

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
January 8, 2015

PETITIONER,
on behalf of STUDENT,¹

Date Issued: January 8, 2015

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution,
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 Petitioner (the Petitioner or 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 (DCMR). In her Due Process Complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by the failure of Respondent District of Columbia Public Schools (DCPS) to offer Student an appropriate residential placement at an October 23, 2014 Individualized Education Program (IEP) team meeting.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on October 27, 2014, named DCPS as respondent. The undersigned Hearing Officer was appointed on October 28, 2014. The parties met for a resolution session on November 7, 2014 and did not resolve the due process complaint. On November 12, 2014, 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 the undersigned Impartial Hearing Officer on December 16, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on a digital audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

On December 12, 2014, Petitioner's Counsel filed a Motion for Partial Summary Judgment on the issue of whether DCPS should be ordered to place Student in a residential facility. After hearing argument on the record, at the beginning of the due process hearing on December 16, 2014, I denied the motion.

Petitioner testified and called as witnesses DAY SCHOOL EDUCATION DIRECTOR, RESIDENTIAL SCHOOL ADMISSIONS COORDINATOR and EDUCATIONAL ADVOCATE. DCPS called LRE PROGRAM MANAGER as its only witness. Petitioner's Exhibits P-1 through P-35, with the exception of Exhibit P-31, were admitted into evidence, including Exhibits P-1, P-12, P-27 and P-28 which were admitted over DCPS' objections. Exhibit P-31 was withdrawn. DCPS' Exhibits R-1 through R-19 were admitted into evidence, including Exhibit R-16 which was admitted over Petitioner's objection. Petitioner's objection to Exhibit R-20 was sustained.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUE AND RELIEF SOUGHT

The following issue to be resolved, and relief requested, were certified in the November 12, 2014 Prehearing Order:

– Whether at an October 23, 2014 IEP meeting, DCPS denied Student a FAPE by failing to provide him with an appropriate educational placement in a residential or other more restrictive setting, as required to address Student’s educational and emotional needs.

For relief, Petitioner requests that DCPS be ordered to ensure that Student’s IEP is revised and that Student is placed, at public expense, in an appropriate residential program, with transportation and school visits for the parent. Petitioner also seeks an award of compensatory education for the denial of FAPE alleged in this case.

DCPS STIPULATION OF FACT

At the beginning of the due process hearing on December 16, 2014, DCPS, by counsel, stipulated, on the record, that as of the hearing date, placement in a residential program is necessary for Student.

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 is an AGE resident of the District of Columbia, where he resides with Mother. Testimony of Mother.
2. Student is eligible for special education and related services as a child with an Emotional Disturbance (ED) disability. Exhibit R-1.
3. Since the beginning of the 2013-2014 school year, Student has been

enrolled at Day School, a special education day program in suburban Maryland. Student was placed at Day School by DCPS. Testimony of Mother.

4. On February 26, 2014, Petitioner filed a prior due process complaint on behalf of Student (Case No. 2014-0101). In that proceeding, Petitioner contended that Student required a more restrictive setting than Day School and suggested that a residential setting was necessary. Following a due process hearing on May 1, 2014, Hearing Officer Michael Lazan issued a Hearing Officer Determination (the May 12, 2014 HOD) in which he concluded, *inter alia*, that Day School was a highly restrictive setting with caring staff who understood Student and took care of him adequately. The hearing officer held that Petitioner had not met her burden of proof to establish that Student needed a residential setting and denied Petitioner's claims with prejudice. Exhibit R-2.

5. Since the beginning of the current 2014-2015 school year, Student's problem behaviors at Day School have increased in intensity and frequency, and have been, at times, dangerous and aggressive. The school's efforts to address these behaviors, including providing a 1:1 dedicated aide, a school-wide behavior system, and incentive programs at school and on the school bus have worked at times, but not worked at other times. Testimony of Education Director.

6. On October 7, 2014, Educational Advocate wrote DCPS PROGRESS MONITOR by email, on behalf of Mother, to state that Mother, the Day School educational team and outside support workers were very concerned about Student's behavior and educational progress and that they all believed Student needed a more restrictive educational environment. Educational Advocate attached to the email letters from Student's psychiatrist and his social worker, which endorsed Student's need for a residential placement. Exhibits P-26, P-13, P-14.

7. An IEP team meeting was convened for Student on October 23, 2014. Mother and Educational Advocate attended the meeting. Exhibit P-16. At the meeting, the Day School representatives informed DCPS for the first time that the school could no longer handle Student because of his behaviors. Testimony of Program Director. Progress Monitor undertook to make a referral to the DCPS LRE team to complete an assessment of Student to determine if a residential placement was warranted. Exhibit R-4. Educational Advocate voiced concerns about how long this process would take. Exhibit P-16.

