District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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District of Columbia Public Schools,	)	
	)	
Petitioner,	)	
	)	**Hearing: April 11, 2018**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0057**
Parents,[1]	)	**Issue Date: April 15, 2018**
	)	
Respondents.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This case involves a student who is currently eligible for services (the "Student"). A Due Process Complaint ("Complaint") was filed by District of Columbia Public Schools ("Petitioner" or "DCPS") pursuant to the Individuals with Disabilities Education Act ("IDEA") on March 1, 2018. Respondents are the parents of the Student ("Respondents" or "Parents"). On March 15, 2018, Respondents filed a response.

II. Subject Matter Jurisdiction

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

[1]Certain names and references are redacted for publication and can be found in the accompanying index.

III. Procedural History

On March 19, 2018, the Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for Respondents, appeared. A prehearing conference order was issued on March 27, 2018, summarizing the rules to be applied in the hearing and identifying the issue in the case. Respondents moved to dismiss the matter by motion dated April 3, 2018, which was after the motion filing deadline of March 30, 2018, set in the prehearing order. As a result, the Hearing Officer accepted the motion as a trial brief and reserved determination of the motion until the issuance of this Hearing Officer Determination ("HOD"). Petitioner submitted opposition papers to the motion on April 10, 2018.

There was one hearing date: April 11, 2018. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-7. There were no objections. Exhibits 1-7 were admitted. Respondent moved into evidence Exhibits 1-6, 74-88, and 95. There were no objections. Exhibits 1-6, 74-88, and 95 were admitted.[2] Petitioner presented as witnesses: Witness A, a non-public school monitor; and Witness B, a compliance manager. Respondent presented no witnesses. At the close of testimony, both sides presented oral closing statements. A supplemental email was provided by Petitioner on April 11, 2018.

IV. Credibility.

Both witnesses presented by DCPS were credible in all respects.

[2]Exhibits were sometimes misnamed by the parties and the Hearing Officer during the hearing because Complaints are often brought by parents as Petitioners. However, all exhibits from Petitioner are herein designated with the letter "P," and all exhibits from Respondents are herein designated with the letter "R."

V. Issue

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

Did Respondent refuse to attend an IEP meeting per an HOD and therefore fail to comply with the HOD and prevent DCPS from providing a FAPE to the Student?

Petitioner contended that it is required to make a FAPE available and to implement HODs, and that, since the Parents refused to attend the IEP meeting as per the HOD, the Parents are preventing DCPS from providing a FAPE to the Student and complying with an order from the Hearing Officer.

As relief, Petitioner is seeking an order directing Respondents to attend an MDT/IEP meeting.

VI. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Autism. The Student currently attends School A, a non-public school in the District of Columbia. The Student was unilaterally placed at School A by the Parents, who received tuition reimbursement awards from District of Columbia Hearing Officers relating to the school for the 2014-2015, 2015-2016, and 2016-2017 school years. (R-1, R-2, R-3; Testimony of Witness A)

2. A Due Process Complaint was filed by Respondents on July 6, 2017, alleging FAPE denial in connection with the May 3, 2017, Individualized Education Program ("IEP") created by Petitioner for the Student for the 2017-2018 school year. Respondents accordingly requested another year of tuition reimbursement for School A. On November 27, 2017, Hearing Officer Coles Ruff issued an HOD (the "Ruff HOD")

corresponding to the July 6, 2017, Due Process Complaint. The Ruff HOD indicated that the May 3, 2017, IEP for the Student was appropriate. Nevertheless, Hearing Officer Ruff wrote, in the "Conclusions of Law" section of the decision, that DCPS must conduct an observation of the Student and convene a multi-disciplinary team ("MDT team") meeting pertaining to the Student. (P-3-13)

3. The Ruff HOD contained a section entitled "Order." In this section, Hearing Officer Ruff ordered DCPS to amend the Student's IEP to include a requirement to provide an adult from the Student's classroom to supervise the Student during lunch. (P-3-13)

