Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, on behalf of Student,[1]	)	
	)	
Petitioner,	)	**Date Issued: February 28, 2015**
	)	
v.	)	
	)	
District of Columbia Public Schools	)	
And Office of the State Superintendent	)	
Of Education,	)	**Hearing Officer: Michael Lazan**
	)	
Respondents.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is eligible for services as a student with learning disability. It is based on allegations in Petitioner's Due Process Complaint ("DPC") dated December 15, 2014. Respondent District of Columbia Public Schools ("DCPS") and Respondent Office of State Superintendent of Education ("OSSE") timely filed responses on December 23, 2014.

Briefly, the DPC alleged that Petitioner tried to enroll the Student at DCPS, but was told that the Student would have to have to attend classes in order to enroll. (DPC, par. 25) Petitioner alleged that DCPS and OSSE would not provide the Student with an FAPE without enrollment. (DPC, par. 25) DCPS and OSSE contended that the Student needed to be enrolled before the Student was entitled to a FAPE.

[1] Personally identifiable information is attached as Appendix A.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act ("IDEIA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30. There is no objection to the hearing officer's jurisdiction in this case.

III. Procedural History

I was assigned to this case on December 17, 2015. Petitioner is the parent of the Student. Respondent DCPS is the Student's current Local Educational Agency. ("LEA") Respondent OSSE is the Student's current State Educational Agency. ("SEA") The case is not expedited and the HOD was due on February 28, 2015. There was no resolution meeting on this case. The resolution period ended on January 14, 2015.

On December 17, 2014, Respondent OSSE filed Office of State Superintendent of Education's Motion for a Continuation to align its timelines with those of the LEA, DCPS. This motion was granted by Interim Order on Continuance Motion by Chief Hearing Officer Virginia Dietrich on January 26, 2015.

On December 22, 2014, Petitioner filed Petitioner's Motion To Enforce Stay-Put Protection, Including Transportation. This motion requested that School B be deemed the stay-put placement of the Student. OSSE opposed the motion by Office of the State Superintendent of Education's Response to Petitioner's Motion to Enforce Stay Put Protection dated December 20, 2014. DCPS opposed the motion by District of Columbia's Opposition to Petitioner's Motion for an Order to Enforce Stay Put filed

December 30, 2014. Petitioner filed Petitioner's Reply to OSSE's Response to the Motion for Enforcement of Stay-Put Protections on December 31, 2014. On January 23, 2015, Petitioner filed Petitioner's Supplemental Motion to Enforce Stay-Put Protection, Including Transportation Based on Additional Actions by DCPS on January 23, 2015. On February 3, 2015, I issued Order on Petitioner's Motion To Enforce Stay-Put Protection, Including Transportation; Petitioner's Supplemental Motion to Enforce Stay-Put Protection, Including Transportation Based on Additional Actions by DCPS on January 23, 2015; District of Columbia Public Schools' Motion to Dismiss the Due Process Complaint; Office of State Superintendent of Education's Motion to Dismiss ("the Order") granting Petitioner's motion.

A prehearing conference took place by telephone on January 13, 2015. Participating in the prehearing conference were Petitioner's Representative, Respondent DCPS's Representative, ., and Respondent OSSE's representative, A Prehearing Order issued on January 19, 2015. This order was revised by Prehearing Order on January 25, 2015.

On January 20, 2015, Respondent OSSE filed Office of State Superintendent of Education's Motion to Dismiss. Petitioner submitted Petitioner's Opposition to OSSE's Motion to Dismiss on January 22, 2015. This motion was granted by the Order on February 3, 2015, and OSSE was dismissed from this case.

On December 23, 2014, Respondent DCPS filed District of Columbia Public Schools' Motion to Dismiss the Due Process Complaint. On the same date, Petitioner filed Petitioner's Opposition to DCPS's Motion to Dismiss. This motion was denied by the Order dated February 3, 2015.

A hearing date followed on February 6, 2015. This was a closed proceeding.

