

**District of Columbia
Office of the State Superintendent of Education**

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
September 23, 2018

Parent, on behalf of Student,¹)	
Petitioner,)	
)	
v.)	Hearing: September 13, 2018
)	Date: September 23, 2018
)	Hearing Officer: Michael Lazan
)	Case No.: 2018-0158
District of Columbia Public Schools,)	
)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving a student who is currently eligible for services as a student with Autism Spectrum Disorder (the “Student”).

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on June 21, 2018. The Complaint was filed by Petitioner, who is the parent of the Student. On June 29, 2018, Respondent filed a response. The resolution period expired on July 21, 2018.

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 Education Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title

¹Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

On July 25, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., and Attorney C, Esq., counsel for Petitioners, appeared. Attorney B, Esq., counsel for Respondent, appeared. On August 1, 2018, a prehearing conference order was issued, summarizing the rules to be applied in this hearing and identifying the issues in the case.

On August 29, 2018, Petitioner filed a motion for a continuance. DCPS consented to the motion. This Hearing Officer found the motion to be necessary and reasonable, and there was no showing of prejudice to the Student, Petitioner, or DCPS. The Hearing Officer Decision (“HOD”) due date was therefore extended to September 23, 2018.

There was one hearing date: September 13, 2018. This was a closed proceeding. Petitioner was represented by Attorney A, Esq, and Attorney C, Esq. Respondent was represented by Attorney B, Esq. Petitioner moved into evidence Exhibits 1-17. There were no objections. Exhibits 1-17 were admitted. Respondent moved into evidence Exhibits 1-25. There were no objections. Exhibits 1-25 were admitted.

Petitioner presented as witnesses: herself and Witness A, an advocate. Respondent presented no witnesses. At the close of testimony, the parties presented oral arguments.

IV. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free Appropriate Public Education (“FAPE”) issues to be determined are as follows:

1. Did the Local Educational Agency (“LEA”) fail to offer the Student an Individualized Education Program (“IEP”) by April 26, 2017? If so, did the LEA act in contravention of the requirement to provide the Student with an annual IEP? If so, did the LEA deny the Student a FAPE?

2. Did the LEA fail to provide Petitioner with educational records? If so, did the LEA violate 34 CFR Sect. 300.501 and related provisions? If so, did the LEA deny the Student a FAPE?

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Autism Spectrum Disorder. The Student has very low academic levels in all areas, and engages in such persistent aggression and self-injurious behavior that the Student cannot be maintained at home. The Student can say some words, but is “basically” non-verbal. The Student is diagnosed with Autism Spectrum Disorder, Mild Intellectual Disability, Disruptive Mood Regulation Disorder, and Attention Deficit Hyperactivity Disorder. (P-4-8; P-13; Testimony of Petitioner; P-13)

2. In or about the 2015-2016 school year, the Student attended School A, a non-public school in Maryland. An IEP meeting was held for the Student on April 26, 2016. The IEP indicated that the Student’s behavior impacted the Student and/or other students in class, and that the Student had a severe language barrier. The IEP contained goals in mathematics, reading, writing, adaptive living skills, speech and language,

social, emotional and behavioral development, and motor skills/physical development. The Student was recommended for 28.5 hours of specialized instruction per week, with occupational therapy and behavior support services for one hour per week, and speech and language therapy for thirty minutes per week. The Student was provided with an iPad, “big line” paper, “chunky” pencils, “read alouds,” and other interventions to help with presentation, as well as human scribes and other interventions to help with responses. The Student was also provided with preferential seating and a location with minimal distractions. Petitioner agreed with this IEP. (P-2; Testimony of Petitioner)

3. At the time of the IEP’s creation, the Student’s speech and language issues prevented the Student from developing social relationships in the classroom. To develop relationships, the Student required supports, such as a voice output device and picture communication symbols. The Student was able to order numbers from 1-400 with minimal prompting, add single digit numbers with the use of “touch math,” and make a 1-to-1 correspondence of objects to numbers up to the number fifteen. The Student could also identify time to the half hour. The Student could identify most letters of the alphabet and knew some letter sounds. The Student could also decode some “CVC” words. The Student’s writing skills included the ability to write the Student’s first and last name, but the Student’s writing was mostly illegible. The Student was able to eat and use the toilet. However, on average, the Student engaged in aggression approximately every other day and in self-injurious behavior approximately every day. (P-2)

