

**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
October 01, 2019

<i>Student,</i> ¹)	Case No.: 2019-0157
through <i>Parents,</i>)	
<i>Petitioners,</i>)	Date Issued: 10/1/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 9/17/19
("DCPS"),)	ODR Hearing Room: 423
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioners, Student's Parents, 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") due to DCPS's delay in evaluating Student and determining eligibility for special education, resulting in the need for significant compensatory education. On the day prior to the hearing, DCPS authorized more compensatory education services than Petitioners requested, asserting that made the case moot.

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 6/19/19, the case was assigned to the undersigned on 6/20/19. An Amended Due Process Complaint was filed as of 8/12/19 pursuant to leave of the undersigned on 8/20/19. Respondent filed a timely response on

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

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6/27/19 to the initial complaint, but did not file an amended response, and did not challenge jurisdiction until filing a motion to dismiss due to mootness after hours the evening prior to the hearing.

Resolution meetings took place on 7/11/19, and 8/27/19 after the amended complaint, but the parties neither settled the case nor shortened the 30-day resolution period, which began again with the amended complaint and ended on 9/11/19. 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 10/26/19.

The prehearing conference in this case was held on 8/28/19 and the Prehearing Order issued that same day. The due process hearing took place on 9/17/19 and was open to the public. Petitioners were represented by *Petitioners’ counsel*. DCPS was represented by *Respondent’s counsel*. *Mother* was present for the entire hearing.

Petitioners’ Disclosures, submitted on 9/10/19, contained a cover letter and documents P1 through P14; P12 and P13 were not offered into evidence, but the remainder were admitted into evidence over certain objections. Respondent’s Disclosures, submitted on 9/10/19, contained a cover letter and documents R1 through R13, which were admitted into evidence without objection.

Petitioners’ counsel presented 1 witness in Petitioners’ case-in-chief (*see Appendix A*): *Educational Advocate* (qualified without objection as an expert in Special Education Programming and Placement).

Petitioners’ counsel presented *Mother* as the sole rebuttal witness.

Respondent’s counsel presented 1 witness in Respondent’s case (*see Appendix A*): *Resolution Specialist*.

The issue to be determined in this Hearing Officer Determination is:

Issue: Whether DCPS denied Student a FAPE with respect to the 3/19/19 IEP and placement by failing to act in a timely manner.² (*Petitioners have the burden of persuasion.*)

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.

² This Issue combined paragraphs 1 and 2 of the due process complaint issues at p. 4 of the amended complaint attachment. The second basis for a denial of FAPE was the failure to “include Extended School Year (‘ESY’),” which was expressly withdrawn without prejudice at the beginning of the due process hearing.

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2. Student shall be awarded compensatory education for any denial of FAPE during 2018/19.³
3. Any other appropriate remedy.⁴

As set forth in the Findings of Fact below, on 9/16/19, the day before the due process hearing, DCPS provided a letter to Petitioners formally authorizing 352 tutoring hours and an additional 48 hours of Applied Behavior Analysis (“ABA”) Therapy. Petitioners’ compensatory education proposal sought 352 hours of tutoring but no ABA therapy, although Petitioners had previously sought such therapy. Based on its authorization, DCPS submitted a Motion to Dismiss just after business hours on 9/16/19, which ODR docketed on 9/17/19, the day of the hearing in this case. Respondent’s counsel expressly stated on the record at the due process hearing that DCPS was not admitting a denial of FAPE.

In addition to being untimely, the undersigned hereby denies the Motion to Dismiss due to the fact that DCPS has not provided all the relief requested by Petitioners. For in addition to the tutoring sought by Petitioners’ compensatory education proposal, the due process complaint also sought a finding that Student was denied a FAPE, which is a “concrete interest” on which compensatory education and prevailing party status rest. *See Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 530 (D.C. Cir. 2019), *quoting Chafin v. Chafin*, 568 U.S. 165, 172, 133 S. Ct. 1017, 1023, 185 L. Ed. 2d 1 (2013); *Boose v. Dist. of Columbia*, 786 F.3d 1054, 1058 (D.C. Cir. 2015) (providing one aspect that student needs does not moot out another).

