

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
June 15, 2020

Confidential

Parent on behalf of Student ¹)	Case No. 2020-0063
)	
Petitioner,)	Hearing Date: May 26, 2020
)	Conducted by Video Conference
v.)	
)	Date Issued: June 15, 2020
District of Columbia Public Schools)	
)	Terry Michael Banks,
Respondent.)	Hearing Officer

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the father of an X year-old student who is not currently enrolled in a school. On March 3, 2020, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing to provide an Individualized Education Programs (“IEP”) that would allow placement at Facility A. On March 17, 2020, DCPS filed *District of Columbia Public School’s Response to Parent’s Administrative Due Process Complaint Notice* (“*Response*”), denying the allegations in the *Complaint*.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 1400 *et seq.*, its implementing regulations, 34 C.F.R. Sect. 300 *et seq.*, Title

¹ Personally identifiable information is attached in the Appendix and must be removed prior to public distribution.

38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

PROCEDURAL HISTORY

Petitioner is the father of an X year-old student who is not currently enrolled in a school. On March 3, 2020, Petitioner filed the *Complaint* alleging that DCPS denied the student a FAPE by failing to provide an IEP that would allow placement at Facility A. On March 17, 2020, DCPS filed its *Response*, asserting that Facility A is not an appropriate placement for the student, that no local residential facility approved by the Office of the State Superintendent of Education (“OSSE”) has accepted the student, that DCPS has submitted admission referrals to eight residential facilities that have not been approved by OSSE, and it is prepared to provide services to the student in the home until an appropriate placement is found.

The parties participated in a resolution meeting on March 11, 2020 that did not result in a settlement. A prehearing conference was conducted by telephone on April 8, 2020, and the Prehearing Order was issued on April 10, 2020.

The due process hearing was conducted on May 26, 2020 by video conference. The hearing was open to the public, but only participants in the hearing logged into the video conference. Petitioner’s counsel disclosed Exhibits P1-P62 (“P:”) There were no objections and Petitioner’s Exhibits 1-62 were admitted into evidence. Respondent’s counsel disclosed Exhibits R1-R12 (“R:”) and offered R1-R7 and R9-R11 into evidence. There were no objections and Respondent’s Exhibits 1-7 and 9-11 were admitted.

Petitioner presented as witnesses in chronological order: Witness A, Petitioner, Witness B, and Witness C. Petitioner offered Witness A as an expert in Clinical Psychology without objection. Petitioner offered Witness B as an expert in Special Education and Special Education Programming without objection. Petitioner offered Witness C as an expert in Occupational Therapy without objection. Respondent presented as witnesses in chronological order: Witness D and Witness E. Counsel for the parties provided oral closing arguments at the conclusion of the testimony.

ISSUES

As identified in the *Complaint* and the *Prehearing Order*, the issues to be determined in this case are as follows:

Whether DCPS failed to provide a FAPE by failing to amend the student’s IEP to facilitate placement at Facility A.

FINDINGS OF FACT

1. Student is X-years-old, who is currently not attending a school.²

² *Complaint* at 1.

2. Student has past diagnoses of Schizophrenia, Mood Disorder, Attention Deficit Hyperactivity (“ADHD”), Conduct Disorder, Learning Disability, Major Depressive Disorder, Borderline Intellectual Functioning, and Eating Disorder.³

3. On December 8, 2017, Examiner A, Student’s primary psychiatrist at the time, recommended that Student be placed in a residential treatment facility.

[Student] is currently experiencing symptoms of schizophrenia that include visual and auditory hallucinations in addition to defiant behavior. Patient is extremely manipulative. Patient enjoys hurting animals. Patient hurts her/himself and blames others such as [Student’s] teachers and parents. Patient has a long history of stealing whenever [Student] is not watched. Patient was hospitalized in a children’s psychiatric ward from September 17, 2017 – September 29, 2017 for aggressive behavior and acute psychotic symptoms. Patient cut [Student’s] face badly and mutilated [Student] with burning water. Patient also states that voices in [his/her] head told [him/her] to do it and tell [him/her] to hurt [his/her] 10 year old brother. Patient was also suicidal. Patient also had hallucinations and cut [her/himself] while hospitalized. Patient must be observed at all times while in school, as [s/he] makes [her/himself] vomit whenever [s/he] gets the opportunity. Please have [him/her] go to the bathroom in the nurse’s room, as [her/his] eating disorder is extreme. Kindly be advised that patient will benefit and it is recommended for patient to be at a Residential treatment facility with a non-public (private) school with an intensive therapeutic setting.⁴