4. For the 2015-2016 school year, the Student continued at School A. DCPS and Petitioner agreed to provide the Student with a dedicated aide in or about September,

2016. However, no aide was provided to the Student at that time. (Testimony of Petitioner)

5. On September 9, 2016, an independent psychologist evaluated the Student and recommended the Student for a residential program. (P-4)

6. The Student engaged in a serious incident at the Student's home in or about February, 2017. The Student broke windows, banged his/her head, bit him/herself, and hit Petitioner. As a result, the Student was hospitalized. (P-6-3; Testimony of Petitioner)

7. Thereafter, on or about February 16, 2017, DCPS sent a letter to the parent requesting her attendance at an IEP meeting to be held on March 14, 2017. On or about February 23, 2017, DCPS sent another letter to the parent requesting her attendance at an IEP meeting to be held on March 20, 2017. On the same date, DCPS sent a different letter to the parent seeking to amend the Student's IEP without an IEP meeting. On or about February 27, 2017, DCPS sent yet another letter to the parent requesting her attendance at an IEP meeting to be held on March 14, 2017. (R-18; P-8-1)

8. The Student's IEP was amended in February, 2017, to add a dedicated aide. No IEP meeting was conducted at this time. (P-8-3; Testimony of Petitioner)

9. After the Student was hospitalized, the Student went to a second hospital. Thereafter, on or about March 20, 2017, the Student was transferred to a residential treatment center, Center A. (Testimony of Petitioner; P-7)

10. The Student received about 4 hours of classes per school day at Center A, which also provided the Student with speech and language therapy, occupational therapy,

and behavior support services. Center A also housed the Student and provided the Student with medical, social, and emotional supports. (Testimony of Petitioner)

11. For the third and fourth terms of the 2016-2017 school year, the Student received academic instruction at Center A in language, math, pre-vocational skills, following directions, on-task behaviors, motor skills, and “citizenship.” In the third term, the Student made progress in all areas except following directions and on-task behaviors. In the fourth term, the Student only made progress in motor skills. Still, comments on the Student’s report card issued in or about July-August, 2017, indicated that the Student made progress during the year. (P-11-1)

12. The Student continued at Center A during the 2017-2018 school year, but the Student had significant difficulty with academics. During the school year, the Student’s teacher often called Petitioner and indicated that the Student was regressing. The teacher mentioned to Petitioner that the Student was vomiting to get out of doing work. The teacher also told Petitioner that the Student was attacking other students at Center A. (Testimony of Petitioner)

13. By February, 2018, the Student was regressing and refusing to participate in activities. The Student was developing more tics and was also often self-injurious. (P-12-1)

14. A new IEP was developed for the Student in February, 2018. However, compared to the IEP of April, 2016, the Student’s “areas of concern” (describing present levels of performance) in reading and writing were left unchanged, and only minor changes were made to the “area of concern” in math. Some slow progress was reported in regard to a communication goal, and the Student was reported to have made progress

in regard to eating. It was also reported that the Student engaged in approximately thirty-six incidents of aggressive behavior per month, with nine incidents of self-injury and twenty-five incidents of non-compliance per month. The IEP did not change the Student's specialized instructional hours, behavior support services, occupational therapy services, or speech and language pathology, but did add orientation and mobility services. (P-13)

15. For the 2017-2018 school year, the Student took classes in language, math, pre-vocational skills, following directions, on-task behaviors, motor skills, and "citizenship." The Student made progress in all areas in the first term, but no progress in any area during the next three terms. (P-14)

16. A request for records was sent by Petitioner's counsel to DCPS on or about March 20, 2018, and May 10, 2018. Some of the requested records were sent to Petitioner, but some were not. (P-16-1, 4, 7; R-9 at 45)

VI. Conclusions of Law

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

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of

production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

See D.C. Code § 38-2571.03(6)(A)(i)

Issues #1 and #2 do not directly involve a challenge to the Student's existing or proposed IEP or placement. Accordingly, Petitioner shall bear the burden of persuasion on both issues. Schaffer v. Weast, 546 U.S. 49 (2005).

