

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: March 1, 2020

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020–0010

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: February 24 and 25, 2020

Respondent.

Office of Dispute Resolution, Room 112
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (MOTHER) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner seeks relief for DCPS’ allegedly developing an inappropriate Individualized Education Program (IEP) for Student at a meeting on January 8, 2020 without the parent’s participation and for failure to provide access to Student’s education records.

Petitioner’s Due Process Complaint, filed on January 16, 2020, named DCPS as Respondent. The undersigned hearing officer was appointed on January 17, 2020. On

¹ Personal identification information is provided in Appendix A.

January 23, 2020, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On January 29, 2020, the parties met for a resolution session and were unable to resolve the issues in dispute. On February 3, 2020, I granted DCPS' unopposed motion to dismiss the discipline claims in Petitioner's complaint and the case proceeded on Petitioner's remaining claims. On February 23, 2020, Petitioner, by counsel, notified the hearing officer by email that she was further narrowing the issues to be addressed at the hearing.

The due process hearing was convened before the undersigned impartial hearing officer on February 24 and 25, 2020 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Mother appeared in person at the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the parties made opening statements. Mother testified at the hearing and called EDUCATIONAL CONSULTANT as an additional witness. DCPS called as witnesses CASE MANAGER, ENGLISH TEACHER, SOCIAL WORKER, LEA REPRESENTATIVE and RESOLUTION SPECIALIST. Petitioner's Exhibits P-1 through P-14 were admitted into evidence, except for Exhibits P-3, P-7 and pages 1 and 2 of Exhibit P-10. Exhibits P-3 and P-7 were withdrawn. I sustained DCPS' objection to pages 1 and 2 of Exhibit P-10. Exhibit P-14 was admitted over DCPS' objection. DCPS' Exhibits R-1 through R-15, R-25 through 28, R-29 except for pages 140 and 141 and R-30 through 36 were all admitted into evidence without objection. DCPS withdrew

Exhibits R-16 through R-24 and pages 140 and 141 of Exhibit R-29. At the conclusion of the taking of the evidence, counsel for the respective parties made oral closing arguments.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as originally certified in the January 23, 2020 Prehearing Order, and narrowed per Petitioner's February 23, 2020 email request, are:

1. Whether District of Columbia Public Schools ("DCPS") has denied the student a free appropriate public education (FAPE) by convening a multidisciplinary team (MDT) meeting on January 8, 2020 and developing an IEP for student without the participation of all necessary IEP team members, including the parent and her representatives;
2. Whether the January 8, 2020 IEP is inappropriate because the IEP goals are not appropriate or adequate, specifically the reading and social/emotional goals;
3. Whether DCPS has denied the student a FAPE by not providing the parent's representatives copies of all of the student's education records, including discipline records.

For relief, Petitioner originally requested that DCPS be ordered to immediately provide to Petitioner's counsel all of Student's education records including discipline documentation; to complete or fund all evaluations of the student necessary to develop an appropriate IEP; to convene an IEP team meeting to develop an appropriate IEP for Student upon the completion of all necessary evaluations and the provision to counsel of all outstanding education records including disciplinary documents if any exist; and to provide an appropriate school placement for the student. The parent indicated that she would also seek a compensatory education award for the Student for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides with Mother in the District of Columbia.

Testimony of Mother.

2. Student enrolled in City School at the beginning of the 2019-2020 school year, where Student is current in GRADE. Prior to the current school year, Student attended PUBLIC CHARTER SCHOOL (PCS), an independent local education agency (LEA) in the District of Columbia. **Testimony of Educational Consultant.**

3. Prior to 2019, Student was last determined eligible for special education in April 2016. **Exhibit R-13.** PCS referred Student for a comprehensive psychoeducational

reevaluation conducted in January 2019. The assessing psychologist reported that Student may meet the criteria for an IDEA classification of Emotionally Disturbed (ED) based on Student's diagnoses of Generalized Anxiety Disorder and Oppositional Defiant Disorder, and that Student's disability was likely to impact educational performance due to disrupted interpersonal interactions, inappropriate behaviors, and mood regulation difficulties. Because of abbreviated testing due to Student's unwillingness to participate, it was not possible for the psychologist to rule in or out other diagnoses such as a specific learning disability. However, the cognitive testing indicated deficits in the areas of verbal comprehension and processing speed abilities. Exhibit R-14.

4. PCS completed a Functional Behavior Assessment (FBA) of Student on January 4, 2019 and developed a Behavior Intervention Plan (BIP) on April 29, 2019. Exhibits R-15 and R-12.

