

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

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PARENT,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: November 21, 2021

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2021-0144

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Date: November 18, 2021

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (Petitioner or 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, Mother alleges that Student has been denied a free appropriate public education (FAPE) by Respondent District of Columbia Public Schools’ (DCPS) failure to identify a nonpublic school location to implement Student’s Individualized Education Program (IEP) for the 2021-2022 school year.

Petitioner’s Due Process Complaint, filed on September 15, 2021, named DCPS as Respondent. The undersigned hearing officer was appointed on September 16, 2021.

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<sup>1</sup> Personal identification information is provided in Appendix A.

On September 29, 2021, the parties met for a resolution session and were unable to resolve the issues in dispute. On September 28, 2021, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters.

Due to the social-distancing protocols in the wake of the COVID-19 virus outbreak, with consent of the parent, the due process hearing was held on line and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on November 18, 2021. Mother appeared on line for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by NONPUBLIC MONITOR and by DCPS' COUNSEL.

At the beginning of the hearing, DCPS' Counsel requested a one week continuance of the hearing because Student had recently visited a nonpublic school where he/she may be admitted. I denied this request, which was opposed by Petitioner.

Counsel for Petitioner made an opening statement. Mother testified and called EDUCATIONAL ADVOCATE as an additional witness. DCPS called Nonpublic Monitor its only witness. Petitioner's Exhibits P-1 through P-24 were all admitted into evidence without objection. DCPS' Exhibits R-1 through R-4, R-14, R-92, R-99, R-102 through R-107 and R-109 were admitted into evidence, including Exhibits R-92 and R-99 admitted over Petitioner's objections. I sustained Petitioner's objection to Exhibit R-32. DCPS did not offer into evidence the remaining exhibits listed in its prehearing disclosure.

After the taking of the evidence, counsel for Petitioner made an oral closing argument. There was no request to file a written closing.

**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 issue for determination in this case, as certified in the September 28, 2021 Prehearing Order, is:

Whether DCPS has denied Student a Free Appropriate Public Education (FAPE) by failing to identify a suitable location of services to implement Student's IEP for the 2021-2022 school year.

For relief, Petitioner requests that DCPS be ordered to fund and timely place Student at an appropriate nonpublic, therapeutic day school; fund and timely provide appropriate interim services until an appropriate location of services/placement at the nonpublic school is made available and fund compensatory education as compensation to Student for the denials of FAPE alleged in the parent's due process 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 in the District of Columbia with his/her parents. Testimony of Mother. Student is eligible for special education under the disability classification Autism Spectrum Disorder (ASD). Exhibit P-8.

2. Student is considered nonverbal and has impairments co-morbid with ASD, including digestive issues, sleep deprivation, obsessive-compulsive disorder, aggression and others. Testimony of Mother.

3. Since July 2018, Student has been placed by DCPS at NONPUBLIC SCHOOL 1. Exhibit P-9. Due to the COVID-19 pandemic, Nonpublic School 1 was closed for most in-person instruction from mid-March 2020 until July 2021. Testimony of Nonpublic Monitor. Student had minimal participation in remote learning activities offered by Nonpublic School 1 between March 2020 to February 2021. Student's participation increased from February 2021 to April 2021, when Student began to adjust to the concept of remote learning. Exhibit P-9, Testimony of Mother.

4. Student has a history at school of engaging in "chinning" others, charging at others, aggression, leaving his/her area, property misuse, not following directions, disrobing, inappropriate sexualized behavior and hand-hitting. Since Student's enrollment at Nonpublic School 1 in July 2018, there had been an increase in Student's maladaptive behaviors along with an observed increase in intensity of charging and aggressions towards staff. Exhibit P-9.

5. In the spring of 2021, Nonpublic School 1 had Mother bring Student to school two times to attempt to transition back to school on a tier schedule. Student was not able to get past the first tier, which meant that Student was not at a level to return to in-person classes. Testimony of Nonpublic Monitor, Exhibit P-15.

6. At a June 1, 2021 IEP team meeting at Nonpublic School 1, Nonpublic

School 1's principal stated that the school had utilized all of its tools and Student was not making progress, that the school did not have other tools to help Student and that it was important to look at alternative placements that would better meet Student's needs.

Exhibit P-15. DCPS agreed that a new placement location for Student was needed.

DCPS shared with the parent at the IEP team meeting that Student could still receive services from Nonpublic School 1 until a replacement school was identified. Testimony of Nonpublic School Monitor. The school principal recommended that if the parents were able to support Student virtually, the school could do an on-line summer session and until a new school placement was identified for the 2021-2022 school year. Exhibit P-15.

7. At the June 1, 2021 IEP team meeting, Student's DCPS IEP was updated (the June 7, 2021 IEP). The June 7, 2021 IEP provided for Student to receive 28.5 hours per week of Specialized Instruction outside general education, 60 minutes per week of Speech-Language Pathology and 30 minutes per week of Occupational Therapy (OT). The IEP also provided, *inter alia*, that Student required two dedicated aides to address aggression concerns. Exhibit p-8.