4. Hearing Officer Ruff also ordered, in paragraph 2 of the Order section, that DCPS conduct an observation of the Student at School A within ten school days to determine whether the following requirements need to be included in the Student's IEP: (a) a class size of four students; (b) a classroom student-to-adult ratio of two-to-one; (c) a quiet classroom (*i.e.*, that the Student not be placed with noisy students or students likely to have outbursts); (d) a maximum group size of twenty-five when the Student is outside the classroom, except for special school assemblies; (e) no more than ten students in the hallway at the time Student is in the hallway during transitions; and (f) special classes with the same small group size as Student's academic classes. (P-3-14)

5. In paragraph 2 of the Order section, Hearing Officer Ruff also ordered DCPS to create an Observation Report that responds to issues addressed in his decision and explains DCPS's determination as to each issue. (P-3-14)

6. In paragraph 3 of the Order section, Hearing Officer Ruff also ordered that the Parents and School A make the Student available for formal observation by DCPS,

and that DCPS make determinations regarding items outlined in paragraph 2 referenced above. (P-3-14)

7. Finally, in paragraph 4 of the Order section, Hearing Officer Ruff directed that DCPS convene an MDT meeting with DCPS personnel, Respondents, and School A personnel all together, in person, in the same room at School A, to consider whether the issues addressed in his order should be addressed in the Student's forthcoming IEP. (P-3-14)

8. On December 15, 2017, DCPS conducted the observation referenced in the Ruff HOD, which involved Witness A going to School A from approximately 11:40 a.m. to 2:00 p.m. A four-page observation report was then written by Witness A, who made recommendations on the issues highlighted by Hearing Officer Ruff. The parties have stipulated that DCPS has complied with all the requirements in Hearing Officer Ruff's order, paragraph 2. (P-7-1-4; Testimony of Witness A; Stipulation of the parties on the record)

9. On December 11, 2018, Witness B from Petitioner offered Respondents dates for an MDT meeting in regard to the Student's educational program. The dates offered were January 3, 2018, and January 4, 2018. Respondent declined to meet, indicating that Respondents are challenging the Ruff HOD in federal court, and that any discussion of the Student's IEP would be premature until the Student's needs are finally determined by the courts. Witness B then offered four more dates for an MDT meeting: January 16, 2018; January 18, 2018; April 5, 2018; and April 6, 2018. Respondents did not change their position and are not willing to attend an MDT or IEP meeting until the matter is decided by federal courts. (P-1-2-3, 7, 13-15)

10. As a result, DCPS has not conducted an MDT or IEP meeting for the Student since the Ruff HOD. This has made it difficult for DCPS to find an alternative school for the Student, since non-public schools ordinarily require an updated IEP, in addition to parental participation in the admissions process. (Testimony of Witness A)

VII. Conclusions of Law

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

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

> Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

D.C. Code Sect. 38-2571.03(6)(A)(i)

This case is brought by the public agency. Accordingly, there is no dispute that DCPS bears the burden of persuasion in its entirety.

Issue: Did Respondent refuse to attend an IEP meeting per an HOD and therefore fail to comply with the HOD and prevent DCPS from providing a FAPE to the Student?

Respondents argued that Petitioner has no standing because school districts do not have the right to bring claims, pursuant to the IDEA, to require parents to attend a meeting designed to create an IEP. Respondents contended that the IDEA allows school districts only to bring claims to require parental consent or to dispute a parent's right to an independent educational evaluation. Respondents also contended that the claim is improper because an IDEA claim requires that the Petitioner suffer "actual or imminent harm," which DCPS cannot show on these mostly undisputed facts.