Petitioner moved to enter into evidence exhibits 1-25. Respondent DCRS objected to any exhibits that contain emails, and to exhibits 6-24 on grounds of relevance and hearsay. These objections were overruled. Exhibits 1-25 were admitted. Respondent DCPS offered Exhibits 1-5. There were no objections to Respondent's exhibits. Exhibits 1-5 were admitted.

Petitioner presented as witnesses: Petitioner; Witness A, an advocate, and Witness B, Director of School B. Respondent presented no witnesses.

At the end of the hearing, the parties provided oral closing statements.

IV. Credibility

I found all the witnesses credible in this proceeding. DCPS did not call any witnesses to contradict any of the Petitioner witnesses, and none of the documents contradicted the testimony of the witnesses. Moreover, there were no material inconsistencies in any of the documents, and Petitioner's witnesses testified in harmony with each other.

V. Issues

1. Did DCPS deny the Student a FAPE and violate the IDEA by requiring that the student enroll in and/or attend his neighborhood DCPS school as a condition to receiving an offer of a Free and Appropriate Public Education from DCPS or whether DCPS otherwise failed to provide the student with a location of service for the 2014-2015 school year that could implement his IEP and provide him with a FAPE?

2. Did DCPS violate the IDEA's child-find requirement by failing to locate and identify the Student as a child with a disability at the beginning of the 2014-2015 school year after the student aged out of his previous LEA?

As relief, Petitioner seeks reimbursement/payment for School B for 2014-2015.

VI. Findings of Fact

1. The Student is eligible for services as a Student with a learning disability. (P-8-1)

2. The Student is a resident of the District of Columbia. (P-8-1)

3. The Student is on about the 6th grade level in math. He has difficulty with retaining material and multi-step directions and requires "constant direct instruction," including significant repetition and reinforcement. He has trouble with higher math concepts. (P-8-4)

4. He is on the late third grade level in independent reading. He reads in a monotone unless prompted; he reads slows, repeating words; and he requires explicit instruction and scaffolding to access abstractions and inferences in reading material at higher grade levels. He has significant difficulties even with consistent 1:1 instruction. (P-8-7)

5. He is working on the foundations of basic writing. He is below average in spelling and fluency, and requires a "medium" level of teacher support. He has difficulty with organization. (P-8-9)

6. He has a receptive and expressive language disorder characterized by deficits in verbal memory, verbal information processing, semantics, syntax and written language. (P-8-10)

7. The Student's LEA was School A PCS for the 2013-2014 school year. (Testimony of Petitioner)

8. During the 2013-2014 school year, the Student attended School B, a non-public school that serves students with special education needs. (Testimony of Petitioner)

9. An IEP was written for the Student as a result of the IEP meeting dated February 27, 2014. In the IEP, the Student was recommended for twenty-nine hours per week of specialized instruction outside general education, with speech and language therapy for 240 minutes per month. (P-8-13)

10. The IEP also provides for repetition of directions, markers to "maintain place," and simplification of oral directions. (P-8-15)

11. The Student was also recommended for special education transportation and an extended school year. (P-8-16-19)

12. At School B for the 2013-2014 school year, the Student's academic grades were in the A, B and C range. (P-17-1-2)

13. The Student aged out of School A PCS at the end of the 2013-2014 school year.

14. Representatives from School B told Petitioner to enroll the Student at a DCPS "neighborhood" school in order for him to attend School B for the 2014-2015 school year. (Testimony of Petitioner)

15. In August, 2014, prior to the start of the school year, Petitioner went to the Student's local school, School C, to enroll the Student. This is a DCPS school. A

representative of the school told her that the Student had to attend the school in order for him to be enrolled. (Testimony of Petitioner)

16. Petitioner then tried to find the Student a school where he could be enrolled but did not have to attend. Petitioner was unable to find such a school. (Testimony of Petitioner)

17. At this time, the Petitioner's intent was to have the Student stay at School B. (Testimony of Petitioner)

18. At about the same time, on August 14, 2015, it was DCPS's position that it will not enroll students who are not attending. (P-1-1)