8. In July 2021, Student attended a couple of virtual sessions with Nonpublic School 1 for Speech and Language and OT related services. Since then, the parents received no communications from the school regarding programming for the 2021-2022 school year. Testimony of Mother.

9. On July 21, 2021, a Nonpublic School 1 staff member wrote Petitioner's

Counsel by email that “[g]iven that we will not be able to program for [Student] in the fall and [Student] will be transitioning to a new placement, it is not necessary to complete the [paperwork] for the 2021-22 school year.” Exhibit P-17.

10. On September 23, 2021, Nonpublic Monitor sent Petitioner’s Counsel, by email, a virtual learning schedule for Student, for the interim period, while DCPS continued to seek a new nonpublic school placement for Student. This schedule provided for a total of 2½ hours per week of virtual instruction. Related services were not included in the schedule. DCPS proposed providing a missed services plan for related services missed or compensatory education for related services to be provided independently. Exhibit P-20. By email of October 18, 2021, Nonpublic Monitor wrote that Nonpublic School 1 did not currently have the staff to accommodate Student’s IEP. Exhibit P-21.

11. The D.C. Office of the State Superintendent of Education (OSSE) maintains a list of nonpublic schools approved to serve District-resident children with disabilities. Since the June 1, 2021 IEP team meeting, DCPS has applied to all of the OSSE approved day schools, which serve students with severe levels of ASD. One school offered a place for Student, but would not be able to provide two dedicated aides as required by Student’s IEP. The parents did not agree to that condition. None of the other OSSE approved schools accepted Student for admission. DCPS has also reached out to three or four nonpublic schools not on OSSE’s approved school list. Mother has visited one of these schools. DCPS has not yet received a response from these “non-

OSSE approved” schools. Testimony of Nonpublic Monitor.

### **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 parent 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, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the parent shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. For the issue in this case, Petitioner has the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

#### **Analysis**

Did DCPS deny Student a FAPE by failing to identify a suitable location of services to implement Student’s IEP for the 2021-2022 school year?

Student is a youth with severe autism. Since July 2018, Student has been placed by DCPS at Nonpublic School 1. Student’s current, June 7, 2021, IEP provides for Student to receive 28.5 hours per week of Specialized Instruction outside general

education, 60 minutes per week of Speech-Language Pathology and 30 minutes per week of OT.

At the June 1, 2021 IEP Team meeting, Nonpublic School 1's principal stated that Student was not making progress at her school and that it was important to look at alternative placements that would better meet Student's needs. DCPS promptly began a search for other nonpublic day schools that could serve Student, but, as of the due process hearing date, DCPS has been unable to secure Student's admission to another suitable school.

On September 23, 2021, DCPS set up a home-based virtual learning schedule for Student, while DCPS continued to seek a new school. This schedule provided a total of 2½ hours per week of home-based virtual special education services for Student. Otherwise, during the 2021-2022 school year, DCPS has not offered Student any special education or related services. Petitioner does not dispute that DCPS has made diligent efforts to secure Student's admission to a new nonpublic school for the 2021-2022 school year. However, Petitioner contends that DCPS has denied Student a FAPE by not providing appropriate interim services while the school search proceeds. I agree.

The IDEA does not set a specific time period for implementation of an IEP, but requires that special education and related services must be made available "[a]s soon as possible following development of the IEP." 34 C.F.R. § 300.323(c)(2). As the Second Circuit Court of Appeals explained in *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503 (2d Cir. 2006), *opinion amended on denial of reh'g*, 480 F.3d 138 (2d Cir.

2007),

Plaintiffs' right to a free appropriate public education requires that their IEPs be implemented as soon as possible. "As soon as possible" is, by design, a flexible requirement. It permits some delay between when the IEP is developed and when the IEP is implemented. It does not impose a rigid, outside time frame for implementation. Moreover, the requirement necessitates a specific inquiry into the causes of the delay. Factors to be considered include, but are not limited to: (1) the length of the delay, (2) the reasons for the delay, including the availability of the mandated educational services, and (3) the steps taken to overcome whatever obstacles have delayed prompt implementation of the IEP.

*D.D., supra* at 513-14.

In this case, Student's IEP mandated educational services have not been available since the end of the 2020-2021 school year because DCPS has not been able to secure Student's admission to an appropriate school which is able to serve students with severe autism. As U.S. Magistrate Judge G. Michael Harvey pronounced in *Brown v. District of Columbia*, Civil Action No. 1:17-cv-00348 (RDM/GMH), 2019 WL 3423208 (D.D.C. July 8, 2019), where implementation of an IEP become impracticable or impossible, the District may not leave a student with a disability without services.

Generally, in situations in which implementation of a student's IEP has become impracticable or impossible, the remedy is not to leave the student without services. For example, in *John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202*, 502 F.3d 708 (7th Cir. 2007), the court addressed a situation in which it was unclear whether a student's prior IEP could be implemented as written because he had progressed from middle school to high school. *Id.* at 711-12. In remanding the case to the court below, the Seventh Circuit instructed that, if the court found that implementation of the prior IEP was impracticable or impossible in the high school setting, it could approve an alternative "as close as possible to the approach used in the middle school but nevertheless compatible with the goals of the IEP and the institutional demands of the high school setting." *Id.* at 716. That

is, when “rigid adherence” to an IEP is impossible, the school district has an obligation to “provide educational services that approximate the student’s . . . IEP as closely as possible.” *Id.* at 714–15.