4. On April 9, 2018, Student was admitted to Facility B after displaying increasingly aggressive behavior and hallucinations instructing him/her to harm him/herself and others. Examiner B at Facility B recommended that s/he be placed in a residential treatment facility:

Despite multiple inpatient admissions, medication trials, and outpatient services, [Student] continues to have difficulties with symptoms of depression and features of psychosis, and continues to engage in self-injurious behaviors. [Student] has continued to endorse suicidal thoughts/thoughts of self-injury here on the inpatient psychiatric unit, and has required a single room throughout the admission, because [Student] has continued to have active thoughts of suicide, self-harm, and homicide toward others, secondary to the command auditory hallucinations that [s/he] reports. It has become clear that [Student’s] safety cannot be assured in an outpatient setting. Given [Student’s] poor response to outpatient treatment, the clear difficulties in maintaining [Student’s] safety in [his/her] home environment, and [Student’s] continued thought of self-harm/self-harm behaviors, this treatment team feels that

³ *Id.* at 5.

⁴ Petitioner’s Exhibit (“P:”) 6-1 at 70. The exhibit number and page are followed by the electronic page number in the disclosure in parentheses, i.e., P6:1 (70).

[Student] would benefit from further treatment in a residential treatment facility.⁵

5. On April 14, 2018, a Hearing Officer Determination (“HOD”) was issued that required DCPS to fund Student’s placement at School A instead of at a residential treatment facility as requested by Petitioner.⁶

6. On May 29, 2018, Examiner B completed a Psychiatric Evaluation of Student.⁷ Examiner B, a board-certified psychiatrist, interviewed Student on May 15, 2018, who was hospitalized at Facility B that time. On May 21, 2018, Student was admitted to the Partial Hospitalization Program (“PHP”) at Facility C, his/her seventh psychiatric hospitalization since September 2017, and was placed in an inpatient psychiatric ward after kicking a staff member in the groin. These hospitalizations were due to self-harm and auditory hallucinations urging Student to harm Student and others.⁸ The auditory hallucinations began at age [REDACTED] and has worsened to include choking and kissing others without warning and harming animals.⁹ Examiner C concurred with Examiners A and B that Student should be placed in a residential treatment facility to address his/her severe problematic behaviors and maximize his/her emotional and intellectual achievement. “Given the developmental deficits [Student] possesses, both behaviorally and intellectually, which have worsened over the past year due to [his/her] constant hospitalizations, it is my recommendation that [Student] be immediately placed in an appropriate residential setting, where [Student] can receive 24/7 monitoring, psychiatric care and educational assistance...” Examiner C diagnosed student with ADHD and Conduct Disorder, with rule-outs of Autism, Psychotic Disorder, Eating Disorder, and Schizophrenia.¹⁰

7. On June 7, 2018, Examiner D at Facility C recommended that Student be placed in a residential treatment center:

Since [his/her] admission, [Student] continues to demonstrate aggressive outbursts as well as continued episodes of self-harm despite being on a one to one staff and constant monitoring. [Student] has also engaged in purging behavior. Given [Student’s] history of severe behavioral dysregulation, aggression, continued auditory hallucinations, and self-harm, [Student’s] treatment needs are not able to be met long term in a less restrictive setting than a residential treatment center (RTC).¹¹

8. On September 28, 2018, an HOD was issued that required DCPS to place Student in an appropriate residential setting.¹²

⁵ P11:1 (86).

⁶ P53:16-17 (303-4).

⁷ P3:1 (35).

⁸ P3:1, 3 (35, 37).

⁹ *Id.* at 5 (39).

¹⁰ *Id.* at 5,6 (39-40).

¹¹ P12:1 (88).

¹² P54:15 (326).

