

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER, an Adult Student,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: August 7, 2015

Hearing Officer: Peter B. Vaden

Case No: 2015-0195

Hearing Date: July 23, 2015

Office of Dispute Resolution, Room 2004
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 “STUDENT”), 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, Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) has denied him a free appropriate public education (“FAPE”) by not fully implementing his Individualized Education Plan (IEP) during the 2014-2015 school year and by not providing a copy the final IEP developed at a May 21, 2015 IEP meeting.

¹ Personal identification information is provided in Appendix A.

Student, an AGE young adult, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 4, 2015, named DCPS as respondent. The undersigned Impartial Hearing Officer was appointed on June 5, 2015. The parties met for a resolution session on June 12, 2015 and were unable to reach an agreement. The 45-day time period for issuance of this Hearing Officer Determination began on July 6, 2015. On June 24, 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 Hearing Officer on July 23, 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 and MOTHER appeared in person and were represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

The Petitioner testified and called as witnesses SPECIAL EDUCATION TEACHER, LICENSED PSYCHOLOGIST, CONTRACT TUTOR and Mother. DCPS made an oral motion to strike the testimony of Licensed Psychologist, which I denied. DCPS called as witnesses ASSISTANT PRINCIPAL and SUMMER SCHOOL PRINCIPAL. Petitioner's Exhibits P-1 through P-44 were admitted into evidence, with the exception of Exhibit P-38. Exhibits P-7 through P-9, P-39, P-43 and P-44 were admitted over DCPS' objections. DCPS' objection to Exhibit P-38 was sustained. DCPS' Exhibits R-1 through R-16 were admitted into evidence, with the exceptions of Exhibits R-2, R-11 and R-15. Exhibits R-6, R-9, R-10, and R-12 were admitted over Petitioner's objections. Petitioner's objections to Exhibits R-2 and R-15 were sustained. Exhibit R-11 was withdrawn. Counsel for the respective parties made closing arguments. Neither party requested leave to file post-hearing written argument.

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 June 24, 2015

Prehearing Order:

- Whether Student was denied a FAPE by DCPS' failure to ensure that a final IEP was developed at a May 21, 2015 IEP meeting and provided to the parent;
- Whether Student was denied a FAPE by the failure of DCPS to ensure that Student received the pull-out hours required by his IEP beginning with second advisory period on or about November 3, 2014.

For relief, Petitioner requested that the Hearing Officer order DCPS to provide the Student with a finalized current IEP. In addition, Petitioner also seeks an award of compensatory education for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

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

1. Student an AGE adult is a resident of the District of Columbia. For the 2014-2015 school year, Student was in the GRADE at CITY HIGH SCHOOL. Testimony of Student.
2. Student is eligible for special education and related services under the primary disability classification Other Health Impairment (OHI) due to Attention Deficit Disorder or Attention Deficit-Hyperactivity Disorder. Student was initially determined eligible for special education on March 24, 2014. Exhibit R-13.
3. In a Hearing Officer Determination in Case No. 2014-0415, concerning

this student, issued December 15, 2014 (the December 15, 2014 HOD), Hearing Officer Coles B. Ruff determined that Student had been denied a FAPE by the failure of DCPS to reconsider Student's special education eligibility and develop an IEP for him from October 2012 through April 7, 2014. Hearing Officer Ruff awarded Student compensatory education and ordered DCPS to reimburse Mother for private tutoring she had obtained for Student. Exhibit P-6.

4. For the compensatory education tutoring services ordered in the December 15, 2014 HOD, Contract Tutor tutored Student over a three to four month period in late 2014 and early 2015. Testimony of Contract Tutor.

5. Student's April 7, 2014 IEP, as amended on September 24, 2014 and October 2, 2014, provided annual goals for Written Expression and Emotional, Social and Behavioral Development areas of concern. The IEPs provided that Student would receive 12 hours per week of Specialized Instruction, including eight hours outside general education, and 60 minutes per month of Behavioral Support Services. The IEPs recited that due to Student's high levels of frustration, poor impulse control, and poor coping skills, he was often not able to consistently access the general education curriculum. Exhibits P-19, P-20.