Findings of Fact

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

³ All dates in the format “2018/19” refer to school years.

Petitioners’ counsel was put on notice at the prehearing conference that Petitioners must introduce evidence at the due process hearing 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 encouraged to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE was found.

⁴ At the beginning of the due process hearing, Petitioners’ counsel expressly withdrew without prejudice the requested relief in paragraph 3, which was “DCPS shall convene a meeting within 30 days of placement to review and revise Student’s IEP as necessary to include ESY and any other suggestions from school staff regarding goals and related services.”

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

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1. Student is a resident of the District of Columbia; Petitioners are Student's Parents.⁶ Student is *Age*, *Gender* and in *Grade* at Nonpublic School, to which Student is adjusting well and loves to attend.⁷ Student was previously enrolled at Prior Public School, but had not attended school since 11/4/18 to the end of 2018/19 after a physical altercation with a peer; Student had emotional meltdowns, poor peer interactions, and was bullied and teased.⁸

2. An initial IEP was developed for Student on 3/19/19 based on the disability classification of Autism Spectrum Disorder, which provided for 24 hours/week of specialized instruction outside general education and 240 minutes/month of Behavioral Support Services ("BSS") outside general education.⁹ Following development of the IEP, Student was placed in Nonpublic School, a nonpublic therapeutic school, several weeks prior to the hearing.¹⁰

3. Prior HOD. An HOD concerning Student was issued on 1/24/19 by Hearing Officer Peter Vaden in Case No. 2018-0303 (the "1/24/19 HOD"), which held that DCPS failed to meet its IDEA "child find" obligations when it did not initiate a special education eligibility evaluation of Student following a May 2018 meeting.¹¹ The HOD explained that whether the child find violation amounted to more than a procedural violation, and was an actual violation of FAPE so that compensatory education may be awarded, would depend on whether Student was ultimately determined eligible as a student with a disability and thus entitled to a FAPE.¹² The HOD stated that compensatory education was not provided at the time because it was premature to conclude that Student was a student with a disability prior to a comprehensive evaluation and eligibility determination, which DCPS had agreed to do.¹³

4. Eligibility. Student's Multi-disciplinary Team ("MDT") met on 2/26/19 and determined that Student was eligible to receive special education services under the classification of Autism Spectrum Disorder; eligibility was based on the psychological and social communication evaluation completed on 11/15/18.¹⁴ The evaluation noted Student's longstanding behavior concerns, including meltdowns without clear provocation and a

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; R3.

⁷ R3; Parent; Educational Advocate.

⁸ R3-8; P1-7; Educational Advocate.

⁹ R3-1,7.

¹⁰ Educational Advocate.

¹¹ 1/24/19 HOD at 1, 12.

¹² 1/24/19 HOD at 12.

¹³ *Id.*

¹⁴ R4; P1-1,7,8,17; R3-2 (IEP identified the evaluation as the basis for eligibility).

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history of being bullied and teased, particularly at school.¹⁵ Student's meltdowns sometimes resulted in Student lying on the floor and refusing to get up, or crawling under Student's desk.¹⁶

5. IEP Development. The initial IEP team meeting for Student was held on 3/19/19 and was collaborative; the team agreed that Student needed a full-time IEP with a separate day school.¹⁷ The IEP noted that Student had a history of meltdowns which occurred in both home and school settings and were characterized by Student simply shutting down and being unable to respond.¹⁸ Student had solid core cognitive skills, but due to variability the Full Scale IQ ("FSIQ") was not a useful measure of overall abilities.¹⁹

