

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

OSSE
Office of Dispute Resolution
April 20, 2019

PARENT,
on behalf of STUDENT,¹

Date Issued: April 20, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0039

Hearing Date: April 9, 2019

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 423
Washington, D.C.

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 (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) by not securing Student’s placement at VIRGINIA SPECIAL SCHOOL, pursuant to a September 2018 settlement agreement between the parties.

Petitioner’s Due Process Complaint, filed on February 5, 2019, named DCPS as respondent. The undersigned impartial hearing officer was appointed on February 6,

¹ Personal identification information is provided in Appendix A.

2019. On February 14, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On February 20, 2019, Petitioner, by counsel filed a motion for summary judgment, which I denied by order issued February 26, 2019. On March 14, 2019, I denied DCPS' February 21, 2019 Motion to Strike Petitioner's Reply to DCPS' Answer to the Due Process Complaint and DCPS' February 22, 2019 Motion to Quash Petitioner's Requests for Notices to Appear.

When she filed her due process complaint, the Petitioner, by counsel requested an expedited due process hearing because, at the time, Student was not enrolled in any school. After Fairfax County (Virginia) Public Schools confirmed Student's pending admission to Virginia Special School, the only remaining relief sought was compensatory education. Accordingly, I set the hearing to be heard on the regular, non-expedited calendar.

The due process hearing was held before me on April 9, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was open to the public, was recorded on an electronic audio recording device. Petitioner, who has been hospitalized for an extended period, did not attend the hearing. Petitioner was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. Petitioner did not call any witnesses. Petitioner's Exhibits P-1, P-5, P-6 and selected pages from Exhibit P-2² were admitted into evidence, all over DCPS' objections. I sustained DCPS' objection to

² Exhibit P-2, copies of email communications, pages 13, 14, 20 through 28, 30 through 52 and 55 through 58 were admitted into evidence, but not for the truth of the statements contained in the emails. I sustained DCPS' objections to the remaining pages of Exhibit P-2.

Exhibit P-3. Exhibit P-4 was withdrawn. DCPS' Exhibits R-6, R-7, R-9, and R-11 were admitted into evidence without objection, but not for the truth of the statements of the emails in Exhibits R-7 or R-9 or for the truth of the content of Exhibit R-11. DCPS did not offer Exhibits R-1 through R-5, R-8 or R-10.

At the conclusion of Petitioner's case in chief, DCPS' Counsel made an oral motion for a directed finding in DCPS' favor. I denied the motion. DCPS did not call any witnesses and elected to rest on the record. Counsel for the respective parties made closing arguments. Because neither party offered evidence at the due process hearing as to what would be an appropriate compensatory education remedy, should I find that DCPS denied Student a FAPE, I invited counsel to submit written compensatory education proposals no later than April 16, 2019. Only Petitioner submitted a compensatory education proposal.

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, as restated by Petitioner's Counsel at the beginning of the Due Process hearing, is:

Whether DCPS has denied Student a FAPE by not providing Student a school placement for the 2018-2019 school year prior to Student's enrollment at Virginia Special School on or about March 21, 2019.

For relief, Petitioner requests an award of compensatory education for Student.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, is a legal resident of the District of Columbia. Student has Multiple Disabilities, including Intellectual Disability and Other Health Impairment. Student is functionally nonverbal, is wheelchair-bound, is tube-fed and participates in academic lessons by eye gazing, following maximum verbal, model and physical prompting. Student's functional level age equivalent is 3 months, with scattered skills. Exhibit P-5.
2. Student's last DCPS special education eligibility review was completed on October 11, 2017. Exhibit P-5.
3. At least since January 2018, Student has lived at NURSING CENTER in suburban Virginia. Exhibit R-7.
4. Petitioner brought a prior due process complaint against DCPS, on behalf of Student, (Case No. 2018-0185) in summer 2018. In the first week of September 2018, the parties reached a written settlement in full satisfaction and settlement of the complaint in Case No. 2018-0185. The Settlement Agreement provided, *inter alia*, that,

Following DCPS' receipt of an acceptance letter for the student to attend [Virginia Special School] within the Fairfax County Public Schools DCPS will place the student at [Virginia Special School] for school year 2018-19.

Exhibit P-1.
5. On October 1, 2018, Impartial Hearing Officer Michael Lazan issued an Order of Withdrawal, dismissing with prejudice Case No. 2018-0185, on the basis of Petitioner's September 14, 2018 withdrawal notice. Exhibit R-6.
6. As early as September 14, 2018, COMPLIANCE CASE MANAGER

informed Petitioner's Counsel by email that the "logistics are working out" to enroll Student in Virginia Special School. Compliance Case Manager confirmed that the process was underway on September 19, 2018. On September 28, 2018, Compliance Case Manager wrote that enrolling Student in a Fairfax County Public Schools (FCPS) facility is a process which takes time. On October 10, 2018, Compliance Case Manager apologized for the delays and stated his understanding that Student would begin "imminently" at Virginia Special School. Exhibit P-2.