9. On December 20, 2018, Student was admitted to Facility F, an RTC.¹³

10. On September 27, 2019, a meeting was held between DCPS and staff of Facility F. The staff indicated that Student's behaviors were a "clear and present threat" to him/herself and others, and that s/he would be discharged.¹⁴

11. On October 10, 2019, DCPS conducted the annual IEP review.¹⁵ The IEP prescribed 27.75 hours per week of specialized instruction outside general education, 90 minutes per week of behavioral support services ("BSS"), 60 minutes per week of speech and language services, 30 minutes per week of occupational therapy ("OT") services, 30 minutes per week of physical therapy ("PT") services, and a dedicated aide "to address [his/her] academic, social/ emotional and behavioral needs."¹⁶ The IEP noted that the least restrictive environment, an RTC, was mandated by a Hearing Officer.¹⁷

12. Student was discharged from Facility F on November 1, 2019 to Petitioner's care pending residential placement.¹⁸

13. Petitioner filed a due process complaint on November 4, 2019 alleging that DCPS had failed to implement Student's IEP after the discharge from Facility F, and failed to provide Student with an appropriate placement after the discharge.¹⁹

14. On November 8, 2019, Student received crisis services from Facility D, which recommended that Student receive a psychiatric evaluation at Facility B.²⁰ Facility B examined and released Student that day; no report was prepared.²¹

15. On November 12, 2019, Student received crisis services from Facility D, which recommended that Student receive a psychiatric evaluation at Facility E.²² Student was admitted to Facility E on November 12, 2019, presenting with suicidal ideation and increased auditory hallucinations.²³ S/he was discharged on December 2, 2019 with the following discharge summary:

Patient continues to need redirection around appropriate social skills, poor boundaries. Patient at baseline functioning. [S/he] is future oriented, looking forward to going home with dad. Denies SI/HI/AVH. Patient did not demonstrate any psychotic behaviors or responding to internal stimuli

¹³ P55:5 (335).

¹⁴ *Id.* at 6 (336); *see* P23:5 (158).

¹⁵ P1.

¹⁶ *Id.* at 15 (23).

¹⁷ *Id.* at 16 (24).

¹⁸ P55:7-8 (337-8).

¹⁹ *Id.* at 1,3 (331, 333).

²⁰ P13:2 (91).

²¹ P14.

²² P15:2 (105).

²³ P16:6 (113).

throughout [his/her] hospitalization. Psychological testing was also completed and ruled out autism spectrum disorder.²⁴

Facility E indicated that Student could return to school the next day.²⁵

16. On January 3, 2020, an HOD was issued that provided Student the following relief: (1) DCPS shall fund 75 hours of compensatory tutoring, to be provided with a one-on-one behavioral aide together with 30 hours of compensatory behavioral support services and fifteen hours of compensatory occupational therapy, physical therapy, and speech and language services, all such services to be used by June 30, 2021, (2) DCPS shall submit applications to all known, appropriate, non-approved (by the Office of the State Superintendent of Education) residential settings that can implement the Student's IEP, including all non-approved residential settings suggested by Petitioner, until the Student is placed at an appropriate residential setting, (3) DCPS shall provide student the following services until s/he is placed in a residential setting: for the week of January 6, 2020 Student shall receive three hours of counseling by a certified social worker, after January 13, 2020, Student shall receive three hours per weekday of individual tutoring by a certified special education teacher together with a one-on-one behavior technician/aide; three hours per week of counseling; one hour per week of occupational therapy and physical therapy, and 30 minutes per week of speech and language therapy. "Such plan must be in effect unless Respondent receives a formal written correspondence from a duly licensed psychiatrist which states that the Student is currently unavailable for instruction."²⁶

17. On January 7, 2020, DCPS inquired as to Student's availability for services, indicating its understanding that Student was in Facility E.²⁷

18. On January 8, 2020, DCPS confirmed that it had been notified of Student's admittance to Facility C. "We have reached out to confirm his/her availability to provide services. Once [Facility C] responds, we will provide another update." The email also inquired as to whether Petitioner had selected independent providers for the compensatory education services awarded in the HOD. DCPS attached an authorization form to allow DCPS to "communicate directly with [Facility C] regarding the implementation of services."²⁸

19. On or about January 8, 2020, DCPS provided Petitioner a letter authorizing him to procure the independent compensatory education services ordered in the January 2020 HOD. Petitioner's counsel objected to the provision prohibiting such services during normal school hours. On January 10, 2020, DCPS provided an updated letter of authorization for Student that did not have the time restriction of the previous letter. ²⁹

²⁴ *Id.* at 7 (114)

²⁵ *Id.* at 4 (111).

