

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
November 24, 2015

PETITIONER, on behalf of)	
STUDENT, ¹)	Date Issued: November 24, 2015
)	
Petitioner,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2015-0304
)	
DISTRICT OF COLUMBIA)	Hearing Date: November 13, 2015
PUBLIC SCHOOLS,)	
)	Office of Dispute Resolution, Room 2006
Respondent.)	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 MOTHER), 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) denied Student a free appropriate public education (FAPE) during the 2014-2015 school year, by failing to fully implement Student’s Individualized Education Plans (IEP) and by not providing a suitable location of services.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on September 11, 2015, named DCPS as respondent. The

¹ Personal identification information is provided in Appendix A.

undersigned Hearing Officer was appointed on September 14, 2015. The parties convened for a resolution session on September 28, 2015, which did not result in an agreement. The 45-day period for issuance of this Hearing Officer Determination began on October 12, 2015 resulting a decision due date of November 25, 2015. On October 9, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer on November 13, 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. The Petitioner appeared in person and was represented by Petitioner's Counsel. Respondent DCPS was represented by DCPS' COUNSEL.²

Petitioner testified and called as witnesses EDUCATIONAL ADVOCATE, and PRIVATE TUTOR. DCPS called as witnesses CONTRACT OCCUPATIONAL THERAPIST (OT), SPECIAL EDUCATION TEACHER, SCHOOL SOCIAL WORKER and SPEECH LANGUAGE PATHOLOGIST (SLP). Petitioner's Exhibits P-1 through P-13, P-15, P-16, P-18, and P-22 through P-28 were admitted into evidence, including Exhibits P-15, P-16, P-24 and P-24 which were admitted over DCPS' objections. Exhibits P-14, P-17, P-19, P-20 and P-21 were withdrawn. DCPS' Exhibits R-1 through R-10 were admitted into evidence without objection. Counsel for Petitioner made an opening statement. Counsel for both parties made closing arguments.

² DCPS COUNSEL 2 substituted for DCPS' Counsel for part of the due process hearing.

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 October 9, 2015

Prehearing Order:

- Whether DCPS failed to fully implement Student’s IEPs during the 2014-2015 school year by failing to provide the hours of Specialized Instruction and Related Services required by the IEPs; and
- Whether DCPS failed to identify a suitable location of services capable of implementing Student’s IEPs for the 2014-2015 school year.

For relief, Petitioner requests that the Hearing Officer order DCPS to fully implement Student’s IEP and, if needed, identify an alternative suitable placement. In addition, Petitioner seeks an award of compensatory education for the denials of FAPE alleged in her complaint.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer’s Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where Student resides with Mother. Testimony of Mother. Student has been determined eligible for special education and related services based upon Multiple Disabilities (MD) comprising Intellectual Disability (ID) and Other Health Impairment - IMPAIRMENT A. Exhibits P-1, P-10.
2. Student is placed in the self-contained ID program at CITY HIGH SCHOOL, where Student has attended for three years. Student is on the non-diploma

certificate track. Testimony of Mother, Testimony of Special Education Teacher.

3. DCPS conducted a comprehensive psychological reevaluation of Student on November 1, 2013. The evaluator reported that based on then-current testing, Student's intellectual functioning fell in the Borderline range (Full Scale IQ = 73). Student's overall adaptive functioning fell in the Extremely Low range. Student's academic functioning was in the Lower Extreme when compared to age-mates. Behaviorally, Student appeared to be adjusting well to high school. There had been no reports of behavior concerns. Exhibit P-10.

4. During the 2014-2015 school year, Student was serviced under revised IEPs developed on February 18, 2014 and February 9, 2015. The February 18, 2014 IEP included Annual Goals for Mathematics; Reading; Written Expression; Communication/Speech and Language; Emotional, Social and Behavioral Development and Motor Skills/Physical Development. The IEP provided, *inter alia*, for Student to receive 27 hours per week of Specialized Instruction, 120 minutes per month of Speech-Language Pathology, 240 minutes per month of Occupational Therapy, and 120 minutes per month of Behavioral Support Services. All services were to be provided outside general education. Exhibit P-2. The Specialized Instruction and Related Services on Student's February 9, 2015 IEP were left unchanged from the 2014 IEP, except that direct Behavioral Support Services were ended. The 2015 IEP added 30 minutes per month of consultative Behavioral Support Services. Exhibit P-1.