19. On the first day of school for 2014-2015, the Student went to School B. The representatives of the school "did not say anything" so the Student continued to attend the school. (Testimony of Petitioner)

20. On November 6, 2014, Petitioner received a letter from OSSE requiring her to enroll her child and confirm residency or funding for the placement at School B would be terminated. (P-2-1-2)

21. Carla Watson of DCPS repeated this position, in regard to the Student, in an email sent on November 26, 2014. DCPS stated that upon enrollment and the submission of paperwork, an IEP meeting can be held "to discuss placement and an offer of FAPE." (P-1-22)

22. Petitioner did not enroll the Student because she was afraid that the Student would have to attend School C. (Testimony of Petitioner)

23. Petitioner was not aware of email, which was sent to her counsel, until near the time of the hearing. (Testimony of Petitioner)

24. At School B for 2014-2015, the cost was $41,000. The school serves a variety of students with disabilities. (Testimony of Witness B)

25. The Student and his classmates stay together all day in the same classroom. (Testimony of Witness B)

26. If the Student were transferred from school in the middle of the school year, it would be damaging to him, he would lose credits, and progress he has made at the school would be jeopardized. (Testimony of Witness B)

27. As of the day of the hearing, the Student had attended school for ninety-one days and was absent for three days for the 2014-2015 school year. (Testimony of Witness B)

28. At School B for 2014-2015, the Student's academic grades were in the A, B and C range. (P-18-1-2)

29. Petitioner paid $7.20 in transportation costs for every day the Student attended school. (Testimony of Witness B)

30. School B is "proper under the Act" and has provided the Student with an appropriate education for 2013-2014 and 2014-2015. (Stipulation of the parties)

VII. Conclusions of Law

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

The burden of proof in a special education due process hearing lies with the party seeking relief. 5 DCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005).

Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, "provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only 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 Sect. 300.513(a).

Petitioner claimed that DCPS failed to offer the Student a FAPE because it required the Student to enroll and/or attend a DCPS school prior to an offer of FAPE. In response, DCPS pointed to provisions of the DCMR, which require DCPS to provide special education to former LEA charter students only after they are enrolled. 5-E DCMR 3019.5. DCPS also pointed to DCMR provisions which require nonpublic school students who are enrolled in a LEA charter to be the responsibility of the LEA charter school until the Student enrolls in DCPS. 5-E DCMR Sect. 3019.9.

Recent federal court decisions provide guidance. In District of Columbia v. Oliver, 991 F. Supp.2d 209 (D.D.C. 2013), Judge Howell was presented with a Student who had not enrolled in the DCPS LEA but nevertheless was seeking stay-put relief for placement from DCPS for a non-public school placement. The Student was a D.C. resident. Even though the Student did not have an IEP and was not enrolled, Judge Howell ordered that DCPS provide stay-put relief at the non-public school in question.

Even more persuasive is D.S. v. District of Columbia, 699 F.Supp.2d (D.D.C. 2010), where Judge Sullivan was presented with a Student who also had not enrolled in the DCPS LEA. The hearing officer in that case had issued an HOD dismissing the case against DCPS because the Student was not enrolled. Judge Sullivan reversed, holding that residency, not enrollment, was the relevant in determining the liability of an LEA. He stated:

> The obligation to provide a FAPE, therefore, is triggered by a child's residency in the District—not the child's enrollment in a public school in the District. Indeed, regardless of a child's enrollment status, DCPS is required to "ensure that procedures are implemented to identify, locate, and evaluate all children with disabilities residing in the District who are in need of special education and related services, including children with disabilities attending private schools."

D.S. v. D.C., 699 F. Supp. 2d 229, 235 (D.D.C. 2010); see also District of Columbia v. Wolfire, 10 F Supp.3d 89 (D.D.C. 2014) ("J.W. is undisputedly a child with a disability who resides in the District of Columbia . . . [DCPS is] required to honor that request and make available a FAPE to J.W. regardless of his current parental enrollment in a private school").