8. When a referral is made to DCPS for a more restrictive setting for a student, the LRE team is tasked with going to the school to observe the student, interview staff and to make a setting recommendation to the Local Education Agency (LEA) representative. On November 10, 2014, LRE Program Manager went to Day School to obtain information concerning Student. She was unable to observe Student because he was not at school that day. The LRE Program Manager later held a telephone conference call with a DC Department of Behavioral Health psychiatrist to get his recommendation. Mother participated in the conference call. Testimony of LRE Program Manager.

9. Petitioner's Counsel filed the due process complaint in this case on October 27, 2014. At the November 7, 2014 resolution meeting for this case, DCPS informed the parent that it was working through the process of determining the appropriate placement for Student and requested the parent to complete Psychiatric Residential Treatment Facility (PRTF) forms. Mother completed and returned the PRTF forms on November 21, 2015. Exhibit R-10.

10. DCPS has secured Student's admission at SOUTHEAST RESIDENTIAL CAMPUS, a licensed specialty hospital, with locations in Florida and Georgia, treating

children ages 5 through 17.² Testimony of LRE Program Manager, Exhibit R-19.

11. On November 25, 2014, a follow-up IEP team meeting for Student was convened. Mother and Petitioner's Counsel attended the meeting. Different residential programs were discussed at the meeting. It was concluded that the IEP team would meet to determine the location of services for Student. Exhibit P-32.

12. Since approximately October 26, 2014, Mother has not sent Student back to Day School due to her concerns about his behavior issues. Testimony of Mother.

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 normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR 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

- Did DCPS deny Student a FAPE by failing, at the October 23, 2014 IEP meeting, to provide him with an appropriate educational placement in a residential or other more restrictive setting, as required to address his educational and emotional needs?

In this case, DCPS has stipulated that Student's IEP placement in a residential program is now necessary. The only issue remaining to be determined is whether DCPS denied Student a FAPE by not offering a residential placement at the October 23, 2014

² The suitability of Southeast Regional Campus is not an issue in this case. *See* November 12, 2014 Prehearing Order.

IEP meeting. DCPS maintains that it was first informed at the IEP meeting that Day School could no longer manage Student and that it has timely moved forward with assessing Student's need for, and identifying, a suitable residential placement.

Under the IDEA, DCPS is obligated to devise IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C.Cir.1991). Since the beginning of the 2013-2014 school year, Student had been placed by DCPS at Day School, a special education day school, which is one of the more restrictive settings on the IDEA continuum of special education placements. *See* 34 CFR § 300.115(b). In the May 12, 2014 HOD, Hearing Officer Lazan concluded that the parent had not established why a residential setting would be better for Student than Day School. In the present case, Petitioner has not established that prior to the October 23, 2014 IEP meeting, DCPS had cause to believe that Student required a more restrictive setting. At the October 23, 2014 IEP meeting, Day School staff informed DCPS, for the first time, that it could no longer handle Student because of his behaviors. At the meeting, the DCPS representative undertook to make a referral to the DCPS LRE team to complete an assessment of Student to determine if a residential placement was warranted.

Petitioner objected to DCPS' conducting an LRE assessment instead of immediately agreeing, at the IEP meeting, to place Student at a residential facility. However, the LEA's assessment was in accord with the IDEA's LRE requirement. The IDEA expressly mandates that disabled students be educated in the least restrictive environment to the maximum extent appropriate, 20 U.S.C. § 1412(a)(5). A residential placement may be appropriate if the full-time placement is considered necessary for

educational purposes, but not if the residential placement is a response to medical, social or emotional problems that are segregable from the learning process. *See McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C.Cir.1985). An LEA must consider less restrictive alternatives before placing a student in a residential facility. *See, e.g., Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 132 (residential placement is not appropriate when lesser restrictive placements can adequately meet a student's needs.) I find that it was appropriate for DCPS to conduct an LRE assessment and that DCPS did not deny Student a FAPE by not immediately agreeing to place him in a residential facility at the October 23, 2014 IEP meeting.

Neither was the time period needed by DCPS to assess Student and identify a suitable residential placement unreasonable. The IDEA requires prompt resolution of disputes involving the educational placement of students with disabilities. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254 (D.D.C.2005) ("Though vague, the interpretation of the IDEA requiring reasonableness shows that prompt resolution of disputes involving the educational placement of learning disabled children is imperative." *Id.* at 259-260.) Here, DCPS required less than 50 days to offer a specific residential placement for Student after the October 23, 2014 IEP meeting. During this period, DCPS assessed Student's need for a residential placement, obtained guidance from an outside psychiatrist, referred Student to potential residential facilities and secured Student's admission at Southeast Residential Campus. This was not an "undue delay."³ *Cf. Herbin, supra* at 259 (In light of the lack of statutory guidance, reevaluations should be conducted in a reasonable period of time, or without undue delay, as

³ Petitioner's filing of her due process complaint only four days after the October 23, 2014 IEP meeting precluded DCPS from assessing Student's least restrictive environment and offering a residential placement before the complaint was filed.

determined in each individual case.) I conclude that Petitioner has not established that DCPS denied Student a FAPE. Therefore, I must deny the prospective placement and compensatory education remedies requested by Petitioner.

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: January 8, 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).