District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 First Street, N.E.
Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parent, through Student,[1]	)	
Petitioner,	)	**Room: 112**
	)	**Hearing: May 25, 2018**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0030**
DCPS,	)	**Issue Date: June 4, 2018**
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case brought by the Petitioner, who is the parent of the student (the "Student"). A Due Process Complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on February 18, 2018. A response was filed by Respondent on February 16, 2018. The resolution period ended on March 10, 2018.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

A prehearing conference call was held with this Hearing Officer on March 19, 2018. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, counsel for

[1] Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

Respondent, appeared. A prehearing conference order was issued on March 23, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case.

A hearing date was originally set for April 19, 2018. Petitioner sought a continuance because documents had not been provided to her. There was no opposition, and the adjournment was granted. On April 23, 2018, Respondent filed a motion for a continuance on consent. This motion was to extend the timelines because Respondent had not provided Petitioner with promised documentation that was necessary for the litigation. As a result, a new hearing date was set for May 25, 2018.

There was one hearing date: May 25, 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 1-26. There were no objections. Exhibits 1-26 were admitted. Respondent moved into evidence Exhibits 1-30. There were objections to Exhibits 2, 4, 6-12, 15, 17, 18, 20, 21, 23, 24, and 26. These objections were overruled with respect to all exhibits and parts thereof, except for page 2 of Exhibit 18. Exhibits 1-30, except for R-18-2, were admitted. Petitioner presented as witnesses: Petitioner. Respondent presented no witnesses. At the close of testimony, both sides presented oral closing statements. Both sides presented optional supplemental emails on May 30, 2018.

IV. Credibility.

Petitioner presented credible testimony that was consistent with documentation in the record.

V. Issues

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

1. Did Respondent fail to provide the Student with an educational placement/location of services from May, 2016, through May, 2017, after the issuance of a Hearing Officer Determination ("HOD")? If so, did Respondent deny the Student a Free and Appropriate Public Education ("FAPE")?

2. Did Respondent provide the Student with an inappropriate Individualized Education Program ("IEP") on May 24, 2016? If so, did Respondent act in contravention of the principles enunciated in such cases as Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017)? If so, did Respondent deny the Student a FAPE?

Petitioner indicated that the IEP does not prescribe: a) a quiet environment; b) a class with other students with vision impairments; c) a program designed for children with multiple disabilities, including vision impairments; d) a program in an environment "rich in Braille" and other tactile instructional formats; and e) the opportunity for recreational activities designed for blind students.

3. Did Respondent provide the Student with an inappropriate educational placement at School B in or about May, 2017? If so, did Respondent act in contravention of the principles enunciated in such cases as Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

Petitioner indicated that School B: a) is not quiet; b) would provide a classroom that would include no other students with vision impairments; c) is designed for students with disabilities other than the Student's disabilities; d) does not provide an environment

rich in Braille and other tactile instructional formats; and e) does not provide the opportunity for recreational activities designed for blind students.

VI. Findings of Fact

1. The Student is a blind X-year-old who has a genetic condition called anophtalmia/micophtolmia syndrome, which caused the Student to have an abnormally small left eye and no eyeball in the right eye. The Student is currently eligible for services. The Student has not attended school since approximately two weeks into the 2014-2015 school year, when the Student was placed in a self-contained program at School C. Petitioner withdrew the Student from that school because of an alleged assault. (R-13-8; R-18-4)

2. The Student has extensive delays in regard to cognitive development and requires extensive repetition to be able to work on math concepts. In reading, the Student functions on a very low level, with the Student reading in Braille. The Student has a difficult time with Braille because of limited movement in the Student's wrists. (R-18-6)

3. On May 12, 2014, a psychological evaluation of the Student was conducted by School A, which is a school that services blind and deaf students. This school is located in a neighboring state, far away from the Student's home in the District of Columbia. The evaluation found that the Student was functioning well below age and grade level in intelligence, and recommended, among other things, a functional academic program that would build the Student's independent living skills and pre-vocational skills. Petitioner was encouraged to visit schools for the blind. (R-27)

4. On March 11, 2016, Hearing Officer Peter Vaden ruled that DCPS denied the Student a FAPE by failing to convene an IEP team after the parent sought a change of

placement following an alleged assault, and by failing to revise the Student's IEP for the 2015-2016 school year. Hearing Officer Vaden ordered an updated IEP and new evaluations, but denied the request for compensatory education without prejudice. (R-13)