*Brown* at \*16, n.18.

In the present case, it is clear that since the beginning of the 2021-2022 school year, DCPS has substantially failed to implement Student’s IEP. Nor has the District offered services to Student that approximate the June 7, 2021 IEP. This was a denial of FAPE. *See, e.g., Middleton v. District of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018) (Failure to implement substantial or significant provisions of the IEP constitutes a denial of FAPE.)

#### Remedy

Following Magistrate Judge Harvey’s guidance in *Brown, supra*, I conclude that until DCPS is able to identify an appropriate replacement school for Student to attend, the District is obliged to provide educational services that approximate Student’s June 7, 2021 IEP as closely as possible. Petitioner’s expert, Educational Advocate, recommended that for interim services, Student should receive 15 hours per week of tutoring, 1 hour per week of speech language therapy, 1 hour per week of OT and 10 hours per week of Applied Behavior Analysis (ABA) therapy. She opined that this level of services would be what Student would be able to handle at the present time, given his/her extreme difficulty with transitions. DCPS’ expert, Nonpublic Monitor, opined in her testimony that Student would not be able to sustain 15 hours per week of virtual special education, based on Student’s documented challenges attending on line over the

prior school year. While Nonpublic Monitor raises legitimate concerns about Student's tolerance for on-line instruction, I adopt the recommendation of Educational Advocate. She has a background in teaching children on the autism spectrum and qualified to testify as an expert in the implementation of IEPs for students with autism.

I conclude that to approximate Student's June 7, 2021 IEP as closely as possible, until DCPS is able to place Student at an appropriate nonpublic school, DCPS should offer Student 15 hours per week of specialized instruction, 60 minutes per week of Speech-Language Pathology and 30 minutes per week of OT. Because the interim services requirement is to approximate an IEP as closely as possible, and Student's IEP did not provide for ABA services or for more than 30 minutes per week of OT, I find unsupported Educational Advocate's recommendation for 10 hours per week of ABA services and an additional 30 minutes per week of OT services.

#### Compensatory Education Relief

Petitioner also seeks a compensatory education award for DCPS' failure to provide IEP services to Student for most of the 2021-2022 school year. When a hearing officer finds a denial of FAPE he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education. . . . [A]n award of compensatory education 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." *B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations

and citations omitted.)

Educational Advocate recommended for compensatory education that Student be awarded 228 hours of academic tutoring, 8 hours of speech language therapy, 4 hours of OT and 80 hours of ABA therapy. This proposed award is essentially an hour-for-hour replacement of missed services prescribed by the June 7, 2021 IEP, plus ABA therapy which was not a service provided in the IEP. I do not find this recommendation persuasive. In *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, (D.C.Cir. 2005) the District of Columbia Court of Appeals rejected “mechanical hour-counting,” and emphasized that an award must be designed to meet the student’s unique needs. *Reid*, 401 F.3d at 524.

In the current school year, except for 2½ hours per week of virtual special education beginning around September 27, 2021, Student has missed some 12 weeks of IEP special education and related services through the date of the due process hearing. Based on Student’s “unique needs,” that is, according to Educational Advocate, Student’s ability to handle 15 hours per week of virtual instruction, I conclude that an appropriate compensatory education award would be 175 hours of tutoring, plus 14 hours of Speech-Language Pathology and 7 hours of OT. I do not award ABA services as compensatory education because ABA services were not provided for in Student’s IEP.

#### Other Relief

Petitioner also requested that I order DCPS to place Student at an appropriate nonpublic, therapeutic day school. In closing argument Petitioner’s Counsel agreed that

since June 2021, DCPS had been diligently seeking to secure Student's admission to an appropriate nonpublic school to implement the June 7, 2021 IEP. I expect DCPS to continue to diligently pursue those efforts and also to give due consideration to any school options which the parents may propose. I decline to order DCPS to place Student at a nonpublic, therapeutic day school when Student's admission to an appropriate program has not been secured.

**ORDER**

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

ORDERED:

1. As compensatory education for the denial of FAPE found in this decision, DCPS shall promptly issue funding authorization to the parent for Student to receive 175 hours of 1:1 academic tutoring, 14 hours of Speech-Language Pathology and 7 hours of OT. These services shall be provided by professionals experienced with working with individuals with severe autism and may be provided virtually on-line or, if the parent requests, in person at a suitable location;
2. For interim services, until such time as DCPS secures Student's admission to an appropriate special education day school, DCPS shall provide Student virtually 15 hours per week of special education services, 1 hour per week of Speech-Pathology Services and 30 minutes per week of occupational therapy services and
3. All other relief requested by the Petitioner herein is denied.

Date: November 21, 2021

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