

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: August 5, 2018

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2018-0168

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: July 26, 2018

Respondent.

Office of Dispute Resolution, Room 111
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 (GUARDIAN), 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 developing an initial Individualized Education Program (IEP) in May 2017, which would have allowed Student to be placed in a regular public school setting, instead of a special school as was agreed to by Student’s IEP team.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on June 28, 2018, named DCPS as respondent. The undersigned hearing officer was appointed on June 29, 2018. On July 11, 2018, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On July 6, 2018, Petitioner filed a motion for summary judgment, which I denied by order entered July 12, 2018. My final decision is due by September 11, 2018.

The due process hearing was held before the undersigned impartial hearing officer on July 26, 2018 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 appeared by telephone and was represented by PETITIONER'S COUNSEL and by PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by COMPLIANCE SPECIALIST and by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Petitioner called as witnesses CLINICAL PSYCHOLOGIST and SPECIAL EDUCATION ATTORNEY. DCPS called as witnesses SPECIAL PROGRAMS MANAGER, CASE MANAGER, SCHOOL DIRECTOR and ACTING PRINCIPAL of NONPUBLIC SCHOOL. Petitioner's Exhibits P-1 through P-19 were admitted into evidence, including Exhibits P-13 and P-15, digital audio recordings, admitted over DCPS' objections. DCPS' Exhibits R-1 through R-5 were admitted into evidence without objection. Counsel for the respective parties made closing arguments. There was no request to file post-hearing written briefs.

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 issues for determination, as certified in the July 15, 2018 Revised Prehearing Order, are:

A. Did DCPS deny Student a FAPE by developing an IEP in May 2018 which it could implement at CITY SCHOOL and, therefore, DCPS failed to develop an IEP based on Student's unique needs and circumstances which the IEP team agreed required Student to attend a nonpublic separate school?

B. Did DCPS deny Student a FAPE by failing to provide Student with an appropriate placement in May 2018, at City School, while its request to place Student was pending with OSSE, which (1) did not comply with Student's least restrictive environment requirement for a nonpublic separate school and/or (2) could not implement Student's May 2018 IEP if that IEP is found to be a separate school IEP.

For relief in this case, Petitioner requests as follows:

- a. That the Hearing Officer order DCPS to convene an IEP team meeting to determine a suitable nonpublic special day school for Student's enrollment within 10 days of the decision in this case;
- b. That Student shall be awarded compensatory education for denials of FAPE that have allegedly occurred.

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 youth, is a resident of the District of Columbia. Student is eligible for special education and related services under the IDEA disability classification Emotional Disturbance (ED). Exhibit R-1.
2. Student has a troubled emotional and behavioral history, characterized by a suspected history of being a survivor of sexual exploitation, lengthy periods of running away and a history of erratic and impulsive behavior. Exhibit P-3. For some time, Student has been directly subject to the authority of the Superior Court of the District of

Columbia Family Court (the Court). Testimony of Special Education Attorney.

3. In a court-ordered Psychoeducational Evaluation report provided to the Court on or about March 23, 2018, Clinical Psychologist reported that Student's cognitive functioning scores were Borderline range. Student's performance on the Broad Achievement clusters indicated that academic skills were in the Low range of abilities when compared to same-aged peers. In terms of emotional and personality functioning, Student presented with distractibility, irritable and unstable mood, a sense of self-worthlessness, recurrent involvement in risky behaviors and poor judgment. These endorsements were described as parallel to the manic symptomology suggested during a previous evaluation in January 2016, and interfered with Student's daily functioning and development across multiple settings. Clinical Psychologist diagnosed Student with Specific Learning Disorder with impairment in mathematics, Bipolar I Disorder, Manic episode and Other Specified Neurodevelopmental Disorder associated with prenatal cocaine exposure. Exhibit P-1.

4. Student has a lengthy history of absconding from home and school. Student's whereabouts were unknown to the Guardian and authorities from April 2017 until February or March 2018. Student has not regularly attended school in the 2017-2018 school year. The Family Court of the D.C. Superior Court appointed Special Education Attorney to assist with educational programming for Student. Exhibit P-1.

5. On April 18, 2018, a Multidisciplinary Team (MDT) at CITY SCHOOL determined that Student was eligible for special education under the ED classification. Testimony of Case Manager.

6. Student's initial IEP was developed at an IEP team meeting at City School on May 10, 2018. The IEP team decided that Student would be served outside the

general education classroom for 100 percent of the time and that the Least Restrictive Environment (LRE) placement category for Student was a separate school. Exhibit P-13. All members of the IEP team agreed that Student required placement in a full-time therapeutic day setting. Stipulation of Counsel.

