

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

PARENT,
on behalf of STUDENT,¹

Date Issued: October 27, 2021

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2021–0104

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Date: October 15, 2021

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (Petitioner or FATHER) 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 his due process complaint, Father alleges that Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools’ (DCPS) failure to implement the special education services required by Student’s Individualized Education Program (IEP) in the 2020-2021 school year, during the pandemic-related school closure.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on July 30, 2021, named DCPS as Respondent. The undersigned hearing officer was appointed on August 2, 2021. On August 10, 2021, the parties met for a resolution session and were unable to resolve the issues in dispute. On August 18, 2021, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was originally scheduled for September 28, 2021; however, due to scheduling issues in the Office of General Counsel, the hearing was rescheduled to October 15, 2021. On September 22, 2021, in order to accommodate the new hearing date, I granted the parties' joint request to extend the final decision due date from October 13, 2021 to October 29, 2021.

Due to the social-distancing protocols arising from the COVID-19 virus outbreak, with consent of the parent, the due process hearing was held on line and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on October 15, 2021. Father appeared on line for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. DCPS waived making an opening statement. Father testified and called EDUCATIONAL ADVOCATE as an additional witness. DCPS called SPECIAL EDUCATION TEACHER as its only witness.

Petitioner's Exhibits P-1 through P-27 were all admitted into evidence without objection. DCPS' Exhibits R-1 through R-8, R-10 through R-18, R-20 through R-22 and,

R-26 were admitted into evidence without objection. DCPS did not offer into evidence the remaining exhibits listed in its prehearing disclosure.

After the taking of the evidence, counsel for the respective parties made oral closing arguments. There was no request to file a written closing.

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 issue for determination in this case, as certified in the August 18, 2021 Prehearing Order, is:

Whether DCPS denied Student a FAPE by failing to implement the specialized instruction services called for in Student's IEP during the 2020-2021 school year.

For relief, Petitioner requests that Student be awarded compensatory education services to compensate for the denial of FAPE alleged in the complaint.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with his/her parents. Testimony of Father. Student is eligible for special education under the disability classification Specific Learning Disability (SLD). Exhibit P-11.
2. Since the 2019-2020 school year, Student has been enrolled in DCPS'

CITY SCHOOL. In the 2021-2022 school year, Student is in GRADE. Testimony of Father.

3. Due to the COVID-19 pandemic, DCPS schools were closed for most in-person instruction, from mid-March 2020 through the end of the 2020-2021 school year. Hearing Officer Notice.

4. Student's March 4, 2020 amended DCPS IEP identified Reading and Written Expression as areas of concern for Student. The IEP provided 7 annual goals for Student, including 5 goals in Reading and 2 goals in Written Expression. The IEP provided that Student would receive 3 hours per week of special education services for Reading and 2 hours per week of special education for Writing. All special education services were to be provided outside the general education setting. The end date for services was November 24, 2020. Exhibit P-10.

5. On September 27, 2020, DCPS issued an Individualized Distance Learning Plan (the IDLP) for Student. The IDLP recited that the purpose of the IDLP was to communicate how the supports and services outlined in a student's IEP would be delivered during remote learning, and that the IDLP was based on the current IEP and did not take the place of the annual IEP. The IDLP stated that the manner in which specialized instruction would be provided for Student during the period of virtual learning would be small group instruction for 10 minutes per week, on 3 of Student's five IEP Reading goals and on both of Student's two Writing goals. The IDLP did not specify in what, if any, manner specialized instruction would be provided for Student's

remaining two annual goals for Reading. Exhibit P-12.

6. Student's IEP was updated at an annual IEP review meeting on November 9, 2020. The November 9, 2020 IEP identified three annual goals for Student, including two goals in Reading and one goal in Written Expression. The November 9, 2020 IEP provided for Student to continue to receive 3 hours per week of special education services for Reading and 2 hours per week of special education for Writing, all outside general education. The services end date for this IEP is November 8, 2021.

Exhibit P-11.

7. For the entire 2020-2021 school year, Student participated, exclusively, in remote, virtual learning. Student returned to in-person classes at City School in August 2021. Testimony of Father.

8. During the 2020-2021 distance learning period, City School offered Student a virtual school day, totaling 5 hours and 45 minutes, four days per week – Mondays, Tuesdays, Thursdays and Fridays. This included 45 minute study blocks on Mondays and Thursdays, which were times for students to meet with teachers and do individualized work. Wednesdays were “asynchronous” days for students to meet on line with teachers to make up missed work, etc. Testimony of Special Education Teacher.