Respondents point to 20 U.S.C. Sect. 1415(b)(6), which establishes the basis for IDEA claims. This statute provides for:

> An opportunity for any party to present a complaint—
> **(A)**
> with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and
> **(B)**
> which sets forth an alleged violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

The statute itself clearly refers to "any party," and Respondents do not point to any persuasive caselaw in support of their claim that this section requires dismissal of this action. In fact, caselaw supports Petitioner in this regard. In Yates v. Charles Cty. Bd. Of Educ., 212 F.Supp.2d 470 (D. Md. 2002), a school district brought an action regarding its decision not to place the Student in a private school. It appears that the parents in Yates delayed the filing of a Due Process Complaint for tuition reimbursement on tactical

grounds and wanted to litigate the case at a time of their own choosing. The Maryland hearing officer (or "Administrative Law Judge") agreed with the parents that there was no jurisdiction to hear the claim under the IDEA and dismissed the case. However, a federal court reversed, pointing to the language in the applicable regulation that "either a parent or a public agency may initiate a hearing." 34 C.F.R. Sect. 507(a)(1). The Court pointed to the fact that the local educational agencies and school districts have a legal duty to develop IEPs and make placement decisions. The Court indicated that students can be harmed if there is no current IEP developed for a student, regardless of the current legal posture of the parties. As the Court stated, in relevant part:

> The very premise of the IDEA is that the duty to develop individualized education programs and to make placement decisions resides in the public educational agencies themselves. See, e.g., 20 U.S.C. §§ 1412(a)(10)(B)(i), 1412(a)(10)(C), & 1414(a)(1); 34 CFR §§ 300.300 & 300.343(a). Necessarily concomitant with that duty is the existence of the opportunity and the power to perform it.

202 F. Supp.2d at 472-473 (footnotes omitted).

It is noted that Judge Royce Lamberth of the United States District Court, District of Columbia, cited to Yates in distinguishing the matter from a claim involving a dispute between two LEAs. In summarizing Yates, Judge Lambert found that allowing school districts to bring their own IDEA claims protects them from liability, and also protects the student. As Judge Lamberth put it: "(b)y allowing the board to initiate the hearing against the parents, the board would be protected in its statutory obligations under IDEA, which would thereby protect the student, should the student remain within the protection of IDEA." Idea Pub. Charter Sch. v. D.C., 374 F. Supp. 2d 158, 165 (D.D.C. 2005)

A similar point was made in Anchorage Sch. Dist. v. M.P., 689 F.3d 1047 (9th Cir. 2012), where parents filed a Due Process Complaint against a school district which had not provided a student with IEPs because federal litigation was pending. The Ninth Circuit found for the parents, holding that the student's rights pursuant to a stay-put order did not insulate the school district from liability. The Ninth Circuit therefore awarded the parents reimbursement of tutoring expenses.

Respondents also argued that a party cannot bring a separate Due Process Complaint for enforcement of a prior Hearing Officer's order under the IDEA. A similar issue was discussed extensively by the United States Court of Appeals for the District of Columbia in 2016, when parents sought, among other things, to enforce an HOD[3] order in federal court. B.D. v. District of Columbia, 813 F.3d 792 (D.C. Cir. 2016). The school district sought dismissal, contending that the parents failed to point to any statutory basis for a cause of action for enforcement of an HOD. The parents insisted that several bases for an enforcement action existed.

The D.C. Circuit found that the parents forfeited a decision on two of the bases for the cause of action because they had not raised the argument below. The Court therefore did not address those bases, which involved: 1) using 42 U.S.C. Sect. 1983 for an enforcement cause of action; and 2) finding that an enforcement cause of action may be implied from IDEA as a whole.

The Court then turned to the parents' preserved argument, which was that 20 U.S.C. Sect. 1415(i)(2)(a) provides a cause of action to enforce a favorable hearing officer decision. This is the IDEA provision relating to the right to appeal to federal

[3]The hearing officer in B.D. was the undersigned.

courts. The Court ruled that the arguments raised by the parents (and *amici*) had "real force," but held for DCPS, stating that Section 1415(i)(2)(A) refers to a party "aggrieved by the findings and decision" of a Hearing Officer, and that "(o)ne who wins before a Hearing Officer is not "aggrieved" by the Hearing Officer's decision." The Court was also influenced by the ninety-day time limit for IDEA appeals, since, as the Circuit noted, noncompliance with a Hearing Officer decision often manifests itself well after ninety days have elapsed.