The same principles apply here. Again, DCPS is arguing that the Student must be enrolled before it is obliged to provide a FAPE. Here, DCPS pointed out that this requirement is codified in the DCMR, which was not an argument that was specifically considered by the federal judges referenced above. DCPS highlights 5-E DCMR Sect. 3019.9, which states that non-public school students at an LEA charter "shall remain enrolled in and is the responsibility of the LEA Charter, unless and until his or her parent re-enrolls the child in another LEA. . . ."

The Supremacy Clause of the United States Constitution, Article VI, Paragraph 2, prevents a state or municipality from limiting Petitioner's rights under the IDEA. If such a state or local law conflicts with the IDEA, it must be preempted. Sarah M. v. Weast, 111 F. Supp.2d 695, 703 (D. Md. 2000)(law that required parents to give additional notice before seeking tuition reimbursement preempted by IDEA). Pursuant to clear federal precedent, DCPS must offer a FAPE to students that are residents even if they are not enrolled notwithstanding any provisions in the DCMR.

There is no dispute that School A PCS can no longer service the Student, who has aged out of the school. The Student has been, in effect, without an LEA, much as the students were in Oliver, Wolfire, and D.S. Moreover, there is no dispute that DCPS did not offer the Student a FAPE because he was not enrolled at the school.

DCPS said in email of November 26, 2014:

> Please advise if your client will be submitting the enrollment paperwork to DCPS? Upon submission of the paperwork, an IEP meeting can be held to discuss placement and the offer of FAPE.

Compounding this, Petitioner testified without contradiction that she was told she had to both enroll her son and have him *attend* a DCPS school before she could get an

offer of FAPE for 2014-2015. No less an authority than the United States Supreme Court has made clear that parents do not have to try out a public school before receiving a tuition award. Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 243 (2009)(statute requiring students to attend public school before receiving tuition award).

Finally, DCPS points to the comparable services provision of the IDEA as authority for its position here. This section provides that:

> (i)n the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

20 U.S.C. Sect. 1414(d)(2)(c)(I).

This provision is inapposite to this fact pattern. The Student did not transfer school districts within the same academic year. The Student was left without a school district after he left School A PCS. At the start of the 2014-2015 school year, the Student was a D.C. resident and therefore should have been offered a FAPE by DCPS. A FAPE was not offered because the Student was not enrolled, denying the Student a FAPE.

Alternatively, though Petitioner did not argue the point during closing, Respondent should have provided the Student with services pursuant to the “Child Find” provisions of the IDEA. The "child find" provisions of the IDEA require each State to have policies and procedures in effect to ensure that "[a]l1 children with disabilities residing in the State ... who are in need of special education and related services, are

identified, located, and evaluated." 20 U.S.C. Sect. 1412(a) (3) (A); 34 C.F.R. Sect. 300.111(a). Child find must include any children "suspected of being a child with a disability under Section 300.8 and in need of special education, even though they are advancing from grade to grade." 34 C.F.R. Sect. 300.111(c) (1). Federal case law indicates that these provisions impose an affirmative duty to identify, locate, and evaluate all such children. Reid v. District of Columbia, 401 F.3d 516, 518-19 (D.C. Cir. 2005); Hawkins v. District of Columbia, 539 F. Supp. 2d 108 (D.D.C. 2008). Consistent with the statutory language, the "child find" obligation "extends to all children suspected of having a disability, not merely to those students who are ultimately determined to have a disability." N G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008).

There is no dispute that this Student has a learning disability and was, in the summer of 2014, without an LEA since his prior LEA only went up to 8th grade. In this situation, to this IHO, it was incumbent upon DCPS to affirmatively identify, locate and evaluate the Student during the summer, 2014 to make sure the Student had an appropriate school placement for the 2014-2015 school year. DCPS did not do so and indeed created hurdles for Petitioner and the Student by failing to respond appropriately when Petitioner sought assistance. I find, therefore, that Respondent violated the Child Find provisions of the IDEA when it failed to locate, identify and evaluate the Student after he no longer fell under the authority of School A PCS.