²⁶ P55:17, 18 (347-8).

²⁷ P24:11 (170).

²⁸ *Id.* at 10 (169).

²⁹ Respondent's Exhibit ("R:") 4 at 14. The exhibit number is followed by the electronic page number in the disclosure, i.e., R4:14.

20. The January 8, 2020 email referenced in the previous paragraph also included DCPS' request for "an update once [Petitioner] has spoken with [Facility C] regarding the implementation of services. It is my understanding [Petitioner] has chosen not to complete the Consent Form which would help streamline the process for the implementation of services."³⁰

21. The January 8, 2020 email from Petitioner's counsel referenced in paragraph 19 also included "a list of possible placements not on the OSSE list, which the parent has researched so far and would like DCPS to send packets out to per the HOD." The list included eight facilities.³¹ DCPS acknowledged receipt on January 10, 2020.³²

22. On January 14, 2020, Petitioner signed an Authorization for Facility C to allow DCPS to receive verbal communications only, and limited to education records.³³ This level of authorization would not allow DCPS to provide services to Student on Facility C premises.³⁴

23. On January 22, 2020, Petitioner's counsel notified DCPS that Student was on the waiting list at Facility G.³⁵

24. On January 22, 2020, DCPS notified Petitioner that it had send referrals to four schools suggested by Petitioner³⁶ that do not have a Certificate of Approval ("COA") from OSSE: School B, School C, School D, and School E. DCPS stated that it would not send referrals to the following facilities suggested by Petitioner: Facility H ("not a residential placement"), Facility I ("there is no school component"), Facility J ("there is no school component"), Facility K ("there is no school component"), Facility L ("not a residential placement"), Facility M ("not a residential placement"), and Facility N ("not a residential placement"). DCPS indicated that it had also sent referrals to School F and School G.³⁷

25. On January 23, 2020, Facility C notified DCPS that Student was receiving treatment there, and that "educational services are not triggered until the three week time frame..."³⁸

26. On January 24, 2020, DCPS sent a referral to School A, an RTC.³⁹

27. On January 29, 2020, Examiner E issued a note stating that "[Student] is not able to receive tutoring and related services at this time due to [his/her] mental illness."⁴⁰

³⁰ *Id.*; P25:1 (173).

³¹ R:15-24.

³² R4:14; P25:1 (173).

³³ R10:40; P26:1-2 (187-8); P27:1 (190).

³⁴ Witness E's testimony.

³⁵ P28:1 (192).

³⁶ P28:3-4 (194-5).

³⁷ P28:1-2 ((192-3).

³⁸ R5:27; Witness E's testimony.

³⁹ P31:5 (222); *see* P31:1 (218), P39:5 (243).

⁴⁰ P18:2 (124).

28. Later on January 29, 2020, Student was admitted to Facility E for command auditory hallucinations telling him/her to kill him/herself and others. At Student's discharge on February 6, 2020, s/he was "Stable. Patient is at his/her baseline and behaving well on the unit. No psychosis or behavioral issues during this hospitalization." The diagnoses were disruptive mood dysregulation disorder and major depressive disorder, recurrent, severe with psychotic features.⁴¹

29. On February 19, 2020, Facility A accepted Student.⁴²

30. On February 26, 2020, Facility A notified DCPS that it could not approve Student's IEP or provide certain services prescribed in the IEP, particularly OT, PT, and a dedicated aide; it would accept Student if the IEP were amended to eliminate these services.⁴³ DCPS notified Petitioner's counsel by email on February 28, 2020, and indicated that "Its not DCPS recommendation that we amend the IEP. The school sent over a denial letter (please see the attachment). I will continue to follow up on the referrals..."⁴⁴

