

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
March 15, 2019

<i>Student</i> , ¹)	Date Issued: 3/15/19
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Case No.: 2019-0006
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 3/8/19
("DCPS"),)	ODR Hearing Room: 423
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because Student was entitled to appropriate compensatory education to make up for denials of FAPE found in the 7/26/18 Hearing Officer Determination ("HOD") in Case No. 2018-0121 between the parties.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Hearing Officers are not given jurisdiction by the IDEA to enforce prior Hearing Officer Determinations. *See Robinson v. Pinderhughes*, 810 F.2d 1270, 1273 (4th Cir. 1987) (the federal statute does not contain any provision for enforcing final administrative orders). However, federal courts in the District of Columbia do encourage determinations of compensatory education to be made after additional evaluations are conducted following a finding of a denial of FAPE, as occurred in this case. *See B.D. v. Dist. of Columbia*, 817 F.3d 792, 800 (D.C. Cir. 2016). Such a two-step process cannot occur in a timely fashion in

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

Hearing Officer Determination

Case No. 2019-0006

a single proceeding, as Hearing Officer Vaden correctly noted in his 7/26/18 HOD at P7-24. That means a second proceeding must be instituted, just as Hearing Officer Vaden ordered, to carry the compensatory education analysis to its conclusion by delivering to the child who was denied FAPE a remedy that will restore the child to the position he or she would have been in but for the denial of FAPE. A Hearing Officer does have jurisdiction over such a remedy, which is necessary for provision of a free appropriate public education. *See* 20 U.S.C. § 1415(b)(6),(f)(1); *Letter to Kohn*, 17 IDELR 522 (OSERS 1991) (“OSEP’s position is that, based upon the facts and circumstances of each individual case, an impartial hearing officer has the authority to grant any relief he/she deems necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he/she is entitled”).

Procedural History

Following the filing of the due process complaint on 1/9/19, the case was assigned to the undersigned on 1/10/19. Respondent filed a response on 1/16/19 and challenged the jurisdiction of a Hearing Officer to hear this case, which was discussed at the prehearing conference. The undersigned stated in the Prehearing Order that he has jurisdiction to proceed with the due process hearing as to subpart (b) of the Issue below, relating to compensatory education, even though not subpart (a) relating to enforcement of a prior Hearing Officer Determination, as set forth above. The current case arose out of the 7/26/18 HOD in which denials of FAPE were found, but Parent did not put on a compensatory education case then, instead bringing this case after unsuccessful efforts to reach agreement with DCPS on an appropriate compensatory education remedy.

A formal resolution meeting was not held in this case, but efforts were made by the parties to reach a resolution. The 30-day resolution period ended on 2/8/19. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination in this case by 3/25/19.

A brief due process hearing took place on 3/8/19 which was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Parent was present during the entire hearing.

Petitioner’s Disclosures and Supplemental Disclosure, timely filed on 2/28/19 and 3/4/19, respectively, contained documents P1 through P11, which were admitted into evidence without objection. Respondent’s Disclosures, filed on 3/1/19, contained documents R1 through R5, which were also admitted into evidence without objection.

Neither party presented any witnesses at the hearing, although a number of witnesses had been listed in their disclosures. The parties instead offered and agreed to the following stipulations to address the issue in this case:

1. The parties have agreed to a substantial number of tutoring and counseling hours for Student as part of the compensatory education needed to remedy the denials of FAPE found in the 7/26/18 HOD.

Hearing Officer Determination

Case No. 2019-0006

2. As additional compensatory education, the parties agreed that Student needs, and will be provided by DCPS within 30 days, all of the software and hardware recommended by *Expert* in his Compensatory Education Technology Plan for [Student] at P8-1,2, which are: (1) Kurzweil 3000, (2) Dragon Speaking Naturally, (3) Mathematics Basic Skills Curriculum, (4) Laptop, (5) Laser Scanner, and (6) Texas Instruments Graphing Calculator (TI-84).
3. The parties agreed that the remedies in paragraphs 1 and 2 above are sufficient compensatory education to elevate Student to the approximate position Student would have enjoyed had Student not suffered the denials of FAPE found in the 7/26/18 HOD.

The issue to be determined in this Hearing Officer Determination is:

Issue: Whether DCPS denied Student a FAPE by failing to (a) comply with the 7/26/18 HOD, and/or (b) develop an appropriate compensatory education plan following the 7/26/18 HOD. *Petitioner has the burden of persuasion on this issue.*

Petitioner seeks the following relief:

1. A finding that Student was denied a FAPE.
2. DCPS shall develop an appropriate compensatory education plan, including educational software installed on an appropriate device as recommended by *Expert*.²

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact³ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁴ Student is *Age* and is in *Grade* at *School*.⁵

² At the beginning of the due process hearing, Petitioner's counsel withdrew without prejudice the requested relief (a) at the end of paragraph 2 of "DCPS shall also revise authorization for tutoring and counseling to provide end dates of 8/31/21," and (b) in all of paragraph 3 of "DCPS shall fund *Expert*'s appearance at any due process hearing in this case, including preparation time."

³ Footnotes in these Findings of Fact refer to an exhibit admitted into evidence or Administrative Notice by the undersigned.

⁴ P3-1,2.

⁵ P3-1.

Hearing Officer Determination

Case No. 2019-0006

2. At the due process hearing, the parties entered into stipulations setting forth the remedies for the denials of FAPE found in the 7/26/18 HOD; the parties intended the stipulations to fully address the issue in this case.⁶

Conclusions of Law

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

Petitioner generally carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). In a hearing to determine an appropriate compensatory education award, it is Petitioner's burden to provide evidence of the educational services necessary to compensate Student for the denials of FAPE. *Phillips ex rel. T.P. v. Dist. of Columbia*, 736 F. Supp. 2d 240, 250 n.4 (D.D.C. 2010).

In determining compensatory education, there may be "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Indeed, "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

Here, the parties engaged in good faith interactions about the appropriate amount of compensatory education, which ultimately resulted in the stipulations set forth above. The remedies stipulated above provide all of the elements that Petitioner sought as compensatory education. The parties stipulated that the remedies are sufficient to make up for the denials of FAPE found by the 7/26/18 HOD, and the undersigned has confidence that the parties are well represented by competent counsel and are making reasonable determinations about the appropriate amount of compensatory education needed. Further, this Hearing Officer concurs with the parties that the remedies they agreed upon are sufficient compensatory education to remedy the denials of FAPE.

⁶ Stipulations of Parties (above); Administrative Notice.

Hearing Officer Determination

Case No. 2019-0006

ORDER

Petitioner has met her burden on the single issue in this case, as set forth above. Accordingly, **it is hereby ordered that:**

Within 30 days, DCPS shall provide to Student the software and hardware recommended by Expert in his Compensatory Education Technology Plan for [Student] at P8-1,2, which are: (1) Kurzweil 3000, (2) Dragon Speaking Naturally, (3) Mathematics Basic Skills Curriculum, (4) Laptop, (5) Laser Scanner, and (6) Texas Instruments Graphing Calculator (TI-84).

Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ *Keith Seat*

Keith L. Seat, Esq.
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).

Copies to:

Counsel of Record (Appendix A, by email)
OSSE-SPED (due.process@dc.gov)
ODR (hearing.office@dc.gov)
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