5. Student's February 12, 2019 PCS IEP classified Student's disability as ED and identified Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development as areas of concern. The IEP provided for Student to receive 2 hours per week of Specialized Instruction Services in the general education setting and 120 minutes per month of Behavioral Support Services. Exhibit R-13.

6. When Student transferred to City School at the beginning of the 2019-2020 school year, City School implemented the February 12, 2019 PCS IEP. Testimony of Case Manager. In the general education English class, Student was able to do the work, but had many absences and did not turn in completed work. Testimony of

English Teacher. Student received F grades in English for both of the first two quarters of the 2019-2020 school year due to not turning in work. Testimony of English Teacher; Exhibit R-26.

7. On December 3, 2019, Case Manager reached out to Mother by email to schedule an IEP annual review meeting for Student for January 8, 2020. On December 10, 2019, Case Manager reached Mother by telephone to confirm she had received the invitation for the IEP meeting. Mother responded that she had not checked the email, but that the January 8, 2020 date was fine. Mother asked if Case Manager had contacted her attorney (Petitioner's Counsel). Case Manager told Mother that she should contact the attorney herself and if they were not able to meet on January 8, 2020, she would reschedule the meeting. On December 20, 2019, Case Manager followed up with another email and phone call to Mother. Mother testified that she told Case Manager to talk to her attorney, but did not dispute that she had agreed to the January 8, 2020 IEP meeting date. In the December 20, 2019 email, Case Manager attached the draft annual IEP, a parental rights notice and a Medicaid consent form. Mother did not state any questions or concerns. Testimony of Case Manager, Exhibits R-29, P-9.

8. On January 6, 2020, Petitioner's Counsel emailed LEA Representative, requesting that the January 8, 2020 IEP meeting be canceled because Mother had not been able to open the documents attached to emails sent her by the school and because the attorney had not been copied on the meeting notices to the parent. LEA

Representative responded the same day that the January 8, 2020 meeting time had been agreed to by all parties and that the team would move forward with the meeting as scheduled. He offered for Petitioner's Counsel to participate by telephone and to hold a multidisciplinary team (MDT) meeting later to hear parental concerns. Petitioner's Counsel responded by email on January 7, 2020 stating that LEA Representative had made it clear that he was going forward with the IEP meeting on January 8, 2020 without the parent present and participating. Petitioner's Counsel asked LEA Representative to forward to her the final IEP, meeting notes and other documents generated at the meeting. Exhibit P-9.

9. The City School IEP team convened on January 8, 2020 for the annual review of Student's IEP. Neither Mother nor any representative for the parent attended. The team developed a revised IEP, notably increasing Student's Specialized Instruction Services from 2 hours per week to 10 hours per week in the general education setting. To effect this change, at the beginning of the 3rd quarter of the school year, Student would be moved to an inclusion classroom co-taught by a general education and a special education teacher. The IEP provided for Student to continue to receive 120 minutes per month of Behavioral Support Services. Exhibit P-4. On January 10, 2020, Case Manager sent the revised IEP by email to Mother and Petitioner's Counsel. Exhibit P-9.

10. Beginning October 31, 2019, Petitioner's Counsel requested City School to provide copies of all of Student's education records. Petitioner's Counsel sent follow-up

emails to LEA Representative on November 18, 2019, November 22, 2019 and January 14, 2020. On January 14, 2020, LEA Representative advised Petitioner's Counsel by email that he had provided all of the requested documents. Exhibits R-29, P-8. DCPS did not provide copies of Student's City School discipline records until it filed its response to the due process complaint in this case on January 26, 2020. Representation of DCPS' Counsel.

11. Since being moved to the inclusion classroom at City School at the beginning of the third quarter of the current school year, Student has been doing better at school. Student likes the new teacher. Testimony of Mother.

12. At the January 8, 2020 IEP team meeting, the IEP team decided that Student's Behavior Intervention Plan (BIP) should be reviewed and updated. Social Worker has completed a draft of the IEP, which is to be reviewed by the IEP team at its next meeting. Testimony of Social Worker.

13. Petitioner's Counsel filed the due process complaint in this case on January 16, 2020. The Resolution Session Meeting (RSM) was held on January 29, 2020. At the RSM, DCPS agreed to convene a new IEP team meeting to review Student's IEP. Resolution Specialist promptly attempted to schedule the IEP team meeting for the week of February 10, 2020, but Petitioner's Counsel was unavailable. Exhibit R-35. The parties agreed to set the IEP team meeting for February 28, 2020, but Petitioner's Counsel became unavailable on that date. As of the due process hearing date, the meeting had not yet been rescheduled. Exhibit R-35, Testimony of Resolution

Specialist.