6. The 3/19/19 IEP incorporated the results of a 12/7/18 Woodcock-Johnson IV Tests of Achievement ("WJ-IV") which found Student to be 3-5 years behind in math, 2-5 years behind in reading, and 3-5 years behind in writing.²⁰ A 9/7/18 SRI found that Student was reading 2 years above grade.²¹ Recent informal testing by Educational Advocate found that Student was not able to tell time from an analog clock or work with basic concepts of time.²² In math, Student could not do division and did not know how to use a calculator properly.²³

7. Compensatory Education. Resolution Specialist emailed Petitioners' counsel on 3/29/19 to ask what Parents might be seeking for missed services; Petitioners' counsel replied that she would follow up, but did not do so.²⁴ Resolution Specialist wrote again on 6/26/19, but received no substantive response from Petitioners' counsel.²⁵ Respondent's counsel was unsuccessful in getting an answer about any relief sought by Parents in late June and early July 2019.²⁶ At the 7/11/19 resolution meeting, Petitioners' counsel stated that Petitioners were seeking compensatory education comprised of 250 hours of tutoring, 250 hours of ABA services, and 100 hours of counseling, all over a 2-year period.²⁷ On 7/12/19, Resolution Specialist followed up on a DCPS settlement offer and was told only

¹⁵ P1-1,7.

¹⁶ P1-2; Educational Advocate.

¹⁷ Educational Advocate; Resolution Specialist; R3.

¹⁸ R2; R3-2.

¹⁹ P1-4,13 (FSIQ 84); *cf.* R6-5 (early Wechsler Preschool and Primary Scale of Intelligence – Third Edition ("WPPSI-III") found Student to be average or high average, with a FSIQ of 113).

²⁰ R3-3,5,7; P1-18,19.

²¹ R7-4; P7-4 (1/25/18 SRI found Student reading 4 years above grade); R8-3 (9/7/16 SRI found Student reading 2 years above grade).

²² P8-4,12,13,14; Educational Advocate.

²³ Educational Advocate.

²⁴ R1-3; R11-1,2; R10-8.

²⁵ R10-7.

²⁶ R10-4,5.

²⁷ R1-3.

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that it was rejected.²⁸ Resolution Specialist emailed again early on 7/24/19 asking if Petitioners had a counteroffer and followed up that day with an updated settlement offer.²⁹

8. On the evening of 9/10/19, as part of the disclosures for this hearing, Petitioners provided a compensatory education plan prepared by Educational Advocate which included detailed goals and concluded that Student needed a total of 352 hours of tutoring as compensatory education.³⁰ Educational Advocate credibly testified that the compensatory education hours were to get Student to the functional level needed and were not directly based on hours of missed services, which she considered to be several multiples of the 352 hours sought, based on Student missing most of 2018/19.³¹

9. On 9/16/19, DCPS provided an authorization letter to Petitioners, unconditionally providing for Student to receive 352 tutoring hours and 48 hours of ABA Therapy at specified rates.³² Petitioners had previously sought ABA Therapy for Student before gaining admission at Nonpublic School, a therapeutic school.³³

10. Resolution Specialist credibly testified that Parents had “not done anything wrong” in the case and were very engaged with Student’s education; both Parents attended in person the important and emotional 3/19/19 IEP team meeting.³⁴ Parent confirmed that she never refused to cooperate with DCPS and would call Prior Public School when Student was scared and refused to attend.³⁵

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

²⁸ R10-1.

²⁹ *Id.*

³⁰ P14-1.

³¹ Educational Advocate.

³² Exhibit R5 to DCPS’s Motion to Dismiss.

³³ Educational Advocate.

³⁴ Resolution Specialist.

³⁵ Parent.

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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 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*, No. 17-2455 (CKK), 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).

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Petitioners carry 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 Petitioners establish 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: *Whether DCPS denied Student a FAPE with respect to the 3/19/19 IEP and placement by failing to act in a timely manner. (Petitioners have the burden of persuasion.)*

Quite simply, this case is about whether compensatory education is due to Student based on a denial of FAPE and, if so, how much compensatory education is required to place Student in the position in which Student should have been but for the denial of FAPE. While these questions are often very challenging, in the circumstances of this case the undersigned finds them to be straightforward and to result in an award of compensatory education in the full amount sought by Petitioners, which has already been provided by DCPS.