As a result of the foregoing, I find that Petitioner met her burden of persuasion and denied the Student a FAPE by failing to offer the Student a FAPE for the 2014-2015 school year.

VIII. Relief

As a remedy, Petitioner asserts that appropriate relief in this matter is to order placement at School B for 2014-2015.

When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated:

> The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confer broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.

School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that "(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school." Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief "must be tailored" to meet a student's "unique needs." Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993). To inform this individualized assessment, courts must consider "all relevant factors" including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

A related, but separate, analysis is laid forth in Burlington. Pursuant to Burlington, a school district may be required to pay for educational services obtained for a student by a student's parent if the services offered by the District are inadequate or inappropriate ("first criterion,") the services selected by the parent are appropriate ("second criterion"), and equitable considerations support the parent's claim ("third criterion"), even if the private school in which the parents have placed the child is unapproved. Burlington, 471 U.S. @ 369-372; Florence County School District Four et al. v. Carter by Carter, 510 U.S. 7 (1993). These holdings have been extended to situations wherein the parent has paid nothing to the school and is in effect asking for funding. Mr. & Mrs. A. ex rel. D.A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 426 (S.D.N.Y. 2011)

The parties have agreed that School B is appropriate for 2014-2015, and there is no disagreement regarding least restrictive environment or cost. The only issue that remains for this IHO is whether equities favor the Petitioner. DCPS argues that the Petitioner was never really seeking an IEP and a corresponding offer for a location of services. Instead, DCPS argues, Petitioner was simply looking for a funding mechanism for the Student to attend School B. However, at least to this IHO, the equities analysis should not be undertaken without a FAPE offer. N.R. ex rel. T.R. v. Dep't of Educ. of City Sch. Dist. of City of New York, No. 07 CV. 9648 (BSJ), 2009 WL 874061, at *7 (S.D.N.Y. Mar. 31, 2009)(the "abdication of its responsibility to provide ... FAPE is so clear from the record—and the law's imposition of this duty on the [Department] is so well-settled—that ... the equities favor the parents" (citations omitted)); Wolfire, 10 F. Supp.3d 89 (no equities analysis where IEP not offered because student not enrolled).

DCPS had the responsibility to locate the Student and provide that Student with an educational placement. DCPS did not do so. DCPS then had the responsibility to provide Petitioner with an IEP and a location of services upon request. DCPS did not do this, either. Petitioner reasonably did what she had to do to get her child into an appropriate school in view of DCPS's failure to offer a FAPE. The equities favor Petitioner in this matter, especially since it would be unfair to take this Student out of his school mid-year. Block v. District of Columbia, 748 F Supp. 891 (D.D.C. 1990)(warning against mid-year transfers); Holmes v. District of Columbia, 680 F. Supp. 40 (D. D.C. 1988)(same).

As a result of the foregoing, I will order that Respondent pay for School B for the remainder of the 2014-2015 school year, and make any outstanding payments for debts owed to School B (if any) for the portion of the 2014-2015 school year that has already elapsed. Additionally, I will order that Respondent pay for transportation to School B in the amount of $7.20 per day for all days that the Student will attend the school during the remainder 2014-2015 school year, and to reimburse Petitioner in the amount of $7.20 per day for all days that the Student attended school and Petitioner had to pay for transportation services "out-of-pocket."

IX. Order

As a result of the foregoing, I hereby order the following:

1. Respondent shall pay for the Student's tuition at School B for the remainder of the 2014-2015 school year, and pay for any outstanding debts owed to School B for the portion of the 2014-2015 school year that has already elapsed;

2. Respondent shall pay for the Student's transportation to and from School B in the amount of $7.20 per day for all days that the Student will attend the school during the remainder 2014-2015 school year;

3. Respondent shall reimburse Petitioner in the amount of $7.20 per day for all days that the Student attended school and Petitioner had to pay for transportation services "out-of-pocket" to and from School B;

Dated: February 28, 2015

Michael Lazan
Impartial Hearing Officer

X. Notice of Appeal Rights

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 final Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: February 28, 2015

Michael Lazan
Impartial Hearing Officer