5. The Student's IEP dated May 24, 2016, contained goals in reading, writing, math, adaptive/daily living skills, vision, health/physical, and motor skills/physical development. It recommended Specialized Instruction outside general education for 24.5 hours per week, with adaptive physical education (270 minutes per month), occupational therapy (240 minutes per month), orientation and mobility services (360 minutes per month), and consultation services (120 minutes per month). The Student received a dedicated aide and assistive technology, including an electronic braille writer and a cane. Additionally, the Student was recommended for a location with minimal distractions, among other classroom accommodations. Extended School Year services were also recommended. (R-18)

6. For the 2016-2017 school year, the Student was assigned to School B. School B's self-contained program is designed for students with intellectual disabilities and autism. It is not a quiet environment. Each classroom has about twenty students. The program has not provided services for students with vision impairments in recent years. The school had no vision instruction available at the time of the October, 2016, IEP meeting. The program planned to accommodate the Student by providing a vision specialist who would work with the Student to try to adapt the program materials for the Student. (P-19-19-32, P-21-117-118, 120, 122; Testimony of Petitioner)

7. However, Petitioner would not send the Student to School B because she felt that the school was inappropriate for the Student. During this school year, the

Student received vision services three times a week, for an hour per session; special education services once a week, for 2-3 hours; adaptive physical education for one hour per week; and occupational therapy twice a week, for an hour per session. (R-15; R-21-6; Testimony of Petitioner)

8. An IEP meeting was held for the Student on October 21, 2016. The IEP largely recommended the same program referenced in the May 24, 2016, IEP, except adaptive physical education was reduced by 240 minutes per month, orientation and mobility services were increased to 480 minutes per month, and consultation services were eliminated.

9. On August 14, 2017, United States District Court Judge Amit P. Mehta issued a decision on the appeal of Hearing Officer Vaden's HOD. Judge Mehta remanded the matter back to the Office of Dispute Resolution to conduct a fact-specific inquiry to determine the amount of compensatory education owed to the Student. (P-3-8)

10. For the 2017-2018 school year, the Student receives vision services with a vision specialist twice a week, for an hour per session. Petitioner is paying for such services with her own money. Petitioner did not contact DCPS to ask what the school placement would be for the 2017-2018 school year, and therefore did not know what the Student's school placement was. (Testimony of Petitioner)

11. On November 10, 2017, on remand from Judge Mehta, Hearing Officer Vaden ordered DCPS to evaluate the Student, through School A, with a psychological evaluation, occupational therapy evaluation, adaptive physical education evaluation, and orientation and mobility assessments. (R-3)

12. In February or March, 2018, DCPS asked the Petitioner for consent to perform these evaluations. Petitioner provided such consent. (Testimony of Petitioner)

VII. Conclusions of Law

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).

The FAPE issues in this case involve Respondent's failure to provide an appropriate IEP and school placement. Accordingly, Petitioner is obligated to establish a *prima facie* case on these issues. Thereafter, if the *prima facie* case is established, the burden of persuasion is on Respondent. In this record, it cannot be fairly argued that Petitioner did not present a *prima facie* case, since Petitioner called the only witness in the case, who testified that the Student's IEPs and the recommended school setting were inappropriate. This contention was supported by documentation in the record, and DCPS did not argue that Petitioner did not present a *prima facie* case. Accordingly, the burden in this proceeding is on the school district.

1. Did Respondent fail to provide the Student with an educational placement/location of services from May, 2016, through May, 2017, after the issuance of an HOD? If so, did Respondent deny the Student a FAPE?

2. Did Respondent provide the Student with an inappropriate IEP on May 24, 2016? If so, did Respondent act in contravention of the principles enunciated in such cases as Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017)? If so, did Respondent deny the Student a FAPE?

3. Did Respondent provide the Student with an inappropriate educational placement at School B in or about May, 2017? If so, did Respondent act in contravention of the principles enunciated in such cases as Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006)? If so, did Respondent deny the Student a FAPE?

An IEP developed through the Act's procedures must be reasonably calculated to enable the child to receive additional benefits. Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982). The IEP should be both comprehensive and specific, and targeted to the Student's "unique needs." McKenzie v. Smith, 771 F.2d 1527, 1533, D.C. Cir. 1985); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B)(the IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv)(the IEP must address the academic, developmental, and functional needs of the child). In 2017, the Supreme Court addressed a split amongst the circuit courts regarding what the IDEA means when it requires school districts to provide an "appropriate" level of education to children with disabilities. Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-I, 137 S. Ct. 988 (2017). In Endrew F., the Court held that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Id. at 1001. The Court made clear that the standard is "markedly more demanding than the 'merely more than de minimis' test" applied by many courts. Id. at 1000.

