

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

OSSE
Office of Dispute Resolution
June 22, 2022

PETITIONER,)	
on behalf of STUDENT,)	Date Issued: June 22, 2022
)	
Petitioner,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2022-0039
)	
DISTRICT OF COLUMBIA)	Hearing Dates: May 11 and 12, 2022
PUBLIC SCHOOLS,)	
)	Office of Dispute Resolution,
Respondent.)	Video Conference Hearing
)	

HEARING OFFICER DETERMINATION - FINAL

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENT, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and District of Columbia Municipal Regulations (DCMR), Title 5-E, Chapter 5-E30 and Title 5-B, Chapter 5-B25. In her Due Process Complaint, Petitioner alleged that Respondent District of Columbia Public Schools (DCPS) denied STUDENT a free appropriate public education (FAPE) by not providing a dedicated aide as required by the Student’s October 27, 2021 Individualized Education Program (IEP).

The due process hearing was held before the undersigned impartial hearing officer by video conference on May 11 and 12, 2022. Parent was represented by PETITIONER’S COUNSEL. Respondent DCPS was represented by ASSISTANT PRINCIPAL and by DCPS’ COUNSEL.

After the hearing was completed, this hearing officer issued an Interim Decision and Order (Interim Decision) on May 17, 2022. In the Interim Decision, I found that

DCPS denied Student a FAPE by not providing a dedicated aide, as required by Student's October 27, 2021 DCPS IEP, until April 20, 2022, a lapse of some 20 school weeks. I concluded that Student was entitled to a compensatory education award to provide the educational benefits that likely would have accrued from his/her having a dedicated aide before April 20, 2022. However, because Petitioner's compensatory education evidence was insufficient to enable the hearing officer to craft an appropriate compensatory education award, in the Interim Decision, I provided both parties additional time to supplement the record to present additional evidence as to appropriate compensatory relief for Student. In my May 17, 2022 interlocutory order, I provided that both parties would be permitted to supplement the hearing record for the compensatory education determination with written submissions, as to (1) what additional or incremental educational benefits would likely have accrued to Student had DCPS provided Student a dedicated aide by the end of November 2021 and (2) what is needed now to get the Student to that position.¹

On May 25, 2022, Petitioner, by counsel, filed a motion requesting that the hearing officer require DCPS to fund an independent compensatory education assessment, on the grounds that the Parent was allegedly not in a financial position to engage a qualified professional to provide a compensatory education recommendation. DCPS opposed this motion. By order issued June 3, 2022, I denied Petitioner's motion.

¹ Reference is made to the May 17, 2022 Interim Decision and Order for complete Procedural History and the hearing officer's Findings of Fact and Conclusions of Law.

On June 17, 2022, both parties, by counsel, filed timely post-Interim Decision pleadings. Petitioner's pleading was titled Motion for Reconsideration, Motion to Exclude Evidence and Proposed Compensatory Education Plan. DCPS' pleading was titled Filing and Motion to Reconsider Pursuant to the Interim Order. Before reaching the compensatory education issue, I address the parties' respective June 17, 2022 motions.

Petitioner's Motion to Exclude Evidence

For her motion to exclude evidence, Petitioner requests that the evidence and hearing testimony of DCPS' expert, AIDES DIRECTOR, stemming from her classroom observation, be given no weight and be stricken from the record because the Parent's educational experts allegedly were not able to, or not allowed to, conduct a classroom observation. Any motion to exclude or strike Aides Director's evidence should have been made at the time she testified, not after the hearing officer issued the Interim Decision with his findings of fact and conclusions of law. *Cf.* Federal Rules of Evidence, Rule 103(a) (A party may claim error in a ruling to admit evidence only if the party timely objects or moves to strike and states the specific ground.)² I deny as untimely Petitioner's motion to strike the evidence and testimony of Aides Director.

Petitioner's Motion for Reconsideration

Petitioner, by counsel, urges the hearing officer to reconsider his June 3, 2022

² The Federal Rules of Evidence are not applicable to special education due process proceedings and are cited here by analogy only.

decision denying Petitioner’s motion for an order that DCPS fund an independent compensatory education assessment. Motions for reconsideration may not be used as an opportunity to reargue facts and theories upon which a hearing officer has already ruled. *See, e.g., Coulibaly v. Tillerson*, 278 F. Supp. 3d 294, 301 (D.D.C. 2017).

“[W]here litigants have once battled for the court’s decision, they should neither be required, nor without good reason permitted, to battle for it again.” *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005) (Internal quotations and citations omitted.) In the June 3, 2022 decision/order, I set out the reasons for denying Petitioner’s motion to require DCPS to fund an independent compensatory education assessment. Petitioner has offered no good reason, other than her disagreement with that decision, to reopen the issue. Petitioner’s Motion for reconsideration is denied.

DCPS’ Motion for Reconsideration

For its part, DCPS asks the hearing officer reconsider his Interim Decision finding that DCPS’ delay of some 20 school weeks in providing Student a dedicated aide rose to a denial of FAPE. DCPS’ motion for reconsideration fares no better than Petitioner’s motion. DCPS offers no good reason, other than the agency’s disagreement with the hearing officer’s decision, to revisit whether DCPS’ failure to timely provide the dedicated aide should be deemed a denial of FAPE. DCPS’ motion for reconsideration is denied.