9. During the 2020-2021 school year, Special Education Teacher provided Student special education in an English Language Arts (ELA) resource class. This was a small group class which met for 45 minutes on Tuesdays and Fridays. Special Education

Teacher also regularly provided services to Student on Mondays, Tuesdays, Thursdays and Fridays in the 30 minute morning meeting ungraded advisory period. Student could also meet with Special Teacher in 4th period ungraded advisory periods on Tuesdays and Fridays, but that was optional for Student. Testimony of Special Education Teacher.

10. In fall 2020, the parents were concerned about Student's perceived lack of academic progress. They sought assistance from Special Education Teacher. Special Education Teacher agreed to provide an additional 20 minutes per week of 1:1 tutoring to Student. This virtual tutoring service continued from about November 2020 through June 2021. Testimony of Father, Testimony of Special Education Teacher.

11. Special Education Teacher's understanding of the IDLP was that she was to provide, in total, 10 minutes of IDLP instruction, one time per week, which she provided in addition to other special education services. Testimony of Special Education Teacher.

12. Adding together the special education services regularly provided to Student by DCPS during the 2020-2021 school year, Special Education Teacher regularly provided Student a total of 4 hours per week of special education services, including 120 minutes during morning meeting advisory periods, 90 minutes of resource class ELA instruction, 20 minutes of 1:1 tutoring on Tuesdays and 10 minutes of IDLP instruction. Testimony of Special Education Teacher, Exhibit P-18. (The 20 minute tutoring sessions did not start until November 2020, but given the intensive

nature of 1:1 tutoring, I credit the tutoring as at least equivalent to a year-long special education small group session.)

13. At the end of the 2019-2020 school year, Student was reported to be “Progressing” on all seven annual goals from the March 7, 2020 amended IEP. Exhibit R-18. At the end of the 2020-2021 school year, Student was reported to be Progressing on all three academic annual goals from the November 9, 2020 IEP. Exhibit P-16. Student was not reported to have mastered any IEP academic goals during this period.

14. When tested on February 2020, prior to the school closings, Student’s Lexile reading comprehension score was 1001, which was on grade level. Exhibit P-19. On the Lexile reading ability tests taken in school year 2020-2021, Student’s scores were 951 on September 22, 2020, 800 on February 2, 2021 and 883 on June 8, 2021. All of these scores were well below the proficiency target range for Student’s grade. Advocate, Exhibits P-20 through P-22.

CONCLUSIONS OF LAW

Based upon the above findings of fact and argument of counsel, as well as this hearing officer’s own legal research, my conclusions of law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the parent in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student’s IEP or placement, or of the program or placement

proposed by the local education agency, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the parent shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. For the issues in this case, Petitioner Father has the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

Did DCPS deny Student a FAPE, during the 2020-2021 school year, by failing to implement the specialized instruction services called for in Student's IEPs?

The issue for decision in this case is whether during the 2020-2021 school year, when DCPS schools were closed and Student was provided remote learning services, did DCPS deny Student a FAPE by not implementing the provisions for special education services in Student's March 7, 2020 and November 9, 2020 IEPs. Both IEPs provided for Student to receive 3 hours per week of special education services for Reading and 2 hours per week of special education for Writing, all outside the general education setting. Special education is defined in the IDEA as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom. . . ." 20 U.S.C. § 1401(29).

The premise asserted in the due process complaint for Petitioner's failure-to-implement claim is that the September 27, 2020 IDLP appeared to provide that during the remote learning period, Student would receive only 50 minutes per week of

specialized instruction – not the 5 hours per week of special education specified in Student’s IEPs. However, during the 2020-2021 school year, Student’s special education services were not limited to 50 minutes per week. According to the unrefuted testimony of Special Education Teacher, notwithstanding the terms of the IDLP, Special Education Teacher actually provided Student some 240 minutes, or 4 hours, per week of virtual special education services. Petitioner maintains that this was still a denial of FAPE because DCPS did not fully implement Student’s IEPs during this period.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child’s IEP may constitute a denial of FAPE.

A school district “must ensure that . . . special education and related services are made available to the child in accordance with the child’s IEP.” 34 C.F.R. § 300.323(c)(2). A material failure to implement a student’s IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party “must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). “Generally, in analyzing whether a student was deprived of an educational benefit, ‘courts . . . 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.’ “ *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

Middleton at 144.

Accepting Special Education Teacher’s testimony that for the 2020-2021 school year, she provided Student some 4 hours per week of special education services,

assuming a 40-week school year, Student was not provided a total of some 40 hours, or one-fifth, of mandated IEP special education services. I find that this shortfall was a failure to implement substantial or significant provisions of Student's IEPs and constituted a denial of FAPE.