5. During the 2014-2015 school year, Student was placed in the City High School ID self-contained classroom for all classes, except Computer-Music and Physical Education. Computer-Music was a class for special education students only, taught by a teacher who was not certified in special education. The teacher was assisted by two

special education para-professionals. Testimony of Special Education Teacher.

6. During the 2013-2014 school year, Mother had requested that Student be placed in a physical education class to help him with weight control. The class was taught by a general education teacher with support from special education para-professionals. There were some non-disabled students in this class. Although Student's IEP provided for all of his instruction to be provided outside of general education, Mother was informed of this arrangement for physical education and agreed to it in writing. For the 2014-2015 school year, Student was placed again in the physical education class, which included both students with disabilities and non-disabled peers. Student did really well in the general education physical education class. Testimony of Special Education Teacher. Mother did not provide her consent for Student to be placed in the general education physical education class after the 2013-2014 school year. Testimony of Mother. The physical education class was provided in 90 minute periods on Tuesdays and Thursdays and for 45 minutes on Mondays. During part of the school year, Student's physical education was provided through Special Olympics instead of class instruction. Testimony of Special Education Teacher.

7. During the 2014-2015 school year, Student was provided Speech/
Language Services/Treatment as follows:

Month:	Total Minutes Provided/Missed:	Reason if not provided or missed:
August	None Provided	Start of School, Provider unavailable
September	90 Provided/45 Missed	Student unavailable due to in-class conflict
October	90 Provided/45 Missed	Provider unavailable

November	90 Provided/90 Missed	School Closure, Student unavailable
December	None Provided	45 minutes Student absent; School closure
January	45 Provided/105 Missed	Provider unavailable
February	45 Provided/105 Missed	60 minutes Student absent, School Closure
March	None Provided	Student absent on three days attempted
April	60 Provided/60 Missed	Student unavailable one day, School Closure
May	None Provided	
June	None Provided	Student unavailable or absent on three days attempted

Exhibit R-5. According to the Service Tracker forms completed by Speech Language Pathologist, Student received 420 minute of Speech-Language services for the 2014-2015 school year – less than one-half of the Speech-Language services specified in his IEP.

8. During the 2014-2015 school year, Student was provided OT services as follows:

Month:	Total Minutes Provided/Missed:	Reason if not provided or missed:
August	60 Provided	
September	120 Provided/180 Missed	Student absent or unavailable due to school conflict
October	240 Provided/60 Missed	School Closure
November	120 Provided/120 Missed	Student absent, School Closure

December	180 Provided/180 Missed	Student absent; School closure
January	240 Provided	
February	180 Provided/120 Missed	60minutes Student absent, School Closure
March	180 Provided/60 Missed	Student absent
April	120 Provided/180 Missed	Student absent, School Closure
May	260 Provided	
June	240 Provided	

Exhibit R-7. According to the Service Tracker forms completed by Occupational Therapist, Student received 1,940 minutes of OT services for the 2014-2015 school year, some 90 percent of the OT services specified in Student's IEPs. Most of the missed services were due to Student's absences from school. Testimony of OT.

9. For the 2014-2015 school year, Student made progress on, or mastered all of his OT IEP annual goals, except for learning to manipulate the lock on his school locker. That goal was not pursued because Student used a book bag instead of a locker. Exhibit R-4, Testimony of OT.

