

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

OSSE
Office of Dispute Resolution
September 04, 2020

PETITIONER,
on behalf of STUDENT,¹

Date Issued: September 4, 2020

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020–0041

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

Hearing Dates: July 1 & 2, 2020
August 31, 2020

Respondent.

FINAL HEARING OFFICER DETERMINATION

The due process hearing in this case was held by video conference on July 1 and 2, 2020. On July 7, 2020, I issued an Interim Hearing Officer Decision (Interim Decision), which provided my Findings of Fact and Conclusions of Law. In the Interim Decision, I determined, *inter alia*, that DCPS denied Student a free appropriate public education (FAPE) by holding a November 25, 2019 IEP review meeting, without the parents' participation and that the denial of FAPE lasted until March 2, 2020, when Student's IEP team, including MOTHER and PETITIONER'S COUNSEL met to review and revise the IEP.

The November 25, 2019 IEP provided, *inter alia*, for Student to receive 14 hours per week of Specialized Instruction Services, including 6 hours outside general education. At the March 2, 2020 IEP review meeting, the IEP team decided that

¹ Personal identification information is provided in Appendix A.

Student required a more restrictive educational placement, namely a full-time special education placement at a nonpublic school. In the Interim Decision, I found that it was likely that the IEP team would have reached the same conclusion at the November 25, 2019 IEP team meeting, if the parents and their representative had been present to advocate for Student

In the Interim Decision, I determined that Student was entitled to compensatory education for the denial of FAPE, but that the hearing record lacked sufficient information to conclude where Student would be now, if Student's placement had been changed to a full-time special education school at the November 25, 2019 meeting, instead of at the March 2, 2020 meeting held some 11 weeks later. Without that information, I was not able to craft a compensatory education award, calculated to place Student in the position Student would be in absent the FAPE denial. *See, e.g., B.D. v. District of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016).

In the Interim Decision, I ordered Petitioner and invited DCPS to submit supplemental written compensatory education proposals that provide the additional information needed for the hearing officer to craft a compensatory education award. I kept the case record open solely to supplement the record with information for determination of an appropriate compensatory education award for Student. Petitioner's Counsel filed a statement on July 27, 2020 that it was not possible to produce an appropriate compensatory education plan without current assessments of

Student. On July 28, 2020, DCPS submitted a compensatory education proposal developed by SCHOOL PSYCHOLOGIST 2. On July 31, 2020, Petitioner, by counsel filed a motion to strike DCPS' compensatory education proposal as untimely filed. By order issued August 10, 2020, I denied Petitioner's motion to strike the DCPS proposal.

At the request of Petitioner, I scheduled a supplemental hearing to give Petitioner's Counsel the opportunity to examine School Psychologist 2 regarding his compensatory education proposal. The supplemental video conference hearing was held on August 31, 2020. Mother, Petitioner's Counsel and DCPS' Counsel participated online. School Psychologist 2, who was qualified as an expert in school psychology, was the only witness. I admitted into evidence, over DCPS' objections, Petitioner's Exhibits P-48 through P-50 and, over Petitioner's objections, Exhibits R-38 and R-39. I am now prepared to determine an appropriate compensatory education award and to issue my final hearing officer determination.

Incorporation of Interim Decision

I adopt my Findings of Fact and Conclusions of Law from the Interim Decision and incorporate them by reference in this final Hearing Officer Determination.

Compensatory Education Remedy

In the Interim Decision in this case, I determined that DCPS had denied Student a FAPE by holding the November 25, 2019 IEP team meeting without the participation of the parents or their representatives and that the resulting harm continued for some 11 weeks, until the March 2, 2020 IEP team meeting when Student's IEP team changed Student's placement to a full-time special education school. I invited both parties to submit additional information to equip this hearing officer to craft an appropriate compensatory education award for the denial of FAPE.

Petitioner elected not to submit a compensatory education proposal.² DCPS submitted a compensatory education proposal developed by School Psychologist 2 (Exhibit R-38), who testified at the supplemental hearing. This expert proposed that Student be awarded 60 hours of special education tutoring and 8 hours of direct Applied

² After I issued the Interim Decision, Petitioner's Counsel contended that it was impossible to develop a compensatory education recommendation until Student was comprehensively reevaluated in all areas of Student's disabilities. Petitioner's Counsel asserted that it was unclear how long these assessments would take in light of the Student's behavior and social/emotional issues. *See Petitioners' Response to the Interim Order that Petitioners Provide a Compensatory Education Plan, July 27, 2020.*

In an attached affidavit, Petitioner's expert, EDUCATIONAL CONSULTANT, declared that data was insufficient to fully understand where Student was functioning prior to, during and at the end of the 11 week period of the denial of FAPE. This expert had testified at the original due process hearing that it would have been possible to get assessment information for Student outside of school, *e.g.*, at a library, a recreation center or private home. In his affidavit, Educational Assessment did not address why he did not undertake such an assessment to enable him to make a compensatory education recommendation.