6. For the 2013-2014 school year, Student failed Spanish, Mathematics and a couple of electives. In order to stay on track to graduate at the end of the 2014-2015 school year, Student had to "double up" on mathematics classes, repeat Spanish and a few electives. Testimony of Mother.

7. Student was delayed starting classes in the 2014-2015 school year until September 25, 2014, because Mother had appealed Student's failing grades in Spanish and Mathematics from the 2013-2014 school year. Mother was also concerned with

Student's behavior goals in his April 7, 2014 IEP. Testimony of Mother.

8. In fall 2014, Student was placed in Special Education Teacher's self-contained classroom for algebra and probability/statistics, for a total of 7.5 hours per week. Special Education Teacher provided differentiated instruction to Student because his performance exceeded that of other students in the class. In Special Education Teacher's opinion, Student's least restrictive environment for mathematics should have been the general education classroom. Testimony of Special Education Teacher.

9. Mother felt that Student was not striving to his potential in the self-contained mathematics classes and that the classes were not socially appropriate for him. Near the beginning of the second advisory period, Mother approached the school guidance counselor and special education department and told them that the self-contained classes were not appropriate for Student. The school staff informed Mother that there were no other self-contained classes where Student could be placed. Mother requested that Student be moved out of the self-contained classroom. Student was moved to general education classrooms for Probability and Statistics and for Algebra/Trigonometry. Testimony of Mother. For the 2014-2015 school year, Student passed both classes, with a C- in Probability and Statistics and D in Algebra/Trigonometry. Exhibits P-23, R-5; Testimony of Student.

10. Student failed his Spanish class for the 2014-2015 school year and as a result was not able to graduate. Student took Spanish over again in the 2015 summer school session. As of the July 23, 2015 due process hearing date, Student was expected to pass Spanish and be awarded his high school diploma. Testimony of Student,
Testimony of Summer School Principal.

11. Student's IEP team convened to review Student's IEP at a meeting on May

21, 2015. Mother and Petitioner's Counsel attended the meeting. Testimony of Mother, Exhibit P-7. By email of May 21, 2015, Petitioner's Counsel requested DCPS to send her a copy of the revised IEP. Exhibit P-7. The due process hearing record does not establish whether Student's IEP, as revised on May 21, 2015 was, or was not, provided to Mother, the attorney or the adult Student.

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:

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, § 3030.14. *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

A.

– Was Student was denied a FAPE by DCPS' failure to ensure that a final IEP was developed at the May 21, 2015 IEP meeting and provided to the parent?

Petitioner's Counsel represented in her oral argument that Student's completed May 21, 2015 IEP was not provided to Mother. (Student, who is now an adult, granted his mother access to his school records by a special power of attorney executed on May 12, 2015. *See* Exhibit P-13.) Parents have a right to examine all relevant educational records pertaining to their child. *See* 34 CFR § 300.613. The failure to provide a parent a copy of her child's IEP would be a procedural violation of the IDEA. *See, e.g., C.U. v.*

New York City Dept. of Educ., 23 F.Supp.3d 210, 226 (S.D.N.Y.2014). The due process hearing evidence does not establish whether the parent was, or was not, provided a copy of the May 21, 2015 IEP. Petitioner did not meet his burden of proof on this issue.²

B.

Was Student denied a FAPE by the failure of DCPS to ensure that he received the pull-out hours required by his IEP beginning with second advisory period on or about November 3, 2014?

Student's IEP, as amended on September 24, 2014, required, *inter alia*, that he be provided eight hours per week of Specialized Instruction outside general education. According to the IEP, due to Student's high levels of frustration, poor impulse control, and poor coping skills, he was often not able to consistently access the general education curriculum. Initially, City High School placed Student in a pull-out classroom for two math courses. However both Special Education Teacher and Mother agreed that the self-contained classes were not sufficiently challenging for Student and that he should be moved to regular math classes. Approximately two weeks into the second advisory period, which began on November 3, 2014, Student was moved to general education math classes and for the rest of the school year, he was no longer provided Specialized Instruction outside general education. Student's IEP team was not convened to approve this change in programming and his IEP was not amended until May 21, 2015. Petitioner contends that DCPS' failure to ensure that Student received the outside of general education instruction required by his IEP was a denial of FAPE. DCPS responds that the