14. On February 13, 2020, DCPS provided funding authorization for the parent to obtain 80 hours of independent tutoring for Student, in order to provide Student additional academic support. This funding authorization was provided without conditions and was not part of a settlement agreement. Exhibit R-36, Testimony of Resolution Specialist.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

- A. Did DCPS deny the student a free appropriate public education (FAPE) by convening a multidisciplinary team (MDT) meeting on January 8, 2020 and developing an IEP for student, without the participation of the parent and her representatives?

The evidence is undisputed that when Petitioner's Counsel learned that City School had scheduled an IEP meeting for January 8, 2020 without communicating with the attorney, Petitioner's Counsel requested that the meeting be cancelled so that she and Mother could review the relevant documents before the meeting. This was on January 6, 2020. LEA Representative refused to postpone the IEP meeting because, he contended that Mother had been properly notified about the meeting and had consented to the date.

For all IEP team meetings, the IDEA expressly requires that the local education agency (LEA) take steps to ensure that the parent is present or is afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

34 CFR § 300.322(a). An IEP meeting may only be held without the parent present if the public agency is unable to convince the parent to attend and if the agency kept a record of its attempts to arrange and agree on a mutually convenient time and place. See *Jalloh v. District of Columbia*, 968 F.Supp.2d 203, 211 (D.D.C.2013).

In this case, City School did notify Mother early enough about the meeting. But

when Petitioner’s Counsel notified LEA Representative on January 6, 2020 that her client had not been able to open the IEP documents forwarded by email and requested a postponement, it was the school’s obligation to reschedule the IEP meeting to a “mutually convenient” time. *See J.N. v. District of Columbia*, 677 F. Supp. 2d 314, 323 (D.D.C. 2010) (By failing to respond to parent’s request to reschedule and formulating the IEP without the parent’s attendance at the IEP meeting or input, DCPS’ actions resulted in denial of a FAPE.) DCPS’ holding an January 8, 2020 IEP meeting, without the parent’s participation, was a procedural violation of the IDEA.

Procedural violations may be deemed a denial of FAPE if the procedural inadequacies significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the child. *See 34 CFR § 300.513(a)(2)(ii)*. Conduct by the District that seriously infringes upon the parent’s opportunity to participate in the IEP formulation process will result in a denial of a FAPE. *See, e.g., A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C.2005). I find that City School’s proceeding with the January 8, 2020 IEP meeting, without the parent’s participation, resulted in a denial of FAPE because it impeded Mother’s opportunity to participate in the development of her [REDACTED] IEP.

- B. Was the January 8, 2020 IEP inappropriate because the IEP goals are not appropriate or adequate, specifically the reading and social/emotional goals?

Petitioner’s expert, Educational Consultant, testified that the annual reading and social/emotional goals in the January 8, 2020 IEP were not appropriate. DCPS’

witnesses opined to the contrary that the goals were appropriate for Student. After Mother filed her due process complaint, in the collaborative resolution process, DCPS immediately agreed to reconvene Student's IEP team to review the January 8, 2020 IEP and revise it as appropriate. Educational Consultant, who only became involved after the last IEP meeting, affirmed in her hearing testimony that she would participate in the reconvened IEP meeting and provide input on appropriate IEP goals for Student. In light of these developments, I decline reach the issue of whether the IEP goals, as originally drafted, were appropriate for Student.

- C. Did DCPS deny the student a FAPE by not providing the parent's representatives copies of all of the student's education records, including discipline records?

Under the IDEA and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, DCPS must permit parents to inspect and review any education records relating to their child with a disability that are collected, maintained, or used by the agency. DCPS must comply with a request without unnecessary delay – in no case more than 45 days after the request has been made and before any meeting regarding an IEP. *See* 34 CFR §§ 300.613(a), 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C. 2006).

Beginning October 31, 2019, Petitioner's Counsel requested City School to provide copies of all of Student's education records. Petitioner's Counsel sent follow-up emails to LEA Representative on November 18, 2019, November 22, 2019 and January 14, 2020. On January 14, 2020, LEA Representative advised Petitioner's Counsel by

email that he had provided all of the requested documents, but DCPS did not provide copies of Student's City School discipline records until January 26, 2020, when DCPS' Counsel filed the agency's response to the due process complaint in this case.