7. On October 3, 2018, FCPS had been provided a completed tuition agreement for Student between FCPS and DCPS. Also, on October 3, 2018, a FCPS official wrote DCPS that with an "addended IEP," we can move forward with this student. On October 9, 2019, the FCPS official wrote DCPS by email to ask when DCPS would provided an addended IEP for Student, so FCPS could start providing services. On October 10, 2018, DCPS OFFICIAL wrote FCPS to apologize for the delay "in getting this sorted out on our side." DCPS Official wrote that "We are resolving some enrollment issues on our end . . ." Exhibit P-2.

8. On October 18, 2018, an official from the FCPS' Office of Special Education Procedural Support contacted DCPS SPECIALIST, from DCPS' Office of Nonpublic and School Monitoring, to request the parent's contact information so that she could start the registration process for Student. The official requested that the parent complete forms to first register Student in a FCPS base school. In a November 6, 2018 email correspondence with Petitioner's Counsel, DCPS Specialist wrote Petitioner's Counsel that she had been in contact with the parent. On November 12, 2018, the FCPS official wrote DCPS Specialist to advise her that FCPS was missing some of the registration paperwork for Student, including immunization verification,

Residency Documentation, a copy of Student's birth certificate and a copy of the enrolling parent's driver's license. DCPS continued to make some effort to have the parent sign the forms required by FCPS. On February 22, 2019, DCPS Specialist attempted to get the required forms signed by the parent, who was then hospitalized in the District of Columbia. The parent did not initially sign the forms, but DCPS was eventually able to obtain the signed forms after communicating with Petitioner's Counsel. Exhibits P-2, R-7, R-9.

9. On October 29, 2018, DCPS convened an IEP annual review meeting for Student. The October 29, 2018 IEP provided for Student to receive full-time Specialized Instruction, outside general education, and designated a separate special education school as Student's least restrictive environment. This IEP also provided for Student to receive 60 minutes per month of Occupational Therapy and 30 minutes per month, each, of Physical Therapy and Speech-Language Pathology consultation services. Exhibit P-5.

10. On February 5, 2019, Petitioner, by counsel, filed her due process complaint in the present proceeding, alleging, *inter alia*, that Student was still not in school and remained all day at Nursing Center. I initially set the case for an expedited hearing. In my initial, February 14, 2019, prehearing order, I advised the parties that I would move the case to the regular, non-expedited calendar, if Student were promptly enrolled in and allowed to attend Virginia Special School. Finalizing Student's enrollment in Virginia Special School was a challenge at that point for DCPS, because parent was in long-term hospitalization, and was limited in her ability to assist with enrollment and with providing the paperwork required by FCPS. Hearing Officer

Notice. Student started school at Virginia Special School on March 21, 2019. Exhibit R-9.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda 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 Petitioner 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 Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. Here, there is no dispute about the appropriateness of Student's IEP or placement. The Petitioner, therefore, 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

Has DCPS denied Student a FAPE by not providing Student a school placement for the 2018-2019 school year prior to Student's enrollment at Virginia Special School on or about March 21, 2019?

In this troubling case, Student, a severely disabled resident of the District of Columbia, has been placed in Nursing Center, a nursing facility in Fairfax County, Virginia. Student was apparently placed at the nursing facility by the parent and

another District of Columbia agency, not by DCPS. Before being placed at Nursing Center, Student attended SPECIAL SCHOOL 1 in the District of Columbia. It appears that since entering Nursing Center, until March 21, 2019, Student has not had a school to attend. In summer 2018, Parent, through Petitioner's Counsel, initiated a due process proceeding to compel DCPS to provide educational services to Student. On September 5, 2018, the parent and DCPS reached a settlement agreement, whereby DCPS agreed to place Student at Virginia Special School, upon receipt of an acceptance letter from FCPS, which apparently operates Virginia Special School. Although as early as October 3, 2018, a tuition agreement was completed between DCPS and FCPS, Student was not able to start at Virginia Special School until March 21, 2019. The parent contends that this delay was a denial of FAPE.

The IDEA regulations provide that an IEP must be implemented "as soon as possible following development of the IEP." 34 C.F.R. § 300.323(b)(2); *See Spiegler v. District of Columbia*, 866 F.2d 461, 466 (D.C. Cir. 1989). Prior to being admitted to Nursing Center, Student had a DCPS IEP developed on October 11, 2017, which apparently provided for Student's placement at Special School 1, a DCPS special school. Student's DCPS IEP was revised on October 29, 2018 and the revised IEP also provided for Student to receive full-time Specialized Instruction outside general education, and designated a "Separate school" as Student's least restrictive environment. As concerns DCPS' timeliness, DCPS agreed in the September 5, 2018 settlement agreement to place Student at Virginia Special School, upon receipt of an acceptance letter from FCPS. Student's start at Virginia Special School was delayed until March 21, 2019.

The query here is whether DCPS denied Student a FAPE by not effecting Student's placement at Virginia Special School "as soon as possible" after the parties

reached the September 5, 2018 settlement agreement. The evidence establishes that some delay was unavoidable. DCPS had to comply with FCPS' admissions requirements which were under the control of the Virginia local education agency. However, by November 12, 2018, FCPS advised DCPS Specialist of the limited remaining paperwork which needed to be provided for Student, including immunization verification, Residency Documentation, a copy of Student's birth certificate and a copy of the enrolling parent's driver's license. Due to her own illness, Mother was only able to provide limited assistance to procure this paperwork.