In S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the Court found that the measure and adequacy of an IEP decision must

be determined as of the time it was offered to the student. Citing to circuit court decisions, the Court found that an IEP should be judged prospectively to avoid "Monday morning quarterbacking." See Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990).

Most cases involving FAPE denial focus on the IEP, the "centerpiece" of the Act. Honig v. Doe, 484 U.S. 305, 311 (1988). Nevertheless, Petitioners may bring claims based upon an inappropriate placement in certain situations. Although the local education agency ("LEA") has some discretion with respect to school selection, that discretion cannot be exercised in such a manner as to deprive a student of a FAPE. Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006); Holmes v. District of Columbia, 680 F. Supp. 40 (D.D.C. 1988). Courts can accordingly rule that school assignments violate the IDEA if, for instance, the school contains an environment that allows bullying. Shore Regional High School Board of Education v. P.S., 381 F.3d 194 (3d Cir. 2004)(denial of FAPE based on the likelihood that a proposed placement would subject a student with an emotional disability to continued bullying because of his perceived effeminacy); M.L. v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005)(if a teacher is deliberately indifferent to the teasing of child with a disability and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied FAPE).

Petitioner testified at the hearing and contended, based on an observation, that School B is too chaotic an environment for her child. Petitioner also expressed her view

that the Student needs to be in an environment that is, in effect, a school for the blind, with teachers who are trained in techniques geared for the instruction of blind students and peers who are also blind.

Respondent, though bearing the burden on all three of these issues, presented no witnesses to show that the IEP and school placement were appropriate for the Student. Instead, Respondent relied on hearsay documents that contained little in the way of convincing affirmations that the subject IEP and placement were appropriate. In fact, the documentary record does not support DCPS on any of the issues in the Due Process Complaint.

Petitioner alleged that the IEP and the corresponding placement at School B do not prescribe or contain a quiet environment, which the Student requires. As Petitioner pointed out in closing argument, School B is not quiet, as was admitted by Respondent's staff in a 2016 IEP meeting. There is no dispute that the Student requires such an environment to be appropriately educated.

Petitioner alleged that the IEP and the corresponding placement do not prescribe and/or contain an environment "rich in Braille" and other tactile instructional formats. The record does not establish that the IEP and the corresponding placement prescribe and/or contain an environment that is "rich in Braille" and other tactile instructional formats, and there is no clear dispute that the Student requires such an environment.

Petitioner alleged that the IEP and the corresponding placement at School B do not prescribe the opportunity for recreational activities designed for blind students. The record does not establish that the IEP and the corresponding placement contain

opportunities for recreational activities for blind students, and again, there is no clear dispute that the Student requires such opportunities.

Petitioner alleged that the IEP and the corresponding placement at School B do not prescribe or contain a class for the Student to be educated with other students with vision impairment. Petitioner also alleged that the IEP and the corresponding placement at School B are not designed for students with multiple disabilities who have vision impairment. Notwithstanding Petitioner's contention to the contrary, DCPS did not admit to those contentions during the 2016 IEP meetings. Additionally, as DCPS pointed out, these recommendations were only suggested, not required, by a School A evaluator in May, 2014.

However, DCPS did not point to any documentation in support of its contention that the Student was able to benefit from a program in a self-contained special education classroom at School B. In fact, the record contains virtually no support for the contention that the Student would benefit from the program at School B recommended in the IEP. Respondent is therefore deemed to have denied the Student educational benefit, and therefore a FAPE, for the 2016-2017 and 2017-2018 school years.

RELIEF

Petitioner's closing argument referenced two main areas of relief, diverging from the relief requested in the Due Process Complaint and at the prehearing conference. In particular, Petitioner did not seek reimbursement for out-of-pocket expenses during the 2016-2017 and 2017-2018 school years, which were not proven in any event. Accordingly, it is appropriate only to consider the items of relief referenced in Petitioner's closing argument.

1. Compensatory Education.

Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate 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. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008)(compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award tailored to the unique needs of the disabled student"). A Petitioner need not "have a perfect case" to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011). Under the IDEA, if a student is denied a FAPE, a hearing officer may not "simply refuse" to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010). Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

A hearing officer must undertake a fact–specific exercise of discretion designed to identify those services that will compensate the student for that denial. Dist. of Columbia v. Oliver, No. 13–00215, 2014 WL 686860, at *4 (D.D.C. Feb. 21, 2014) (citing Walker v. Dist. of Columbia, 786 F.Supp.2d. 232, 239 (D.D.C.2011)) (internal quotation marks omitted); see also Dist. of Columbia v. Masucci, Nos. 13–1008, 97–1629, 2014 WL 331344, at *4 (D.D.C. Jan. 30, 2014).