31. On February 28, 2020, DCPS authorized Petitioner to get independent OT and PT evaluations because Student was not in a school where DCPS could evaluate [REDACTED].⁴⁵

32. On February 28, 2020, Petitioner's counsel notified DCPS that "I have spoken with the father. He is willing to waive the implementation of the PT, OT, and dedicated aide, at least on an interim basis – if it means that the student can be placed immediately."⁴⁶

33. On February 28, 2020, Witness D notified Petitioner that "DCPS is prepared to put Behavior Support Services in place at the home on Monday March 2, 2020. What time will the parent and student be available on March 2, 2020 for in home services?"⁴⁷ Petitioner replied, "We are also taking a vacation out of town until my [son/daughter] is placed so that my family can support me in taking care of many of [Student's] psychiatric needs... I know you're sending the IEE's for the OT and PT evaluations. Thank you for that."⁴⁸ Petitioner was reluctant to have Student hospitalized again due to the COVID-19 virus.⁴⁹ Later in the day, Petitioner replied:

I really want [Student] to attend [Facility A] and to waive the OT/PT and dedicated aid. Can you please amend his/her IEP to reflect that and send me the ICPC to sign?

⁴¹ P17:1 (119).

⁴² P34:1 (229); R11:49-50; P32:1 (225).

⁴³ R11:42.

⁴⁴ P45:1 (261).

⁴⁵ Witness D's testimony.

⁴⁶ P46:1 (264).

⁴⁷ R6:29.

⁴⁸ P49:1 (272).

⁴⁹ Petitioner's testimony.

FYI – we are taking a vacation to be with family until s/he can hopefully start at [Facility A] next week. I’m hoping.⁵⁰

On March 2, 2020, Petitioner forwarded the January 29, 2020 email indicating that Student was hospitalized at Facility E earlier that day, and attached the note from Examiner E stating that Student was not able to receive services due to his/her mental illness.⁵¹

34. On April 10, 2020, Student was admitted to Facility G subject to the submission of nine specific documents.⁵² Student is on the waiting list at Facility G and School B.⁵³ Neither facility was accepting new students at the time of the hearing due to COVID-19 restrictions.⁵⁴

35. Student has received no educational services since the January 3, 2020 HOD.⁵⁵

36. Witness B testified that the period of harm, due to DCPS failing to provide services, begins on February 28, 2020.⁵⁶

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer’s legal research, the Conclusions of Law are as follows:

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.⁵⁷

The issues in this case involve the appropriateness of Student’s IEP and placement. Therefore, the burden of persuasion is on DCPS as to these issues presented.⁵⁸

⁵⁰ R7:33.

⁵¹ R7:30-31.

⁵² R2:5.

⁵³ Petitioner’s testimony.

⁵⁴ Witness D’s testimony.

⁵⁵ Petitioner’s testimony.

⁵⁶ Witness B’s testimony. *See also*, P56:8 (359).

⁵⁷ D.C. Code Sect. 38-2571.03(6)(A)(i).

⁵⁸ *Schaffer v. Weast*, 546 U.S. 49 (2005).

Whether DCPS failed to provide a FAPE by failing to amend the student's IEP to facilitate placement at Facility A.

Despite the volume of oral and documentary evidence presented about Student's unavailability for services during January and February 2020, the *Complaint* does not allege a violation of the January 3, 2020 HOD. Had Petitioner made such claim, it would have constituted a second issue, whether DCPS violated the HOD, as to which Petitioner would have had the burden of persuasion as to Student's availability for services. Moreover, Petitioner's counsel's closing argument was focused on DCPS' failure to accede to Facility A's insistence on a revised IEP, although she also argued that DCPS "never attempted to comply" with the HOD in a timely fashion. However, the allegations in the *Complaint*, and confirmed in the Prehearing Order, are limited to the allegation that DCPS did not facilitate Student's acceptance to Facility A by amending Student's IEP. This is consistent with Petitioner's compensatory education plan, in which it is asserted that the period of harm began on February 28, 2020, the date DCPS notified Petitioner's counsel that it would not eliminate services on Student's IEP to ensure his/her acceptance by Facility A.