10. During the 2014-2015 school year, Student was provided Behavioral Support Services as follows:

Month:	Total Minutes Provided/Missed:	Reason if not provided or missed:
August	None provided	
September	None provided	Student absent one day
October	270 Provided/60 Missed	Provider unavailable, student absent
November	270 Provided	

December	None Provided	Student absent or unavailable for two sessions; School closure
January	90 Provided/60 Missed	Student absent for two sessions
February	150 Provided/90 Missed	School closure
March	180 Provided ³	
April	No services provided	Student absent, School Closure
May	135 Provided/90 Missed	Provider unavailable
June	30 Provided	

Exhibit R-8. According to the Service Tracker forms completed by School Social Worker and her own testimony, Student received 1,125 minutes of Behavioral Support Services for the 2014-2015 school year. Student's IEP provided that he was to receive 120 minutes per month of Behavioral Support Services through January 2015. His IEP was amended on February 5, 2015 to curtail direct Behavioral Support Services because Student no longer had behavior issues at school. The revised IEP provided for 30 minutes per month of consultative Behavioral Support Services. Testimony of School Social Worker.

CONCLUSIONS OF LAW

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

³ Although no Behavioral Support Services service trackers were provided for March 2015, I found credible the testimony of School Social Worker that, as confirmed by her computer, she did provide Student 180 minutes of Behavioral Support Services in March 2015.

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, § 3030.3. *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

– Did DCPS fail to fully implement Student’s IEPs during the 2014-2015 school year by failing to provide the hours of Specialized Instruction and Related Services required by the IEPs?

– Did DCPS fail to identify a suitable location of services capable of implementing Student’s IEP for the 2014-2015 school year?

Student’s IEPs at City High School for the 2014-2015 school year provided that Student would receive 27 hours per week of Specialized Instruction, and, for related services, 120 minutes per month of Speech-Language Pathology and 240 minutes per month of Occupational Therapy. The February 18, 2014 IEP also provided that Student would receive 120 minutes per month of Behavioral Support Services. In the February 9, 2015 revised IEP, direct Behavioral Support Services were removed and replaced with 30 minutes per month of consultative Behavioral Support Services. In her due process complaint, Mother contends that for the 2014-2015 school year, DCPS failed to fully implement Student’s IEP requirements for Specialized Instruction and related services. DCPS responds that it substantially complied with the requirements of Student’s IEPs and that any failure to implement was *de minimis*.

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 (Aug. 27, 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*. See, also, *Catalan v. District of Columbia*, 478 F.Supp.2d 73, 75 (D.D.C.2007) (“Thus, a court reviewing failure-to- implement claims under IDEA 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.’” *Id.* at 75 (D.D.C.2007) (quoting *Bobby R.*)).

Specialized Instruction

Mother contends that instead of providing Student 27 hours per week of Specialized Instruction outside of general education, as specified in Student’s 2014-2015 school year IEPs, City High School removed Student from the self-contained ID classroom for Computer-Music and physical education classes. With regard to the Computer-Music class, the evidence establishes that this was a class for children with disabilities, completely outside the general education setting, taught by a general education teacher. The teacher was assisted by two special education para-professionals. Petitioner apparently contends that because the Computer-Music teacher was not certified in special education, placing Student in the Computer-Music class was a failure to implement Student’s IEP. The IDEA generally requires that special education teachers in public secondary schools have obtained full state certification as a

special education teacher or have passed the state special education teacher licensing examination, and hold a license to teach in the state as a special education teacher. *See* 34 CFR § 300.18. However, a parent cannot obtain relief in a due process hearing for failure of teachers to meet highly qualified special education criteria. *See*, Office of Special Education and Rehabilitative Services (OSERS), *Questions and Answers On Highly Qualified Teachers Serving Children With Disabilities* (Jan. 2007), citing 34 CFR §§ 300.18(f) and 300.156(e).⁴ Therefore, I conclude that to the extent DCPS did not ensure that Student's Computer-Music teacher was certified in Special Education, this is not actionable as a failure to implement Student's IEPs.

Mother next argues that placing Student in a general education physical education class constituted a failure to implement Student's IEP requirement for full-time outside of general education instruction. The physical education class was a mixed setting with special education students and non-disabled students taught by a general education teacher. A failure to provide the full extent of specialized instruction required by a student's IEP can result in the denial of a FAPE. *See, e.g., Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 823 (9th Cir.2007) (finding that a 50% deprivation of hours was material); *see also Sumter County School District 17 v. Heffernan*, 642 F.3d 478, 481 (4th Cir.2011) (finding that providing seven and a half to ten hours of the required

⁴ Rule of construction. Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular SEA or LEA employee to be highly qualified, or to prevent a parent from filing a complaint under §§ 300.151 through 300.153 about staff qualifications with the SEA as provided for under this part.