1. Did the LEA fail to offer the Student an IEP by April 26, 2017? If so, did the LEA act in contravention of the requirement to provide the Student with an annual IEP? If so, did the LEA deny the Student a FAPE?

The IDEA has a long-standing provision requiring districts to conduct a periodic review of each student's IEP. According to 20 USC 1414 (d)(4)(A) through 20 USC 1414 (d)(4)(B), the LEA must ensure that the IEP team "reviews the child's IEP periodically, but not less frequently than annually," to "determine whether the annual goals for the child are being achieved." The LEA must also revise the IEP "as appropriate" to address: any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate; the results of any reevaluation conducted; information about the child provided to, or by, the parents concerning additional evaluation data; the child's anticipated needs; or other matters.

The IDEA does permit school districts and parents to agree not to convene an IEP team meeting to make changes to the child's IEP, but only as long as the annual IEP meeting has been held. 34 CFR 300.324 (a)(4); K.A. ex rel. F.A. v. Fulton Cty. Sch. Dist., No. 1:11-CV-727-TWT, 2012 WL 4403778, at *3 (N.D. Ga. Sept. 21, 2012), aff'd, 741 F.3d 1195 (11th Cir. 2013)(when the parties agree to amend an IEP without a meeting, parental consent is required, but that is not the case when the change is made during an IEP team meeting). There are no exceptions to the requirement to meet

annually as an IEP team to review the Student's progress and determine a new program for the forthcoming year.

Notices were sent to Petitioner indicating that there was to be an IEP meeting in or about February, 2017. However, there is nothing in the record to clearly indicate that this meeting occurred, and during testimony and argument, DCPS did not indicate that any such meeting occurred. DCPS pointed to the fact that the amended IEP of February, 2017, added a dedicated aide for the Student. However, without an actual meeting of participants in a room, a merely amended IEP does not satisfy the requirement to conduct an annual review meeting for the Student.

It is true that, by April, 2017, the Student was placed in a residential treatment facility with its own educational program. However, where a student is placed in a non-public school, it is still the school district's responsibility to create a new IEP, and therefore a new formal educational program, for the student. Though the Student is obviously challenging to educate, the Student's poor performance in the 2016-2017 school year should have been addressed by an IEP team, which could have then assessed the Student and tried to improve the Student's program with a new IEP. Even though the non-public school was a highly restrictive placement, there are variables within a restrictive placement that can be modified, such as access to particular kinds of behavioral incentives, or access to different types of sensory input. Without an annual review and a new IEP, the Student's behaviors not only continued, but worsened. For the second and third terms of the 2017-2018 school year, according to the Center A report card, the Student made no progress in any area listed on the document.

It is noted that DCPS did not present any authority to indicate that the failure to conduct an annual IEP review for the Student can be viewed as a procedural violation. Lesesne ex rel. B.F. v. D.C., 447 F.3d 828,834 (D.C. Cir. 2006)(“(a)n IDEA claim is viable only if those procedural violations affected the student's substantive rights”); Hill v. D.C., No. 14-CV-1893 (GMH), 2016 WL 4506972, at *18 (D.D.C. Aug. 26, 2016)(failure to conduct vocational assessment and speech and language assessment).

DCPS denied the Student educational benefit, and therefore a FAPE, by failing to conduct an annual review for the Student in April, 2017.

2. Did the LEA fail to provide Petitioner with educational records? If so, did the LEA violate 34 CFR Sect. 300.501 and related provisions? If so, did the LEA deny the Student a FAPE?