The regulations provide four specific reasons for an IEP team to revise an IEP: (1) lack of progress toward goals, (2) the result of reevaluations, (3) information about the student provided by the parent, and (4) the child's anticipated needs.⁵⁹ Reevaluations must be conducted if the LEA determines that "the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child's parent or teacher requests a reevaluation."⁶⁰ DCPS argues that it could not remove services from a current IEP without conducting reevaluations in the areas related to those services.

In *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student's performance from year to year:

When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly... awaiting the time when they were old enough to drop out...' The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."⁶¹

Student's particular circumstances include a long history including, but not limited to aggression, impulsivity, irritability, suicidal ideation, homicidal ideation, and auditory hallucinations. Student's most recent IEP, the appropriateness of which was not challenged in the January 3, 2020 HOD,⁶² was developed on October 10, 2019 and prescribed 27.75

⁵⁹ 34 C.F.R. §300.324(b).

⁶⁰ 34 C.F.R. §300.303(a).

⁶¹ 137 S.Ct. at 988, 1000-01 (2017).

⁶² P55:3 (333).

hours per week of specialized instruction outside general education, 90 minutes per week of BSS, 60 minutes per week of speech and language services, 30 minutes per week of OT services, 30 minutes per week of PT services, and a dedicated aide “to address [his/her] academic, social/ emotional and behavioral needs,” in a RTC.⁶³ Petitioner argues that being in a RTC was the paramount requirement, and DCPS should have been willing to remove the OT services, PT services, and the dedicated aide to make the placement happen.

Instead, DCPS took steps to reevaluate Student in the areas of OT and PT to support removing those services from the IEP, by authorizing Petitioner to obtain independent examinations. Petitioner understood why DCPS wanted new evaluations: “I know you’re sending the IEE’s for the OT and PT evaluations. Thank you for that,”⁶⁴ but was willing to eliminate these services without further evaluations to effectuate the acceptance by Facility A.⁶⁵

Petitioner cites *Schiff v. District of Columbia*⁶⁶ for the proposition that the failure to provide a placement is not excused even if the LEA took “prompt action” to find a new placement. The student in *Schiff*, like the student herein, had serious behavioral problems that made it difficult for DCPS to find a facility willing to accept him. The court stated that this was no excuse; IDEA contemplated students with severe anti-social behavior, but still requires LEAs to provide placements for them. The issue here is not whether DCPS failed to provide a placement, but whether it should have agreed to eliminate services from Student’s IEP to facilitate placement at a particular facility that could not implement the IEP. Petitioner argued that Student has not required OT services since an OT evaluation opined as much on February 6, 2016.⁶⁷ However, Student’s subsequent IEPs continued to include OT services, with Petitioner’s concurrence, up to and including the most recent IEP on October 10, 2019. Petitioner’s only justification for eliminating PT and the dedicated aide from the IEP is that for ■■■, the residential treatment is the most important feature of the services provided by Facility A, and DCPS should have been changed the IEP to reflect that imperative. While Petitioner’s expert psychiatric Witness A also testified that Student required immediate placement in an RTC, on cross examination, Witness A conceded that an IEP should not be modified to meet the capabilities of an otherwise inappropriate placement.

The regulations require the following in the development of an IEP:

(a) Development of IEP—

(1) General. In developing each child's IEP, the IEP Team must consider—

- (i) The strengths of the child;
- (ii) The concerns of the parents for enhancing the education of their child;
- (iii) The results of the initial or most recent evaluation of the child; and

⁶³ *Id.* at 15 (23).

⁶⁴ P49:1 (272).

⁶⁵ R7:33.

⁶⁶ 2019 WL 5683903, C.A. No. 18-cv-1382 (D.D.C. 2019).

⁶⁷ P2:4 (33).