DCPS argues, justifiably, that due to the COVID-19 pandemic and resulting school closures, the District was not expected to fully adhere to the requirements of Student's IEPs during the 2020-2021 school year. In its distance learning guidance after the pandemic-related school closures, the U.S. Department of Education explained that if a local education agency (LEA) continued to provide educational opportunities to the general student population during a school closure, the school must ensure that students with disabilities also have equal access to the same opportunities, including the provision of FAPE. LEAs were required to "ensure that, to the greatest extent possible, each student with a disability [could] be provided the special education and related services identified in the student's IEP developed under IDEA" See U.S. Department of Education (DOE), *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, p. 2 (March 2020), Exhibit R-4.

It may well be that after City School closed to in-person learning in March 2020, the greatest extent possible that DCPS was able to implement the mandated special education services in Student's IEPs was four hours per week. But that is not the end of the analysis. While DOE guidance acknowledged that there may be exceptional

circumstances that could affect how a particular IEP service would be provided, the guidance also provided that if IEP services were not implemented, a student's IEP team would be required to make an individualized determination as to whether compensatory services were needed under applicable standards and requirements. *See id.*

It is well established that under judicial interpretation of the IDEA in the District of Columbia, “[w]here a school system fails to provide special education or related services, a student is entitled to compensatory education.” *Holman v. District of Columbia*, 153 F. Supp. 3d 386, 390 (D.D.C. 2016), quoting *Walker v. District of Columbia*, 157 F.Supp.2d 11, 30 (D.D.C.2001) (citations omitted). “Compensatory education consists of prospective services ‘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.’” *Holman, supra*, quoting *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C.Cir.2005).

DCPS’ Counsel argues that the hearing officer lacks jurisdiction to award compensatory education to Student in this case, because DOE’s guidance provides that the IEP team would be required to decide whether compensatory education is needed. This argument is unpersuasive. DCPS did not offer any evidence it had already directed Student’s IEP team to decide whether compensatory education was needed for Student. Moreover, while there is precedent in the case law in this jurisdiction for a hearing officer to order a child’s IEP team to develop a compensatory education plan, *see, e.g., Shelton v. Maya Angelou Pub. Charter Sch.*, No. CV 07-00933 (CKK), 2012 WL

13050712, at *8 (D.D.C. July 31, 2012), the preferred course is for the hearing officer to award compensatory education, should she find a denial of FAPE. *See, e.g., Butler v. District of Columbia*, 275 F. Supp. 3d 1, 5 (D.D.C. 2017) (“What [the hearing officer] cannot do is . . . outright reject an award for compensatory services and terminate the proceedings.”) I find that the hearing officer has jurisdiction to award compensatory education in this case and that Petitioner is entitled to that remedy.

Compensatory Education Relief

The compensatory education inquiry requires “figuring out both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.” *Butler v. District of Columbia, supra*, at 6. Petitioner’s expert witness, Educational Advocate, opined that had Student been provided the 5 hours per week of Reading and Writing special education services per ■■■ DCPS IEPs, Student should have made 1 to 1½ years of academic progress over the 2020-2021 school year. However, Student’s reading ability, according to Lexile Reading Inventory test scores, actually regressed over the time period. To get Student back to the position he/she would have been in absent the FAPE denial, Educational Advocate recommended awarding Student 100 hours of 1:1 academic tutoring. (At the hearing, DCPS did not propose an alternative compensatory education formula.)

To arrive at his opinion and recommendation, it appears that Educational Advocate assumed that Student received only 50 minutes per week of special education services in the 2020-2021 school year. However, based on Special Education Teacher’s

unrefuted testimony, Student actually received some 4 hours per week per week of special education and DCPS failed to implement only some 40 hours of services over the school year. Adjusting Educational Advocate's recommended award downward based on the hours of special education Student actually missed, I will award Student 24 hours of compensatory education tutoring. I find that this award would be reasonably calculated to put Student in the position he/she would be had DCPS provided Student 5 hours per week of special education services as provided in Student's IEPs. *See B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.C. Cir. 2016).

DCPS' Counsel questioned Educational Advocate regarding Student's not fully using the education tutoring hours granted to him/her in a prior, unrelated, case. According to Father, the assigned tutor stopped providing services to Student because DCPS failed to pay her. Whatever the reason for Student's not using all of the authorized tutoring hours from the prior matter, the failure of DCPS to fully implement Student's special education hours in the 2020-2021 school year is a separate incident and Student is entitled to a new compensatory education award to compensate for this denial of FAPE.

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 found in this decision, DCPS shall promptly issue funding authorization to the parents for Student to receive 24 hours of 1:1 academic tutoring provided by a qualified special education tutor and

2. All other relief requested by the Petitioner herein is denied.

Date: October 27, 2021

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
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