Denial of FAPE Results in Compensatory Education. The first step is to determine whether there has been a denial of FAPE to Student due to the delay in determining eligibility for special education services, which DCPS refused to admit despite providing all the compensatory education sought as a result of the denial of FAPE.

The 1/24/19 HOD concluded that DCPS failed to meet its IDEA child find obligations when it did not evaluate Student following the May 2018 meeting. But that would have been a mere procedural violation if the evaluation didn’t find a need for special education services which had been delayed. *See* 34 C.F.R. § 300.513(a)(2). The eligibility determination did not occur until 2/26/19, but should have been much sooner based on the HOD’s holding that DCPS should have moved forward after the May 2018 meeting. Student was found eligible on 2/26/19 based on Student’s longstanding issues, so this Hearing Officer determines that there is no doubt that the delay was a denial of FAPE due to the delay of special education services, for which compensatory education can now be calculated.

Amount of Compensatory Education. Having found a denial of FAPE, the only remaining issue is the amount of compensatory education necessary to put Student in the position in which Student should have been but for the denial of FAPE. That is often a challenging question requiring careful exercise of the Hearing Officer’s discretion to weigh the evidence and decide between the parents’ assertions based on their concerns for and knowledge of their child and the school systems’ experience and expert perspective. *See B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016); *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010).

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Here, once Student's eligibility for special education was determined in February 2019, it was clear to all that compensatory education was due for the delay found by the 1/24/19 HOD. DCPS did its best to negotiate with Petitioners' counsel and resolve the case prior to hearing, going so far as to finally provide unconditional authorization on the day prior to the hearing in this case for all 352 hours of tutoring sought by Petitioners in their compensatory education plan, plus an additional 48 hours of ABA therapy.

That authorization by DCPS was not sufficient to settle the case due to disagreement between counsel for the parties over legal provisions in the draft settlement agreement, the details of which were not discussed in the hearing based on the undersigned's ruling that they constituted confidential settlement discussions between the parties. Similarly, attorney's fees are outside the province of the Hearing Officer and are not discussed herein beyond recognizing that the statutory scheme for awarding attorney's fees to successful parents' counsel can be important to permit access to counsel by parents seeking to enforce the IDEA for the benefit of their children.

In short, this Hearing Officer is persuaded by the evidence of Petitioners seeking 352 hours of tutoring as compensatory education and of DCPS not just offering, but actually authorizing, 352 hours of tutoring, that the proper amount of compensatory education for Student in this case is 352 hours of tutoring. This is based on the credible testimony of Educational Advocate, as well as Petitioners' compensatory education plan prepared by Educational Advocate, and significant documentary evidence of Student's inability to access education in 2018/19 and Student's academic limitations. While DCPS did not admit or acknowledge that 352 hours of tutoring was the amount Student needed, the undersigned notes that DCPS did not provide evidence to refute that amount, and not only authorized the 352 tutoring hours but also another 48 hours of ABA therapy no longer sought by Petitioners.

Accordingly, the undersigned below orders the provision of 352 hours of tutoring of Student by independent providers. All compensatory education hours are to be used within 2 years from 9/16/19, the date on which DCPS provided authorization for tutoring (with a 2 year deadline), in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on DCPS which may result from compensatory education awards stretching over excessively long timeframes. The remaining 48 hours of ABA therapy that DCPS authorized even though not sought in Petitioners' compensatory education plan are not incorporated into the Order below, although DCPS at the hearing made clear representations that authorization for the 48 hours would not be withdrawn even if not ordered by the undersigned.

ORDER

Petitioners have prevailed on the issue 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 authorization for 352 hours of independent tutoring, which DCPS already

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has carried out. All hours are to be provided and used within 2 years from 9/16/19; any unused hours shall be forfeited.

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:

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