also indicated that the provision of the 12.5 hours per week was inconsistent. The school representatives explained that they could not provide the mandated fifteen hours per week because of the way the school was set up. The school representatives also indicated that the Student was making some progress academically due to the specialized instruction that the Student received. (Testimony of Witness A)

10. At least some of the specialized instruction added after February, 2018, was in a group with other children who were much younger than the Student. These other children were working on “potty training.” The special education teacher would help these younger children with potty training and also try to help the Student with reading, writing, and/or math. (Testimony of Witness A)

11. The Student’s report card for the second advisory in the 2017-2018 school year indicated that the Student was “doing a great job” and was always prepared and focused on work. However, the Student’s academics were deemed to be below proficient in every area except speaking and listening. (P-22)

12. The IEP progress reports for the second advisory in the 2017-2018 school year indicated that the Student was making progress on all three math goals, all three reading goals, and the one written expression goal. (R-1; Testimony of Witness A)

13. The Student would benefit from a location of services that would allow the Student to be removed from class for additional help in reading, writing, and math, and would also provide the Student with 1:1 or small group instruction. (Testimony of Witness C)

## **VII. Conclusions of Law**

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

“Failure to implement” claims are actionable if a school district cannot materially implement an IEP. A party alleging such a claim must show more than a *de minimis* failure, and must show that material, or “substantial or significant,” portions of the IEP

could not be implemented. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007). Courts applying the materiality 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. Garmany v. Dist. of Columbia, 935 F.Supp.2d 177, 181 (D.D.C. 2013).

There is no question in this record that the Student did not receive the fifteen specialized instructional hours that were recommended in the IEP dated November 29, 2017. The Student only received 7.5 hours of instruction per week through February, 2018, which amounts to only half of the hours of instruction that the Student was entitled to receive per week. Thereafter, the Student did receive more hours of specialized instruction per week, but there was unrefuted testimony that these hours: i) at best, only amounted to an additional five hours per week (still 2.5 hours shy of the number of hours required by the IEP); ii) were provided inconsistently; and iii) were, at least in part, delivered to the Student when the Student was grouped with much younger students who were still learning how to go to the bathroom.

The only argument offered in opposition by DCPS, which did not call any witnesses, was that the Student did make some progress during the time period in question, but caselaw makes clear that the issue for a hearing officer (in regard to FAPE denial) is to determine the proportion of services provided to services mandated. This standard does not require that the child suffer demonstrable educational harm in order to

prevail. Walker v. D.C., No. CV 12-00411 2014 WL 3883308, at \*5 (D.D.C. Aug. 6, 2014), report and recommendation adopted sub nom. A.W. v. D.C., No. CV 12-411 (JEB), 2014 WL 12538126 (D.D.C. Sept. 19, 2014)

The Student effectively received only half the hours that were due pursuant to the IEP. The additional hours provided after February, 2018, should not be deemed to constitute implementation of the IEP hours, since they were provided in an inappropriate group and without any consistency. As a result of the foregoing, DCPS denied the Student educational benefit, and therefore a FAPE.

### **RELIEF**

When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to “grant such relief as [it] determines is appropriate.” School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.”

Under the theory of compensatory education, courts and hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison

Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008)(compensatory award must be based on a “‘qualitative, fact-intensive’ inquiry used to craft an award tailored to the unique needs of the disabled student”). A Petitioner need not “have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011). Under the IDEA, if a student is denied a FAPE, a hearing officer may not “simply refuse” to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner’s expert witness, Witness C, recommended 200 hours of individualized instruction as compensatory education for the Student in this matter. However, the Student did receive some benefit from the services that were delivered, and Witness C did not clearly credit this benefit while calculating the recommended award. Moreover, the period of deprivation was only about five months since the IEP was written in late November, 2017. Considering that the Student missed, at most, 7.5 hours of instruction per week for approximately five months, an award of 200 hours of services would be, to this Hearing Officer, excessive. Under the circumstances, it is more appropriate to award the Student individualized tutoring in the amount of 125 hours, to be provided by a qualified, certified special education teacher at the teacher’s usual and customary rate.

Parenthetically, there is no opposition to Petitioner’s reasonable request for this Hearing Officer to order DCPS to provide the Student with a location of services that can implement the IEP. Nor is there any opposition to the request for an order that requires

all communication relating to meetings between DCPS and the Student's parent to be directed to parent's counsel.

### **VIII. Order**

As a result of the foregoing:

1. The Student shall receive 125 hours of compensatory instruction in the form of 1:1 tutoring by a certified special education teacher, at the teacher's usual and customary rate;
2. Within twenty school days, DCPS shall provide the Student with a location of services that can implement the Student's IEP;
3. All meetings between DCPS and the Student's parent shall be scheduled through communications with parent's counsel for the remainder of the 2017-2018 school year.

Dated: May 13, 2018

*Michael Lazan*  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Attorney A, Esq.  
Attorney B, Esq.  
OSSE Division of Specialized Education  
Contact.resolution@dc.gov

### **IX. Notice of Appeal Rights**

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

Date: May 13, 2018

*Michael Lazan*  
Impartial Hearing Officer