Analysis of Compensatory Education Remedy

In the Interim Decision, I found there was insufficient evidence in the record

craft an appropriate award to compensate Student for DCPS' delay in providing a dedicated aide as required by the October 27, 2021 IEP. For the reasons explained in that decision, I found unpersuasive the recommendation of Petitioner's compensatory education expert, EDUCATIONAL CONSULTANT, that Student be awarded, as compensatory education, 360 hours of Applied Behavior Analysis (ABA) therapy, 30 hours of independent speech therapy, 16 hours of independent occupational therapy (OT) and 16 hours of independent speech therapy. I also discounted the opinion of DCPS' expert, Aides Director, that no compensatory education was warranted because Student's needs were allegedly being met at DCPS SCHOOL 2 even without a dedicated aide. As I explained in the Interim Decision, under the case law in this judicial circuit, the question is not whether Student's needs were being met without a dedicated aide, but rather how much more progress the child might have shown if DCPS had timely implemented the October 27, 2021 IEP requirement for a full-time dedicated aide.

Following the judicial precedents in *Jones v. Dist. of Columbia*, No. 115CV01505BAHGMH, 2017 WL 10651264 (D.D.C. Jan. 31, 2017), *report and recommendation adopted*, No. CV 15-1505 (BAH-GMH), 2017 WL 10651306 (D.D.C. Feb. 22, 2017) and *Stanton v. Dist. of Columbia*, 680 F. Supp. 2d 201 (D.D.C. 2010), I provided the parties additional time to supplement the hearing record with written submissions, preferably sworn declarations from qualified professionals, as to (1) what additional or incremental educational benefits would likely have accrued to Student had DCPS provided Student a dedicated aide by the end of November 2021 and (2) what is

needed now to get the Student to that position. *See Interim Decision.*

In her post-hearing pleading, Petitioner did not offer additional evidence as to appropriate compensatory relief, but argued that the compensatory education plan proposed by Educational Consultant in his hearing testimony should be reconsidered and ordered. For the reasons explained in the Interim Decision, I did not find Educational Consultant's original recommendation to be persuasive and I decline to order his recommended award.

In the Agency's post-hearing pleading, DCPS, by counsel, offered written declarations by TEACHER and ASSISTANT PRINCIPAL attesting that even without the full-time dedicated aide required by his/her October 27, 2021 IEP, Student made appropriate progress and would not have made more progress with a dedicated aide in any of his/her educational settings. Both declarants were knowledgeable about Student having taught or interacted with him/her at DCPS School 2 during the 2021-2022 school year.³

³ In a June 21, 2022 email, Petitioner's Counsel objected to the post-hearing declarations of Teacher and Assistant Principal being considered or admitted into the record on the asserted grounds that it would be highly prejudicial to Petitioner to allow DCPS to introduce new evidence after the hearing and because Petitioner would not have the opportunity to cross examine these witnesses. I find this objection lacks merit. In the Interim Decision, the hearing officer invited both parties to present additional evidence as to appropriate compensatory relief as recommended by the Courts in *Jones v. Dist. of Columbia, supra* and *Stanton v. Dist. of Columbia, supra*. Petitioner did not object to this interlocutory decision but did not provide additional evidence. Moreover, both Teacher and Assistant Principal testified in person at the due process hearing and were cross-examined by Petitioner's Counsel. Their respective post-hearing declarations are consistent with their hearing testimony.

Under the case law in this jurisdiction, the parent has the burden of proposing an appropriate compensatory education plan. *See Jones, supra* at *9; *Phillips ex rel. T.P. v. Dist. of Columbia*, 736 F. Supp. 2d 240, 248 (D.D.C. 2010) (Plaintiff has the burden of proposing a well-articulated plan that reflects student's current educational abilities and needs); *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 583 F. Supp. 2d 169, 172 (D.D.C. 2008) (same); *Banks ex rel. D.B. v. Dist. of Columbia*, 720 F. Supp. 2d 83, 91 (D.D.C. 2010) (same). After the Interim Decision was issued, both parties were on notice that the hearing officer found that Petitioner had not proposed a compensatory education plan that appropriately addressed the denial of FAPE in this case. Following the *Jones* decision precedent, the hearing officer permitted the Parent (and DCPS) to present additional evidence as to compensatory relief. *See Jones, supra*, at *9.

Unfortunately Petitioner's post-hearing filings add nothing to the record to support a specific compensatory education award. *See Stanton, supra*. For its part, DCPS presented declarations from Student's teacher and Assistant Principal asserting that Student made progress under the October 27, 2021 IEP and would not have made more progress with a dedicated aide. I conclude that even given the opportunity to present additional evidence after the hearing, Petitioner has not met her burden to propose a well-articulated compensatory education plan for Student. I therefore must deny the Student compensatory education relief.

ORDER

Based upon the Findings of Fact and Conclusions of Law in the Interim Decision and herein, it is hereby ORDERED:

All relief requested by the Petitioner herein is denied.

Date: June 22, 2022

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
[REDACTED]@k12.dc.gov
[REDACTED]@k12.dc.gov