² Assuming that DCPS had unduly delayed providing Mother a copy of the IEP, such violations are only actionable if they compromise the student's educational opportunities or seriously infringe parents' participation in their child's education. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006); see 20 U.S.C. § 1415(f)(3)(E)(ii). No evidence was offered that Student's educational opportunities or Mother's participation rights were infringed upon as a result of not being provided a copy of the May 21, 2015 IEP.

class change was made at the behest of the parent and that Student benefitted from being moved to the regular education setting.

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*.

Mother’s request that Student be moved out of the City High School pull-out mathematics classes did not relieve DCPS of its obligation to comply with Student’s IEP requirement that he be provided eight hours per week of Specialized Instruction outside general education. That requirement was not linked to any disability in mathematics, but rather to Student’s difficult accessing his education as a result of his attention deficit disability. Student was deprived of some 25 weeks of Specialized Instruction, outside of general education, required by his IEP. I find that this was a failure to implement a substantial provision of Student’s IEP and he was denied a FAPE as a result.

Remedy

Petitioner seeks an award of compensatory education for the denial of FAPE in this case. Compensatory education is educational service that is intended to compensate

a disabled student, who has been denied the individualized education guaranteed by the IDEA. *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 276 (D.D.C.2011) (citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005)). 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 upon the type and amount of services that would place the student in the same position he would have occupied but for the LEA's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011), citing *Reid, supra*. The burden of proof is on the Petitioner to produce sufficient evidence demonstrating the type and quantum of compensatory education that is appropriate. *See Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012).

Licensed Psychologist proposed a compensatory education award of 80 hours of Spanish language tutoring services and DCPS funding for a credit recover course in Spanish. She also recommended funding for a college preparatory course because Student was not able to graduate in June 2015. Neither proposal correlates to the denial of FAPE suffered by Student in this case – not receiving outside of general education Specialized Instruction after mid-November, 2014.³

The IEP team's purpose in requiring Specialized Instruction for Student was to address his difficulty in accessing the general education curriculum due to his high levels of frustration, poor impulse control, and poor coping skills resulting from his attention-deficit disability. Contract Tutor testified that Student's main difficulty was

³ Licensed Psychologist's rationale was that Student failed a Spanish language course needed for him to graduate from high school in June 2015. Student has already retaken the course in DCPS' 2015 summer school and he was expected to graduate upon completion.

that he did not do a lot of work on his own and needed one-on-one adult support to complete his work.

Student testified that after his anticipated graduation from high school this summer, he expects to attend college and he was waiting to hear from colleges to which he had applied. Despite his expected graduation from high school, Student is clearly entitled to compensatory education for the denial of FAPE in this case. *See Brooks v. District of Columbia*, 841 F.Supp.2d 253, 258-60 (D.D.C.2012) (citing, *inter alia*, *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 63 (1st Cir.2002) (“First, even after graduation, compensatory education is an available remedy.”)) There is a lack of credible evidence to show the quantum of compensatory education that would be appropriate in the present case. Notwithstanding, Petitioner is not required “to have a perfect case to be entitled to compensatory education.” *See Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148 (D.D.C.2012) (citations omitted.) The challenge of independently completing his academic work on the higher education level will undoubtedly remain an issue for Student. Rather than withhold all relief for want of satisfactory compensatory education evidence, I find that an appropriate compensatory education award would be to order DCPS to fund independent behavior counseling for Student targeted toward preparing him for transition to higher education. In the December 15, 2014 HOD, Hearing Officer Ruff awarded Student, *inter alia*, 20 hours of behavior counseling. Here, I will order DCPS to provide Student an additional 20 hours of independent behavior counseling.

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 20 hours of one-on-one independent pre-college counseling and/or mentoring targeted toward preparing Student for his anticipated transition from high school to college. These counseling services must be used by the end of the 2015 calendar year or shall be forfeited.
2. All other relief requested by the Petitioner herein is denied.

Date: August 7, 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 Division of Specialized Education
DCPS Resolution Team