Then, in *dicta*, the Court provided language which, to this Hearing Officer, signaled its disposition with respect to the issues raised herein. The Court stated that "(w)e are unconvinced that our conclusion that section 1415(i)(2)(A) provides no enforcement cause of action necessarily leaves families like the [redacted] without a viable route to relief in federal court." After considering the possibility of an action pursuant to 42 U.S.C. Sect. 1983, the Court wrote: *"(l)ikewise, we are aware of no decision specifically foreclosing an IDEA enforcement suit premised on an implied cause of action." Id. At 802. The Court then wrote: "(w)e leave for another day the viability of the alternative bases for such a cause of action."* Id., at 801-802.

Given this suggestive language from the D.C. Circuit, and considering that Judge Tatel's decision indicated that the argument of the parents in B.D. had "real force," it is appropriate to find that an implied right of action does in fact exist to enforce a HOD in federal court in the District of Columbia. The difference here is that this case is not a federal court proceeding but an administrative hearing before a Hearing Officer.

However, there is additional language in B.D. that suggests an enforcement action can be brought before an IDEA Hearing Officer. In the concurring opinion, Judge Millett

noted that the United States Department of Education, which has responsibility for the federal administration and enforcement of the IDEA, has identified another avenue for enforcing a Hearing Officer's decision. Since, under the IDEA, any "matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" can be the basis of a Due Process Complaint, parties facing a lack of compliance "might be able to" bring another due process complaint to enforce the prior decision and, if necessary, seek judicial review of any denial of needed relief in that proceeding. Id., at 803-804.

This is the appropriate approach here, especially given the circumstances of this case. Respondents argued that the specific text of Hearing Officer Ruff's order does not require them to attend an MDT meeting; that, in fact, the Order section of the decision, taken literally, only directs DCPS (not the Parents) to convene an MDT team and does not specifically direct the Parents to attend the meeting. However, the Order section of the Ruff HOD requires that the Parents be at the MDT meeting. Moreover, the "Conclusions of Law" section of the Ruff HOD makes it clear that Hearing Officer Ruff's intent was to order the Parents to attend, since it requires that "DCPS convene a meeting and that [Parents] and DCPS personnel attend the meeting together in person at School A...."

Parenthetically, Respondent also suggested that a Hearing Officer cannot order a parent to go to an IEP meeting, and that it is particularly inappropriate to do so in a case brought by a school district. However, as the United States Supreme Court has found, courts have wide discretion to ensure students receive a FAPE going forward. As the Supreme Court has stated, the statute directs the Court to "grant such relief as [it]

determines is appropriate." The type of relief is not further specified, except that it must be "appropriate" to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

Under the circumstances, this HOD is necessary to ensure compliance with the Ruff HOD and to ensure that the Student receives an offer of FAPE. Accordingly, DCPS is entitled to an order enforcing the relevant portion of the Ruff HOD, which requires Respondents to appear at an MDT meeting.[4]

VIII. Order

As a result of the foregoing, Respondents are hereby ordered to appear at an IEP/MDT meeting on behalf of the Student, upon the request of DCPS, within the next thirty school days.

Dated: April 15, 2018

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
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[4]Respondents did not clearly argue that the appeal of the Ruff HOD bars this enforcement action. Nor is there anything in the record to suggest that Respondents have filed a motion to stay the instant Due Process Complaint as part of the federal court appeal of the Ruff HOD.

IX. Notice of Appeal Rights

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

Date: April 15, 2018

Michael Lazan
Impartial Hearing Officer