Behavior Analysis (ABA) therapy as compensatory education. He explained that he arrived at this recommendation because research data suggested that on average, students' achievement scores declined by one month's worth of school learning during the 12 week summer break (the "summer loss") and the period of denial of FAPE in this case, 11 weeks, was comparable in duration to the typical 12 week school summer break.

In his written proposal, School Psychologist 2 acknowledged that DCPS' denial of FAPE in this case did not actually cause a gap in services to Student comparable to a summer break. After the November 25, 2019 IEP team meeting, the parents unilaterally chose to home school student rather than accept the special education services offered by DCPS. Notwithstanding, School Psychologist 2 assumed that Student experienced a decline of one month's worth of school learning, comparable to a summer loss because from November 25, 2019 to March 2, 2020, Student was not enrolled in a nonpublic educational program that included principles of ABA incorporated in the learning environment in the areas of reading, math and written expression. To make up for this loss, School Psychologist 2 recommended a compensatory education award to Student of 60 hours of academic tutoring and 8 hours of direct ABA therapy.

In closing argument, Petitioner's Counsel contended that School Psychologist 2's proposal was not credible for two reasons. First, the expert allegedly relied upon Student's 2017 psychological evaluation and his plan was not based on underlying data specific to Student. *See, e.g., Stanton ex rel. K.T. v. District of Columbia*, 680 F. Supp.

2d 201, 208 (D.D.C. 2010) (Requirement for individualized compensatory education assessment.) However, School Psychologist 2, testified that in addition to considering Student's 2017 reevaluation, he also reviewed Student's March 4, 2020 IEP present levels of performance³ and achievement testing for Student from the last school year, and he obtained input from Student's principal and teacher. Considering that DCPS Schools have been closed since March 16, 2020 due to the Coronavirus, I find that this was a reasonable basis for School Psychologist 2's recommendations.

Petitioner's Counsel also asserts that School Psychologist 2 erred in using a numerical formula to compensate for Student for the denial of FAPE in this case. *See, e.g., Mary McLeod Bethune Day Academy Public Charter School v. Bland*, 534 F.Supp.2d 109, 115 (D.D.C.2008) ("In [*Reid v. District of Columbia*, 401 F.3d 516 (D.C.Cir. 2005)], the Court rejected 'cookie-cutter' or mechanical remedies, such as awarding one hour of compensatory instruction for each hour that the student was denied FAPE, and stressed that the Hearing Officer must take into account individual assessments of the student and focus on the student's individual needs. *Reid*, 401 F.3d at 523–24.") But, as the Court explained in *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 555 F. Supp. 2d 130, 136 (D.D.C. 2008) "[a] compensatory award

³ On March 2, 2020, Student's IEP team, including Mother and her representative met to review Student's City School 2 IEP. Based on data showing increased behavior concerns as well as academic concerns for Student, the team proposed to revise Student's IEP to increase service hours and change Student's educational setting to a nonpublic setting. The parent agreed with this decision. See Exhibit P-2.

constructed with the aid of a formula is not *per se* invalid,” and that “[a] formula-based award may in some circumstances be acceptable if it represents an individually-tailored approach to meet the student’s unique prospective needs, as opposed to a backwards-looking calculation of educational units denied to a student.” *Id.* at 136 (quoting *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 532 F. Supp. 2d 121, 123 (D.D.C. 2008)).

For his proposal, School Psychologist 2 did not propose a “cookie-cutter” or “mechanical” remedy. As School Psychologist 2 explained in his testimony, he concluded that as a result of the denial of FAPE in this case, Student’s loss was comparable to the “summer loss,” *i.e.*, the equivalent of 20 school days worth of learning. His compensatory education proposal does not represent one hour of compensatory instruction for each hour that the student was actually denied FAPE, but reflects the expert’s estimate of services needed to remedy the harm resulting from the denial of FAPE over the 11 week period. I find that, especially considering the relatively short period of denial of FAPE in this case, this analysis was credible.

I conclude that School Psychologist 2’s proposed compensatory education award “aims to put [Student] . . . in the position [Student] would be in absent the FAPE denial,” and is “reasonably calculated to provide the educational benefits that likely would have accrued from special education services [DCPS] should have supplied in the first place.” *See Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL

3502927 (D.D.C. Aug. 1, 2019); *B.D., supra*, 817 F.3d at 799. I will order DCPS to provide the compensatory education remedy to Student proposed by School Psychologist 2.

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 set forth in my Interim Decision in this case, within 21 days of the date of this decision, DCPS shall provide funding authorization for the parent to obtain for Student 60 hours of individual academic tutoring from a qualified special education teacher and 8 hours of direct ABA therapy services from an ABA certified therapist.
2. All other relief requested by the Petitioner herein is denied.

Date: September 4, 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).

Case No. 2020-0041
Final Hearing Officer Determination
September 4, 2020

cc: Counsel of Record
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