34 CFR § 300.18(f).

fifteen hours, in combination with the school's failure to use the teaching method specified in the IEP, was material); *see also Turner v. D.C.*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013) (finding that failure to provide Specialized Instruction in daily English and math classes was material.) However, in this case, a comparison of the Specialized Instruction hours that were provided to Student outside of general education with the hours mandated by Student's IEPs reveals that the deviation here is less important.

For the 2014-2015 school year, Student's physical education class was provided in 90 minutes periods on Tuesdays and Thursdays and for 45 minutes on Mondays – a total of 225 minutes per week. In sum, of the 27 hours (1,620 minutes) per week of Specialized Instruction required by Student's IEPs, City High School provided all but some 225 minutes, or around 86 percent, outside of the general education setting. Moreover, the general education physical education class was staffed with special education para-professionals in addition to the general education physical education teacher and, during part of the school year, Student's physical education was provided through Special Olympics instead of class instruction. On these facts, I conclude that City High School's providing physical education to Student in the general education setting was not a material deviation from Student's IEPs.

With regard to the second issue, whether for the 2014-2015 school year, DCPS failed to place Student at a school that was capable of implementing Student's IEPs, it appears that the basis for this claim is that Student was placed in the general education physical education class, when Student's IEPs required that all of his Specialized Instruction be provided outside general education. *See Lofton v. District of Columbia*, 7 F.Supp.3d 117, 123 (D.D.C.2013) ("In order to provide a student with a FAPE, the student's education must be "provided in conformity with the IEP" developed for him,

and therefore, the educational agency must place the student in a setting that is capable of fulfilling the student's IEP." *Id.*, citing 20 U.S.C. § 1401(9); 34 C.F.R. § 300.116.)

Although, beginning in the 2013-2014 school year, Student was placed in a physical education class with a mix of disabled and non-disabled students (initially with Mother's consent), the evidence does not establish that City High School was not capable of implementing Student's IEP requirement for 27 hours per week of Specialized Instruction. I find that Petitioner has not met her burden of proof on this issue.

Related Services

i. Occupational Therapy

Student's IEPs for the 2014-2015 school year provided that Student was to receive 240 minutes per month of OT services. Occupational Therapist was able to provide some 90 percent of the required services. Most of the services missed were due to Student's frequent absences from school. For the school year, Student made progress on, or mastered all of his OT IEP annual goals, except for learning to manipulate the lock on his school locker. That goal was not pursued because Student used a book bag instead of a locker. I find that Petitioner has not met her burden of proof that DCPS failed to implement substantial occupational therapy provisions of Student's IEPs.

ii. Speech-Language Pathology

Student's IEPs for the 2014-2015 school year provided that Student was to receive 120 minutes per month of Speech-Language services. Over the school year, Student received less than one-half of the specified services. SLP acknowledge in her testimony that a considerable part of the services were missed due to her being unavailable. The SLP service trackers also indicate that numerous sessions were missed due to Student's being absent. However, considering that Student's IEP required only

120 minutes per month of Speech-Language services, compared to 240 minutes of occupational therapy services and that the OT provider was nonetheless able to provide almost 90 percent of specified OT services, I am not persuaded that DCPS' failure to provide more than one-half of Student's Speech-Language services can be reasonably excused by Student's frequent school absences. Student's IEPs described how Student's deficits in receptive and expressive language skills affected him and, specifically, how Student's oral language disorder had a direct impact on his performance in the classroom, especially with processing new information and communicating learned knowledge. Clearly the goals and import of Student's IEP Speech-Language services were fundamental to Student's accessing the general education curriculum. I conclude that Petitioner has met her burden of proof that, by not providing the greater part of Student's IEP Speech-Language services during the 2014-2015 school year, DCPS failed to implement a substantial provision of the IEPs.