- (iv) The academic, developmental, and functional needs of the child.
- (2) Consideration of special factors. The IEP Team must—
 - (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;
 - (ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP...
 - (iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and
 - (v) Consider whether the child needs assistive technology devices and services.⁶⁸

Thus, the regulations require an IEP to be developed through collaboration between members of the IEP team, including the parent and school officials. Petitioner would have me find that DCPS was unreasonable in refusing to change the IEP to accommodate the capabilities of Facility A rather than to retain Student's established service requirements. It was not unreasonable for DCPS to insist upon OT and PT reevaluations before removing those services from the IEP. It was also incumbent upon DCPS to convene an IEP team meeting to discuss the efficacy of removing OT, PT, and dedicated aide services before removing those services from the IEP, the appropriateness of which was never questioned before Facility A indicated it could not provide those services. That IEP has now become a nuisance, complicating Student's admission to the only RTC with an opening. When Petitioner approved the October 10, 2019 IEP, he did so with the understanding that a dedicated aide was required even though the placement was in an RTC. While Petitioner offered testimony that OT services were not needed, he did not testify that a dedicated aide was unnecessary. Student's hospitalizations since the January 3, 2020 HOD for suicidal and homicidal ideation, and his/her continued unavailability for services, suggest that the need for a dedicated aide has not diminished.

Two business days after the issuance of the January 3, 2020 HOD, DCPS inquired as to Student's availability for services.⁶⁹ The next day, it learned that Student was a patient at Facility C.⁷⁰ On January 22, 2020, DCPS notified Petitioner that it had sent referrals to four schools suggested by Petitioner⁷¹ as well as additional referrals to School F and School G.⁷² Student remained an in-patient at Facility C on January 23, 2020, and Facility C notified DCPS "educational services are not triggered until the three week time frame..."⁷³ On January 24, 2020, DCPS sent a referral to School A, an RTC.⁷⁴ On January 29, 2020, Examiner E issued a note stating that "[Student] is not able to receive tutoring and related

⁶⁸ 34 C.F.R. §300.324.

⁶⁹ P24:11 (170).

⁷⁰ P24 at 10 (169).

⁷¹ P28:3-4 (194-5).

⁷² P28:1-2 ((192-3)).

⁷³ R5:27; Witness E's testimony.

⁷⁴ P31:5 (222); *see* P31:1 (218), P39:5 (243).

services at this time due to [his/her] mental illness.”⁷⁵ On January 29, 2020, Student was admitted to Facility E for suicidal and homicidal ideation and discharged on February 6, 2020.⁷⁶ Facility A accepted Student on February 19, 2020,⁷⁷ but a week later, it conditioned the acceptance on a modification of the IEP.⁷⁸ Student is on the waiting list at School B and Facility G; both institutions are not taking new students due to COVID-19 restrictions. ⁷⁹ By the date of the hearing, Student had not been admitted to School B or Facility G only because of a nationwide pandemic, and he/she had been unavailable for tutoring or related services since January 29, 2020.⁸⁰

The preponderance of the evidence supports DCPS’ position that it did not deny Student a FAPE by refusing to amend Student’s IEP without OT and PT evaluations and without an IEP meeting to determine the continuing need for OT, PT, and dedicated aide services.

RELIEF

For relief, Petitioner requests, *inter alia*, that DCPS be ordered to amend the student’s IEP to facilitate placement at Facility A, execute the necessary paperwork, and make arrangements for the student to be transported to the residential facility. Alternatively, in the event a different residential placement becomes available, DCPS should be ordered to convene an IEP team to discuss a transfer of the student to the alternate facility, and DCPS shall execute the necessary paperwork and make arrangements for the student to be transported to the residential facility. Petitioner also requests that DCPS be ordered to fund compensatory education services.

ORDER

Upon consideration of the *Complaint*, DCPS’ *Response*, the exhibits from the parties’ disclosures that were admitted into evidence, and the testimony presented during the hearing, it is hereby

ORDERED, that the Complaint is **DISMISSED**.

⁷⁵ P18:2 (124).

⁷⁶ P17:1 (119).

⁷⁷ P34:1 (229); R11:49-50; P32:1 (225).

⁷⁸ R11:42.

⁷⁹ Witness D’s testimony.

⁸⁰ P18:2 (124).

APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).

Terry Michael Banks

Terry Michael Banks
Hearing Officer

Date: June 15, 2020

Copies to: Attorney A, Esquire
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OSSE Office of Dispute Resolution
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