Once Mother filed her due process complaint on February 5, 2019, thanks to the considerable efforts of DC Specialist, including making multiple trips to the hospital to obtain Mother's signature on the FCPS forms, DCPS was able to complete the paperwork needed by FCPS and meet FCPS' other requirements for Student to attend Virginia Special School, where Student started on March 21, 2019. It is not possible to know with certainty how much sooner Student could have started school, if DCPS had shown the same diligence, as soon as it entered into the September 6, 2018 settlement agreement with Mother. However, even with the complications of Mother's hospitalization and the ongoing paperwork requests by FCPS, DCPS was able to complete Student's enrollment at Virginia Special School within some six weeks after Mother filed her due process complaint. I find, therefore, that it is more likely than not that with appropriate diligence, DCPS could have completed the requirements for Student to enroll in Virginia Special School within some six weeks of receiving FCPS' November 12, 2018 additional paperwork request. I conclude that if DCPS had exercised reasonable diligence and adhered to the IDEA's mandate to implement Student's IEP "as soon as possible," Student could have been enrolled in Virginia Special

School in time to start classes the end of the FCPS' winter break, which was on or about January 7, 2019. I find that DCPS' failure to complete the enrollment formalities in time for Student to start at Virginia Special School by the end of FCPS' winter break was a denial of FAPE.

Remedy

After the complaint in this case was filed, DCPS placed Student at Virginia Special School, where Student started on March 21, 2019. The remaining relief requested by the parent is an award of compensatory education for DCPS' delay in completing Student's enrollment at the special school. The D.C. Circuit pronounced in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016), that if a hearing officer concludes that the school district denied a student a FAPE, he has "broad discretion to fashion an appropriate remedy, which may include compensatory education." *Id.* at 800. "That 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*, 275 F. Supp. 3d 1, 6 (D.D.C. 2017), citing *B.D.* at 799.

Neither party proposed a specific compensatory education remedy at the due process hearing in this case. At the end of the hearing, I encouraged counsel for both parties to submit compensatory education recommendations by April 16, 2019 for me to consider, were I to conclude that DCPS had denied Student a FAPE by not timely implementing Student's placement at Virginia Special School. Only Petitioner's Counsel submitted a compensatory education proposal.³

³ DCPS' Counsel sent the hearing officer an email on April 16, 2019 stating that, due to Spring Break and the Emancipation Holiday, DCPS was unable to access the student in FCPS and would require additional time to provide the compensatory education assessment data requested by the hearing officer. I responded to counsel that I intended to issue my decision by the April 21, 2019 final decision due date. As of April 19, 2019,

Petitioner's compensatory education recommendation, prepared by SPECIAL EDUCATION CONSULTANT, proposes that for each week that Student was denied a FAPE during the 2018-2019 school year, DCPS be ordered to fund ten hours of specialized instruction, as described on Student's most recent DCPS IEP, *to wit*:

Academic: The special educator/compensatory education provider will provide full physical and verbal assistance, using verbal cues and gestures, adaptive materials, adapted manipulatives in order to increase Student's ability to respond to sensory stimulatory activities and to increase Student's ability to touch a grid on a speech-generated device;

Adaptive/Daily Living: The special educator/compensatory education provider will provide full physical guidance, verbal prompting, cues and gestures to allow Student to participate in adaptive/daily living activities, as Student's ability allows. Student will increase the ability to eye gaze to communicate Student's needs. Given objects and stimulants of different texture, temperatures, and other properties, the educator will attempt to elicit different facial responses from Student to express emotions and desires;

Communication: The special educator/compensatory education provider will consult with the school staff regarding specific adaptive strategies that Student can implement to improve the ability to participate in a curriculum based lesson or activity. The special educator will create a communication board in order for Student to participate in adaptive/daily living activities, specifically to increase the ability to eye gaze to communicate Student's needs.

I find this compensatory education proposal, except for the provision to create a communication board, to be appropriate and reasonably calculated to get Student back to the position where Student would have been had DCPS timely secured Student's admission to Virginia Special School. (Student should not need a communications board as compensatory education, because Virginia Special School staff presumably already uses a communication board with Student.)

From the end of 2018-2019 FCPS winter break to March 21, 2019, when Student started at Virginia Special School, Student missed some 10 weeks of school. I will

DCPS had not submitted a compensatory education recommendation.

therefore order DCPS to provide Student 100 hours of compensatory specialized instruction, as described in Special Education Consultant's recommendation.

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, not later than 15 business days from the date of this decision, DCPS shall provide Petitioner funding authorization to obtain 100 hours of Specialized Instruction from a qualified special educator to address Student's Academic, Adaptive Living and Communications areas of need and such other needs arising from Student's disability as the special educator may determine appropriate.
2. All other relief requested by the Petitioner herein is denied.

Date: April 20, 2019

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
OSSE - SPED
DCPS Resolution Team