iii. Behavioral Support Services

Student's February 18, 2014 IEP provided that he was to receive 120 minutes per month of Behavioral Support Services. Those services were ended in the February 9, 2015 IEP and replaced with 30 minutes per month of consultative services. Over the 2014-2015 school year, Student was actually provided 1,125 minutes of counseling services by School Social Worker – more than his IEPs actually required. Moreover, the evidence was undisputed that Student did not exhibit any major behavior concerns at school. Therefore, I conclude that Petitioner has not met her burden of proof that during the 2014-2015 school year, DCPS failed to implement substantial Behavioral Support provisions of Student's IEPs.

Remedy

In this decision, I have concluded that Petitioner has met her burden of proof to establish that DCPS failed to implement the greater part of the Speech-Language services required by Student's 2014-2015 school year IEPs. For a remedy, Petitioner has requested that Student be awarded compensatory education. If a parent has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those compensatory services that will compensate the student for that denial. Compensatory education is educational service that is intended to compensate a disabled student, who has been denied the individualized education guaranteed by the IDEA. 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 the type and amount of services that would place the student in the same position he would have occupied but for the school district's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005)).

Private Tutor holds a Masters degree in communications. From the months that she worked with Student providing previously-awarded compensatory education services, Private Tutor appears to have a basis of knowledge of Student's Speech-Language needs. Private Tutor related that she had observed, from speaking to Student in August 2015, that Student had regressed in the area of language. In her compensatory education plan (Exhibit P-28), Private Tutor recommended, *inter alia*, that Student be awarded 30 hours of compensatory education Speech-Language services. However, for the entire 2014-2015 school year, Student's IEPs only provided

for approximately 18 hours (two hours per month) of Speech-Language services and he received some seven hours of those services.

A compensatory education award must be reasonably calculated to provide the educational benefits that likely would have accrued from the Speech-Language services that Student should have received under his IEPs. *See, e.g., Kelsey v. D.C.*, 85 F. Supp. 3d 327, 334 (D.D.C. 2015). Even crediting Private Tutor's observation about Student's regression in speech after the 2014-2015 school year, I find that her recommended award does not correlate the harm Student likely suffered from DCPS' failure to provide some 11 hours of Speech-Language Services. I conclude that an award of one-half of the Speech-Language compensatory services recommended by Private Tutor would be reasonably calculated to compensate Student for the harm in this case. *Cf. Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148 (D.D.C.2012) (Petitioner is not required "to have a perfect case to be entitled to compensatory education.")

Other Relief

Petitioner also requests that I order DCPS to fully implement Student's current IEP and, if needed, to identify an alternative suitable placement. This case concerned DCPS' implementation of Student's IEPs during the 2014-2015 school year. Although Student's IEPs required full-time Specialized Instruction outside the general education setting, City High School provided Student physical education in a general education setting with non-disabled peers. According to Special Education Teacher, Student is still receiving special education services in the current school year. It was unclear from the witness' testimony whether Student now receives physical education instruction outside general education as required by his IEP. Therefore, I will order DCPS to ensure that Student receives all of his instruction outside the general education setting as

required by his IEP. The IDEA requires the local education agency to ensure that students with disabilities have available to them the variety of educational programs and services available to nondisabled students. *See* 34 CFR § 300.110. That must include physical education instruction, provided to Student outside the general education setting, to the extent that physical education instruction is offered to nondisabled students at City High School.

ORDER

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

ORDERED:

1. As compensatory education for the denial of FAPE in this case, DCPS shall provide Student 15 hours of DCPS-funded one-on-one independent Speech-Language Pathology services. These services must be used by the end of the 2015-2016 school year or shall be forfeited;
2. Effective December 7, 2015, DCPS shall ensure that for the remainder of the 2015-2016 school year, all of Student's instruction at City High School is provided in an outside of general education setting, unless Mother agrees otherwise in writing. This shall include physical education instruction to the extent that physical education instruction is offered to nondisabled Students at City High School; and
3. All other relief requested by the Petitioner herein is denied.

Date: November 24, 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 - SPED
DCPS Resolution Team