7. The May 10, 2018 IEP provides for Student to receive 27.5 hours per week of Specialized Instruction outside General Education and 120 minutes per month of Behavioral Support Services outside General Education. The LRE page of the IEP states that the LRE placement category for Student is “Separate school.” Exhibit R-1.

8. In a text box on the Special Education and Related Services section of the IEP, it is stated that “[Student] is not enrolled in general education classes. [Student’s] IEP is 100% specialized instruction outside of the general education setting.” The LRE page of the May 10, 2018 IEP states that “Based on the services decisions made by the IEP Team, the percentage of time that the student will be serviced outside the general education classroom” is “86.15%”. Exhibit R-1. Case Manager explained that the 86.15% figure was automatically populated on the IEP form by the Special Education Data System (SEDS) software used by DCPS and that the IEP team actually decided that Student would be serviced outside of the general education classroom for 100% of the time. Testimony of Case Manager. This was confirmed by Special Education Attorney’s notes from the meeting, *to wit*, LRE: 100% outside general education. Placement is “separate school.” Exhibit P-12.

9. Following the decision of the May 10, 2018 IEP team that Student required a separate school placement, the Change in Placement team of the D.C. Office of the State Superintendent of Education (OSSE) began the process of identifying a suitable nonpublic school for Student. The OSSE location team identified several nonpublic

schools to which referrals for Student would be sent. Student had not interviewed at any of the schools because of being in abscondance. Testimony of Special Programs Manager. One of the schools identified by OSSE, Nonpublic School, made a conditional acceptance of Student, subject to Student's completing a school visit and the school's interview process. Based on its review of Student's IEP, evaluations and other documentation, the Nonpublic School staff knew that this was a student the school could serve. Testimony of Acting Principal. On July 17, 2018, the Change in Placement team convened a meeting to discuss progress in locating a special school for Student to attend. Special Education Attorney and Petitioner's Co-Counsel participated in the meeting. Testimony of Special Programs Manager. OSSE informed Special Education Attorney at the July 17, 2018 meeting that OSSE had identified a location of services that had offered a conditional acceptance for Student. Testimony of Special Education Attorney.

10. Student "returned from abscondance" on March 18, 2018 after about one year's absence. Student absconded again before the May 10, 2018 IEP team meeting. Student returned on May 17, 2018. Student was at City School for 3-4 days before absconding again. Student returned from this abscondance around July 16, 2018. Student is currently in Family Court pre-disposition detention. At a status meeting around July 19, 2018, Student's probation officer told Special Education Attorney that they would recommend that the court place Student, involuntarily, in a Private Residential Treatment Facility (PRTF) for 12 to 18 months. As of the due process hearing, the Court's disposition was still pending. If Student is placed by the Court in a PRTF, DCPS will continue to be Student's local education agency. Testimony of Special Education Attorney.

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

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, in this case DCPS, 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. Did DCPS deny Student a FAPE by developing an IEP in May 2018 which it could implement at City School and, therefore, DCPS failed to develop an IEP based on Student's unique needs and circumstances which the IEP team agreed required Student to attend a nonpublic separate school?

Petitioner's first claim is that DCPS failed to ensure that Student's initial May 10, 2018 IEP was appropriate, because by providing for 27.5 hours per week of Specialized Instruction, DCPS purportedly crafted the IEP to be capable of implementation at City School, instead of at a separate special education day school, as all members of the IEP team had agreed was Student's least restrictive environment (LRE).

The IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Z. B. v. District of Columbia*, 888 F.3d 515, 519 (D.C. Cir. 2018), quoting *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, — U.S. —, 137 S.Ct. 988, 1001, 197 L.Ed.2d 335 (2017). The IDEA contemplates a continuum of educational placements to meet the needs of students with disabilities. Depending on the nature and severity of the disability, a student may be instructed in regular classes, special classes, special schools, at the home, or in hospitals and institutions. See 5E DCMR § 3012, 20 U.S.C. § 1412(a)(5), 34 CFR § 300.115. In this case, all witnesses agreed that the May 10, 2018 IEP team decided, unanimously, that Student required placement in a separate full-time special education day school. Special Education Attorney’s meeting notes confirm that the IEP team decided that Student’s LRE was “100% outside general education” and Student’s placement would be a “separate school.” The IEP reflects this decision by identifying Student’s LRE placement category as “Separate school” and reciting in the Special Education and Related Services section that Student’s IEP is “100% specialized education outside of the general education setting.”

