

**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 25, 2019

PARENT,
on behalf of STUDENT,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS, and

OFFICE OF THE
STATE SUPERINTENDENT OF
EDUCATION,

Respondents.

Date Issued: April 25, 2019

Hearing Officer: Peter B. Vaden

Case No: 2019-0078

Hearing Date: April 11, 2019

Office of Dispute Resolution, Room 423
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 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, Mother alleges that Respondents District of Columbia Public Schools (DCPS) and Office of the State Superintendent of Education (OSSE) failed to implement the alleged February 2019 decision of Student’s Individualized Education Program (IEP)

¹ Personal identification information is provided in Appendix A.

team that Student required a separate, nonpublic, special education day school as an educational placement.

Petitioner's request for an expedited due process hearing, naming DCPS and OSSE as respondents, was filed on March 20, 2019. The undersigned hearing officer was appointed on March 21, 2019. On March 28, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On March 29, 2019, OSSE filed a motion for summary judgment. On April 3, 2019, Petitioner filed a motion for summary judgment. By order issued April 5, 2019, I denied both motions.

The due process hearing was convened before the undersigned impartial hearing officer on April 11, 2019 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. Petitioner and Student appeared in person and were represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL. Respondent OSSE was represented by PROGRAM MANAGER and by OSSE's COUNSEL.

Petitioner's Counsel made an opening statement. MOTHER testified at the hearing and called LAW CLERK and EDUCATIONAL ADVOCATE as additional witnesses. OSSE called Program Manager as its only witness. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-14 and P-16 through P-18 were admitted into evidence, including Exhibit P-14 admitted over OSSE's objection. Exhibit P-15 was withdrawn. DCPS' Exhibits R-4 through R-8, R-11 through R-21 and R-23 through R-50 were admitted into evidence without objection. DCPS did not offer Exhibits R-1 through R-3, R-9, R-10 or R-22. OSSE's Exhibits OSSE-1 through OSSE-4 were admitted

without objection.

After the taking of the evidence, DCPS made a motion for a directed finding in its favor and OSSE renewed its motion for summary judgment. I denied both motions. Counsel for the respective parties then made closing arguments. My final decision in this matter is due within 10 school days of the expedited hearing date – by May 2, 2019.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUE AND RELIEF SOUGHT

The issues for determination, as certified in the March 28, 2019 Prehearing Order, are:

1. Whether since February 5, 2019, DCPS has denied Student a free appropriate public education (FAPE) because the February 5, 2019 IEP does not reflect the IEP team's decision that Student requires an educational placement in a nonpublic school completely separate from Student's nondisabled peers and because the IEP does not describe Student's least restrictive environment placement on the continuum of alternative placements;
2. Whether since February 5, 2019, DCPS and OSSE have denied Student a FAPE by failing to implement the decision of Student's IEP team that Student's least restrictive environment is a nonpublic separate school.

For relief, Petitioner requested that the hearing officer order DCPS and/or OSSE to provide Student with an appropriate nonpublic location of services within 10 days of issuance of the hearing officer's decision. The parent also seeks an award of compensatory education from DCPS for the denials of FAPE alleged in the complaint or funding to obtain an independent compensatory education assessment.

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. Testimony of Mother.

2. Student is eligible for special education under the IDEA disability classification Multiple Disabilities, based upon the underlying disabilities Emotional Disturbance and Other Health Impairment. Exhibit P-5.

3. For the 2017-2018 school year, Student attended CITY SCHOOL 1. While enrolled at City School 1, Student allegedly experienced incidents of fights, bullying and assaults. For the 2018-2019 school year, Student received a safety plan from school officials, which included a transfer to CITY SCHOOL 2. At City School 2, Student has continued to experience the same safety concerns. Although Student's grades at City School 1 were satisfactory, Student is doing poorly in the current school year at City School 2. Testimony of Mother.

4. On February 5, 2019, City School 2 convened an IEP Annual Review meeting for Student. At the meeting, the IEP team determined unanimously that Student required 22.5 hours per week of Specialized Instruction Services and 240 minutes per month of Behavioral Support Services, and that Student required a separate day, non-public, school as Student's educational placement. In the Least Restrictive Environment discussion in the IEP, the team stated that "Based on [Student's] emotional and behavioral concerns coupled with [Attention Deficit-Hyperactivity Disorder], [Student] needs a small, therapeutic setting in order to be successful in the academic setting. Exhibit P-5, Testimony of Mother.