The time span for the compensatory education referenced here encompasses almost two full school years. Since no compensatory education plan was offered, and no compensatory education expert was called as a witness, Petitioner seeks an "independent compensatory education evaluation." The independent evaluator would assess the evaluations mandated by Judge Mehta and ordered by Hearing Officer Vaden, then develop a plan on the extent of compensatory education necessary to provide remediation to the Student, consistent with Reid. Respondent suggested that an independent evaluator cannot calculate his/her own enforceable compensatory education award, but certainly an independent evaluator can come up with a plan to address the appropriate amount of compensatory education that should be provided.

Here, the appropriate course of action is to order that, within thirty days of the date that the evaluations mandated by Judge Mehta and ordered by Hearing Officer Vaden are completed, said evaluations shall be forwarded to an expert in determining educational services for students with blindness. Such expert shall have at least ten years of professional experience in determining or providing educational services for/to students with total blindness. The parties shall work together to select such expert, who must not have an actual or perceived bias that might favor one party. Such expert shall then recommend an appropriate compensatory education award for the 2016-2017 and 2017-2018 school years. Such recommendation shall then be submitted to DCPS for its consideration. DCPS then may choose to accept the evaluator's recommendation. If DCPS does not accept the recommendation, Petitioner may file a Due Process Complaint and seek to persuade a hearing officer that DCPS must provide the services recommended in the compensatory education evaluation.

2. Placement.

Given Petitioner's view that the Student requires a school specifically designed for blind students, and since there appears to be no school for blind students in or near the District of Columbia, Petitioner seeks an order requiring DCPS to "create" an educational setting that is specifically for blind students.

While the record does suggest that the Student may require such a placement, Petitioner did not call an expert witness to support her position on this issue. Moreover, Petitioner submitted no legal authority to support this request. Independent research conducted by this Hearing Officer also found no authority for the proposition that IDEA hearing officers should get involved in the creation of public educational systems, which are the function of LEAs, not hearing officers. 34 CFR Sect. 303.23(a)("local educational agency or LEA means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools").

Though not directly on point, it is also relevant to note the challenge in Diaz-Fonseca v. Puerto Rico, 451 F.3d 13 (1st Cir. 2006), where a parent sought broad changes to the educational system, including declaratory changes to the entire system of providing for physical therapy and parental participation for special education students. The court warned that "these declarations have potentially far-reaching effects on the special education system in Puerto Rico, as well as on the administrative law system there and

beyond." Id., at 40. Here, in a case where there was only one witness called and Petitioner relied on an evaluation from 2014 that only suggests that the Student be placed in a school for the blind, it would be improvident for this Hearing Officer to order DCPS to reshape its educational system to accommodate blind students.

ORDER

For the foregoing reasons:

1. Within thirty days of the completion of the evaluations required by Judge Mehta and Hearing Officer Vaden, said evaluations shall be forwarded to an expert in determining educational services for students with blindness. Such expert shall have at least ten years of professional experience in determining or providing educational services for/to students with total blindness. The parties shall work together, cooperatively, to select such expert. Such expert must not have an actual or perceived bias that might favor one party. Such expert shall then, within thirty days of receiving the evaluations, recommend an appropriate compensatory education award for the 2016-2017 and 2017-2018 school years. Such recommendation shall then be submitted to DCPS for its consideration. DCPS may then choose to accept the evaluator's recommendation. If DCPS does not accept such recommendation, Petitioner may file an action to present the compensatory education evaluation to a hearing officer, so that the hearing officer may then determine the appropriateness of that recommendation and issue an appropriate order;

2. Within twenty days of the completion of the evaluations ordered by Judge Mehta and Hearing Officer Vaden, the IEP team shall meet to discuss the findings of the evaluations and create an IEP for the Student for the 2018-2019 school year;

3. Petitioner's other requests for relief are hereby denied.

Dated: June 4, 2018

Michael Lazan
Michael Lazan, Esq.
Impartial Hearing Officer

Copies to:

Petitioner's Representative: Attorney A, Esq.
Respondent's Representative: Attorney B, Esq.
OSSE Office of Specialized Education
Office of Dispute Resolution

XIII. Notice of Appeal Rights

This is the final administrative decision in this matter. A party aggrieved by the findings and decision of a due process hearing may bring a civil action in any court of competent jurisdiction in accordance with 20 U.S.C. § 1415(I)(2). *See* 5-E DCMR Sect. 3031.5.

Dated: June 4, 2018

Michael Lazan
Impartial Hearing Officer