20 USC 1232g(a)(1)(A) requires each educational agency or institution to grant parents access to the educational records of their children no more than forty-five days after the request. The IDEA regulations provide in pertinent part: “(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child and the provision of FAPE to the child.” 34 CFR 300.501(a). The term “education records” means the type of records covered under the definition of “education records” in 34 C.F.R. Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 USC 1232g (FERPA)). 34 CFR 300.611-300.625. Education records as defined under FERPA are “directly related to a student” and “maintained by an educational agency or institution or by a party acting for the agency or institution.” The term does not include “records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a

temporary substitute for the maker of the record.” “Record” means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. 34 CFR 99.3.

Through her attorney, Petitioner requested a wide variety of educational records in or about March, 2018, and May, 2018. However, DCPS provided Petitioner with at least some of the records before the hearing date, and Petitioner herself did not mention the records issue during testimony. Nor did Witness A explain how the records issue had any substantive impact on the Student’s education (or even this litigation). Lesesne, at 834; see also Kruvant v. District of Columbia, 99 Fed. App’x. 232, 233 (D.C. Cir. 2004). Moreover, Petitioner did not present any authority to support this claim, which must therefore be dismissed.

RELIEF

When school districts deny students a FAPE, courts have wide discretion to ensure 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.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confer broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.” 20 USC 1415(i)(2)(C)(iii).

During closing argument, Petitioner requested a revised IEP to address the Student’s academic and behavioral issues. While an IEP was written for the Student in February, 2018, the Student continues to do poorly at Center A, which appears to be struggling to maintain the Student. While it is not clear whether any superior locations of

services are available, certainly the Student's location of service should be discussed by an IEP team. It is noted that the February, 2018, IEP not did not change the Student's specialized instructional hours, behavior support services, occupational therapy services, or speech and language pathology, and did not make any significant changes to the Student's accommodations. (The IEP did add orientation and mobility services, but did not indicate how many hours or minutes of services per month were due to the Student.) This Hearing Officer agrees with Petitioner that a new IEP is required to address the Student's current educational needs.

Petitioner also seeks extended eligibility for the Student, though the Student has years of eligibility remaining under the IDEA. Petitioner presented no authority for this request, and did not acknowledge that extended eligibility is generally required only where a Student is no longer eligible for services. Ferren C. v. School Dist. of Philadelphia, 612 F.3d 712 (3d. Cir. 2010) (affirming a decision that required a district to develop IEPs for a student with multiple disabilities who had aged out of eligibility under the IDEA). Petitioner also did not present testimony or argument as to why extended eligibility would be necessary for this Student. Under the circumstances, the request for extended eligibility must be denied.

Petitioner also seeks compensatory education. Though Petitioner did not mention compensatory education in her initial closing argument, she did mention it in rebuttal and also during the prehearing conference.

Under the theory of compensatory education, courts and hearing officers may award "educational services to be provided prospectively to compensate for a past deficient program." Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005).

In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate 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. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “‘qualitative, fact-intensive’ inquiry used to craft an award tailored to the unique needs of the disabled student”).

Since the Student was denied a FAPE from April, 2017, through February, 2018, compensatory education is due to the Student. However, Petitioner did not present a compensatory education plan or present any witnesses to support this claim. Under the circumstances, it is appropriate for the hearing officer to fashion an appropriate compensatory education award. Given the circumstances of this case, this Hearing Officer finds that the appropriate award is to provide the Student with seventy-five hours of individualized behavior therapy designed for students with autism, to be delivered by a qualified service provider within two years of the date of the HOD.

VII. Order

As a result of the foregoing:

1. The Student is hereby awarded seventy-five hours of compensatory behavior therapy, to be provided on an individual basis. Such therapy shall be specifically designed for students with autism, and shall be delivered by a qualified service provider within two years of the date of this HOD;
2. DCPS shall reconvene the Student's IEP team, conduct an annual review, and revise the Student's IEP as appropriate;

3. All other requests for relief are hereby denied.

Dated: September 23, 2018

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
OSSE Division of Specialized Education
Contact.resolution@dc.gov

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

Dated: September 23, 2018

Michael Lazan
Impartial Hearing Officer