5. On March 5, 2019, Petitioner's Co-Counsel wrote SPECIAL EDUCATION DIRECTOR at City School 2, by email, to inquire if DCPS has made a request to OSSE to locate a nonpublic placement for Student. Exhibit P-7. When he did not receive a response, Petitioner's Co-Counsel followed up with an email sent March 15, 2019. Special Education Director responded by email sent March 15, 2019 that OSSE had received the IEP team's request for a more restrictive placement for Student and that she was waiting for OSSE to set a change-in-placement (CIP) meeting date. Exhibit P-8.

6. On March 21, 2019, SPECIAL EDUCATION SUPERVISOR from DCPS informed OSSE Program Manager by email that DCPS would like to refer Student for consideration of a nonpublic school placement. In the Justification for Removal Statement (JRS), DCPS staff wrote that the IEP team believed that Student would be best supported in a separate day non-public school and that the IEP team believed that Student requires intensive support in a non-public setting with a therapeutic component to address aggression, anger management, and positive interpersonal relationships. Exhibits OSSE-2, OSSE-3. Special Education Director, who stated in the March 15, 2019 email (Exhibit P-8) that OSSE had already received the CIP request for Student, did not testify at the due process hearing. Based on the preponderance of the evidence, including the testimony of OSSE Program Manager, I find that the March 21, 2019 email from Special Education Supervisor was the first change in placement (CIP) request received by OSSE for Student. OSSE convened a CIP meeting for Student on April 9, 2019. Testimony of OSSE Program Manager.

7. Student stopped going to City School 2 on March 17, 2019, after allegedly being "jumped" by other students. Until March 21, 2019, neither DCPS nor OSSE had contacted Mother about a nonpublic placement for Student. Testimony of Mother.

8. At the April 9, 2019 CIP meeting, the IEP team decided to move forward with requesting Student's admission to nonpublic schools. At the meeting, Mother signed parental consent forms for the process. Testimony of OSSE Program Manager.

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 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. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

1. Has DCPS denied Student a FAPE because the February 5, 2019 IEP does not reflect the IEP team's decision that Student requires an educational placement in a nonpublic school completely separate from Student's nondisabled peers and because the IEP does not describe Student's least restrictive environment placement on the continuum of alternative placements?

Petitioner first alleges that Student has been denied a FAPE because the February 5, 2019 IEP does not reflect the IEP team's decision that Student's least restrictive

environment (LRE) is a separate, nonpublic special education day school. DCPS has the burden of persuasion as to the appropriateness of the February 5, 2019 IEP.

There is no dispute in this case that the February 5, 2019 IEP team did in fact decide that Student required an educational placement in a non-public setting with a therapeutic component, *i.e.*, a special school. *See Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018) (“Courts in this jurisdiction have concluded that an IEP Team is required to discuss a student’s specific “Least Restrictive Environment” (“LRE”) and that the IEP is required to include at least a brief description of the child’s LRE.” *Id.* at 121.) The IEP team specified in the LRE section of the February 5, 2019 IEP that based on Student’s emotional and behavioral concerns, Student needs a small, therapeutic setting. Petitioner points out, correctly, that Student’s prior February 21, 2018 DCPS IEP contained the same LRE language, and Student was nonetheless placed at City School 1 and City School 2, both DCPS public schools, not at a special school. Notwithstanding, here it is not contested that in using the language “small therapeutic setting” for Student’s LRE, the February 5, 2019 IEP team’s unanimous intent was that Student’s educational placement would be a nonpublic special school. I find, therefore, that DCPS has met its burden of persuasion that the February 5, 2019 IEP contained an adequate description of Student’s LRE and adequately identified Student’s educational placement. *See O.O. ex rel. Pabo v. District of Columbia*, 573 F. Supp. 2d 41 (D.D.C. 2008) (“This issue appears to revolve solely around semantic discrepancies, not any substantive difference in the parties’ positions. The IEP does not have to be drafted perfectly.” *Id.* at 53.)

2. Have DCPS and OSSE denied Student a FAPE since February 5, 2019 by failing to implement the decision of Student’s IEP team that Student’s least restrictive environment is a nonpublic separate school?

Next, Petitioner alleges that DCPS and OSSE denied Student a FAPE by not timely implementing the February 5, 2019 IEP team's decision to place Student in a nonpublic special school. 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).