The IDEA requires that every special education placement location must be “based on the child’s IEP,” 34 C.F.R. § 300.116(b)(2), and be “capable of fulfilling the student’s IEP.” *Lofton v. District of Columbia*, 7 F.Supp.3d 117, 123 (D.D.C. 2013). *Joaquin v. Friendship Pub. Charter Sch.*, No. CV 14-01119, 2015 WL 5175885 (D.D.C. Sept. 3, 2015). By its clear terms, the May 10, 2018 IEP required a separate special education school for Student and no regular DCPS public school would be capable of fulfilling the IEP. Moreover, after the May 10, 2018 IEP team meeting, OSSE moved promptly to locate a full-time separate school for Student to attend and Student was

actually conditionally accepted by Nonpublic School, a separate special education day school. Nonpublic School's Acting Principal testified that the school was able to implement the May 10, 2018 IEP. (Whether Nonpublic School is capable of implementing the May 10, 2018 IEP has not been raised as an issue in this case.)

The May 10, 2018 IEP does contain a conflicting statement on the LRE page that the percentage of time that the student would be serviced outside the general education classroom is 86.15% – instead of 100% as decided by the IEP team. Case Manager explained that this was an error was caused by DCPS' SPED software, which generated the incorrect percentage number and inserted it on the LRE page. The error of inserting 86.15 percentage of time outside general education on the IEP's LRE page was, at worst, a procedural error.

Procedural violations may only be deemed a denial of FAPE if the procedural inadequacies—

- (i) Impeded the child's right to a FAPE;
- (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child;
or
- (iii) Caused a deprivation of educational benefit.

34 CFR § 300.513(a)(2). In this case, no one at DCPS or OSSE ever proposed to implement Student's IEP at any school, other than a full-time, nonpublic, special education day school. While, in response to Student's absconding from Student's residential placement, the D.C. Family Court may now place Student at a residential treatment facility, instead of the special education day school agreed to by the IEP team, this development does not cast doubt on the appropriateness of the IEP at the time it was developed. *See Z. B., supra*, 888 F.3d at 524 (The *Endrew F.* standard calls for

evaluating an IEP as of “the time each IEP was created” rather than with the benefit of hindsight.) The May 10, 2018 IEP expressly provides for Student to receive 100% specialized education outside of the general education setting and states that Student’s LRE is a “Separate school.” That is the educational setting which Student’s IEP team unanimously agreed upon and with which OSSE has endeavored to comply. I find that Student was not denied a FAPE by the conflicting, erroneous, statement in the IEP that Student would be serviced 86.15% outside the general education classroom. I conclude, therefore, that DCPS has met its burden of persuasion that the May 10, 2018 IEP was reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances. *See Andrew F., supra.*

2. Did DCPS deny Student a FAPE by failing to provide Student with an appropriate placement in May 2018, at City School, while its request to place Student was pending with OSSE, which (1) did not comply with Student’s least restrictive environment requirement for a nonpublic separate school and/or (2) could not implement Student’s May 2018 IEP if that IEP is found to be a separate school IEP?

After the May 10, 2018 IEP team meeting, OSSE began the process of identifying a suitable nonpublic school for Student to attend. On July 17, 2018 OSSE convened a meeting with the Guardian’s representatives to propose several schools able to meet Student’s IEP requirements. None of the private schools had formally admitted Student, because Student had absconded and had not been available to be interviewed. While the process of locating a suitable nonpublic school was underway, Student was supposed to attend City School. However, following the May 10, 2018 IEP meeting, Student absconded from Student’s residential placement and did not actually go to school for more than several days.

Petitioner contends that having Student attend City School, while OSSE located a

nonpublic separate school to meet Student’s IEP requirements, was an “inappropriate placement” resulting in denial of FAPE. However, there was no evidence that DCPS ever proposed City School as Student’s IEP placement. Moreover, as I explained in my July 12, 2018 decision denying Petitioner’s motion for summary judgment, the IDEA regulations require that “[a]s soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child’s IEP.” See 34 CFR § 300.323(c)(2) (emphasis supplied).

What Petitioner is arguing, in effect, is that DCPS failed to implement the May 10, 2018 IEP by not making a separate school available as soon as possible. In *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34 (D.D.C. 2016), the U.S. District Court analyzed when a failure to implement an IEP results in a denial of FAPE:

To establish a deprivation of educational benefits, a moving party “must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.”

Beckwith, 208 F. Supp. 3d at 49 . (quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000)). The burden of persuasion for failure-to-implement claims is on the Petitioner.

Petitioner offered no evidence that DCPS failed to ensure that the separate school required by Student’s IEP was made available to Student “as soon as possible.”

Following the May 10, 2018 IEP team meeting, there remained only some 17 days in DCPS’ 2017-2018 school year. Given the challenges of locating a suitable nonpublic school for Student, and OSSE’s prompt efforts to locate a separate school even though Student was in abscondance, I find that DCPS’ providing for Student to attend City School on an interim basis, until OSSE identified a suitable nonpublic school, was not a

failure to implement substantial or significant provisions of the May 10, 2018 IEP.
Petitioner has not met her burden of persuasion on this claim.

ORDER

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

All relief requested by the Petitioner herein is denied.

Date: August 5, 2018

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