DCPS clearly did not meet the 45-day deadline to provide access to Student's education records to Petitioner's counsel. But there was no evidence at the due process hearing that the records were not ultimately provided. Failure to timely provide access to education records is a procedural violation of the IDEA. As explained above in this decision, procedural violations may only be deemed a denial of FAPE 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 § 300.513(a)(2). In this case, I find that Petitioner did not meet her burden of persuasion that DCPS' delay in providing copies of Student's education records to Petitioner's counsel impeded Student's right to FAPE or significantly impeded Mother's opportunity to participate in the decision-making process.

Remedy

In this decision, I have found that DCPS denied Student a FAPE by its procedural violation of holding the January 8, 2020 IEP meeting without the participation of Mother or Petitioner's Counsel. "Once a hearing officer finds that a

school district has denied the student a FAPE, she is required to craft an award that will place a student ‘in the position she would be in absent the FAPE denial.’ *B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.C. Cir. 2016).” *Shaw v. District of Columbia*, No. CV1700738DLFRMM, 2019 WL 498731 (D.D.C. Feb. 8, 2019), *report and recommendation adopted*, No. 17-CV-0738 (DLF/RMM), 2019 WL 935418 (D.D.C. Feb. 26, 2019). An award of compensatory education aims to put a student in the position he or she would be in absent the FAPE denial. *See Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927 (D.D.C. Aug. 1, 2019).

Petitioner did not put on evidence of educational harm resulting from DCPS’ holding the January 8, 2020 IEP meeting without the parent’s participation and did not propose a compensatory education remedy for this denial of FAPE. However, DCPS’ Resolution Specialist testified that on February 13, 2020, DCPS had of its own accord issued funding authorization for the parent to obtain 80 hours of independent tutoring for Student in order to provide Student additional academic support.

The U. S. Department of Education’s Office of Special Education Programs (OSEP) encourages parents and local educational agencies to work collaboratively, in the best interests of children, to resolve the disagreements that may occur in serving students with disabilities. *See Memorandum to Chief State School Officers* (OSEP July 23, 2013) (“The purpose of the resolution process is to attempt to achieve a prompt resolution of the parent’s due process complaint as early as possible at the local level and to avoid the need for a more costly, adversarial, and time-consuming due process

proceeding. Thus, the IDEA’s due process procedures emphasize prompt and early resolution of disputes between parents and public agencies through informal mechanisms at the local level without resorting to the more formal and costly due process hearing procedures and potential for civil litigation.” *Id.*, Answer to Question C-1.) Here, I conclude that where DCPS has been proactive in “compensating” Student for its not ensuring Mother’s participation in the January 8, 2020 IEP meeting, and in the absence of evidence of substantive harm to Student from this procedural violation, I find that DCPS’ voluntary provision of 80 hours of independent tutoring is reasonably calculated to put Student at least in the position Student would have been in, had DCPS not held the January IEP meeting without the parent. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) (“[U]ltimate 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.”)

At the due process hearing, Petitioner’s Counsel argued that I should *order* DCPS to reconvene Student’s IEP team, even though DCPS is already working with Petitioner’s Counsel to schedule the IEP meeting. The purpose of the resolution session under the IDEA is to enable the parents of the student to discuss their complaint and to provide the opportunity for the local educational agency to resolve the complaint. *See* 20 U.S.C. § 1415(f)(1)(B)(i)(IV); *Bridges Pub. Charter Sch. v. Barrie*, 709 F. Supp. 2d 94, 99 (D.D.C. 2010). At the RSM meeting in this case – held only 21 days after the January 8, 2020 IEP meeting where the parent did not participate – DCPS agreed to convene

another IEP team meeting to include the parent and her attorney. The hearing evidence establishes that immediately following the January 29, 2020 RSM meeting, DCPS endeavored in good faith to schedule the new IEP meeting, but the meeting had to be postponed due to Petitioner's Counsel's schedule conflicts.

A hearing officer has broad authority to determine, in his or her discretion, whether particular equitable relief is appropriate. *Cf., e.g., United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 ("The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." *Id.* at 898.) Here, I find that because DCPS has been attempting in good faith to schedule another IEP meeting, as it committed to do at the RSM session, it would not be appropriate for me to order DCPS to do what it has already undertaken to do.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. Petitioner's request that I order DCPS to schedule another IEP team meeting is denied without prejudice;
2. Petitioner's request that I order DCPS to provide copies of Student's education records is denied without prejudice and
3. All other relief requested by the Petitioner herein is denied.

Date: March 1, 2020

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
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