In the District of Columbia, OSSE has issued regulations for making changes to a special education student's educational placement to a more restrictive environment outside of DCPS (the OSSE Placement Procedures). *See State Superintendent of Education, Policies and Procedures for Placement Review, Revised* (Jan. 5, 2010) (OSSE Exhibit 1). These regulations provide that prior to an IEP team's meeting to discuss a possible Change in Placement (CIP), the local education agency (LEA) must document the need for a more restrictive environment in the Special Education Data System (SEDS). Additionally, the LEA must submit a completed Justification for Removal Statement (JRS) to OSSE. Following a review process, an OSSE placement review specialist will provide a recommendation to the IEP team, indicating whether the placement into a more restrictive environment is "warranted" or "not warranted." The OSSE Placement Procedures specify that the IEP team, and not OSSE, will then determine whether the student's needs require a more restrictive placement. Assuming the IEP team's decision is to place the student in a more restrictive environment, OSSE will make the decision regarding the actual nonpublic school facility at which the student will receive his or her instruction.

In this case, DCPS first informed OSSE by email on March 21, 2019 that DCPS would like to refer Student for consideration of a nonpublic school placement. OSSE

followed the OSSE Placement Procedures and convened a CIP meeting with Student's IEP team on April 9, 2019. At the CIP meeting, the IEP team decided to move forward with placing Student in a nonpublic special school. I find that after OSSE received the March 21, 2019 CIP request from DCPS, OSSE moved "as soon as possible" to carry out the decision of Student's IEP team to place Student in a special school. With respect to OSSE, therefore, I conclude that Petitioner has not met her burden of persuasion that the state agency failed to timely implement the decision of Student's IEP team that Student required a change in placement to a nonpublic special school.

DCPS, for its part, did not rebut the evidence that it delayed, from February 5, 2019 to March 21, 2019, submitting to OSSE the decision of Student's IEP team that Student required a change in placement to a nonpublic special school. This delay of more than six weeks violated the IDEA's mandate to implement a student's IEP as soon as possible. I find that DCPS' untimely action on the February 5, 2019 IEP team's placement decision for Student was a denial of FAPE.

Remedy

For relief, the parent requests that the hearing officer order DCPS and OSSE to provide Student with an appropriate nonpublic location of services within 10 days of issuance of the hearing officer's decision. As discussed above, DCPS has now referred the CIP request for Student to OSSE, as required by the OSSE Placement Regulations. The OSSE Placement Regulations provide that OSSE – not DCPS – shall issue a notice of location assignment within ten business days after the placement decision at the CIP meeting. Therefore, I find that ordering DCPS to provide a nonpublic location of services for Student is not appropriate equitable relief.

Prior to the due process hearing, at the April 9, 2019 CIP meeting, Mother signed

parental consent for OSSE to proceed with identifying a suitable nonpublic separate school for Student. There was no evidence at the due process hearing that OSSE was not moving forward expeditiously or had otherwise delayed the location assignment process and I have concluded above in this decision that OSSE did not deny Student a FAPE. On these facts, I also conclude that Petitioner is not entitled to an order to compel OSSE to provide Student a nonpublic location of services.

The parent also seeks an award of compensatory education from DCPS for its denial of FAPE in this case. 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.

Parent’s expert, Educational Advocate, declined to propose a compensatory education remedy, but recommended that a compensatory education study be completed after Student has been enrolled in a nonpublic school for one month. Educational Advocate’s proposal is unworkable, because the IDEA requires that I issue my final decision in this case within 10 school days of the April 11, 2019 expedited due process hearing, see 34 CFR § 300.532(c)(2), and as of the hearing date, there was no information on when Student would start attending a nonpublic school.

Notwithstanding, a parent 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). Here, Student continued at City School 2 until March 17, 2019 when

Student stopped attending after allegedly being “jumped” by other students. Between March 17, 2019 and the April 11, 2019 hearing date, Student was out of school for some 4 weeks, which was due, in part, to DCPS’ delay in acting on the IEP team’s decision to place Student at a special school. A compensatory education award must be “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.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) (internal quotation marks omitted). I find that an appropriate compensatory education award, reasonably calculated to provide the educational benefits that Student missed from not attending school after March 17, 2019, would be 90 hours of academic tutoring in the areas of concern identified in Student’s IEP.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. As compensatory education for its denial of FAPE in this case, not later than 10 school days from the date of this decision, DCPS shall provide Petitioner funding authorization to obtain 90 hours of independent academic tutoring for Student;
2. All claims against OSSE herein are dismissed and
3. All other relief requested by the Petitioner herein is denied.

Date: April 25, 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