

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

Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parents], on behalf of
[Student],¹

Date Issued: October 30, 2013

Petitioners,

Hearing Officer: Jim Mortenson

v

[Local Education Agency],

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioners on July 2, 2013. The Petitioners and Respondent are both represented by counsel. A resolution meeting was held on July 15, 2013, and resulted in no agreements. A prehearing conference was held on July 15, and a prehearing order was issued on that date.

On July 22, 2013, a “stay-put” order was issued requiring the Respondent to maintain the Student’s placement at the Attending School for the duration of the proceedings. The Petitioner moved for clarification of the “stay-put” order on July 26, 2013, and the Respondent replied to the motion and filed its own motion to quash the prehearing order on July 31, 2013 (really the “stay-put” order of July 22, 2013). No orders were issued on either of the motions, effectively denying them, because the order for “stay-put” was very simple and clear, and the motion to

quash was merely an attempt by the Respondent to address what it had failed to address as required by the first prehearing order, which was an opportunity to brief the question of whether “stay-put” applied, and whether that includes keeping the Student at the Attending School pending the outcome of the proceedings, by July 19, 2013. (See paragraph 5 of the July 15, 2013, prehearing order.) Further, the motions included no evidentiary support.

On August 16, 2013, the Petitioners filed a motion to amend their complaint. The same day, the Respondent filed an objection to the motion and the Petitioners filed a reply to that objection. An order granting leave to amend the complaint was issued August 16, 2013.

On August 19, 2013, an amended complaint was filed, restarting all of the applicable timelines for the resolution and hearing processes. A response to the amended complaint was filed on August 29, 2013. On September 3, 2013, another prehearing conference to discuss the amended complaint and response to the amended complaint was held, and another prehearing order issued, scheduling the hearing for October 16, 2013.

On September 3, 2013, the Respondent filed another motion to dismiss. The Petitioners filed a reply to the Respondent’s motion and their own motion for partial summary judgment on September 6, 2013. A resolution meeting was held September 9 or 11, 2013, and resulted in no agreements. On September 13, 2013, an Order was issued denying the Respondent’s motion and granting the Petitioners’ motion. In relevant part, the primary issue for hearing was resolved: whether the Respondent had denied the Student a FAPE because it did not develop an individualized education program (IEP) and propose a placement for the Student for the 2013-2014 school year? The fact that the Respondent had not developed an IEP and proposed a placement for the Student for the 2013-2014 school year was not in dispute, only whether the Respondent was required to do so. The Respondent was required to propose an IEP and so the only question

remaining concerned the remedy: whether the Petitioners were entitled to reimbursement for the Attending School for the 2013-2014 school year.²

On October 8, 2013, the parties filed their trial briefs and shared disclosures. The hearing was convened at 12:00 p.m. on Wednesday, October 16, 2013, in room 2006 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. After preliminaries the parties were offered the opportunity to resolve the matter before the presentation of evidence. The parties took the opportunity and in less than an hour advised the Undersigned that they had reached a settlement. They agreed to finalize the agreement that afternoon and a withdrawal of the complaint would be sent to the Undersigned once the written agreement was executed.

On the morning of October 21, 2013, the Undersigned was informed by Petitioner's Counsel that the parties had reached an "impasse" and that a new hearing date would have to be set. A prehearing was convened on October 22, 2013, and the breakdown in the heretofore agreed upon settlement was discussed. The Undersigned expressed that the parties had advised him that there was a settlement on October 16, 2013, and that it did not follow that there was no longer an agreement. Apparently the written agreement included items not discussed during the discussions on the 16th, and the Respondent's Counsel advised that the parties had agreed that additional elements may be included in the written agreement. In any event, the matter was not resolved and steps needed to be taken to obtain the remaining evidence on the remedy question prior to the deadline for the Hearing Officer Determination (HOD) due date of November 2, 2013. Thus, after consideration of this breakdown and the parties' agreement that a hearing was necessary, a

² The analysis of the primary question is contained in the Order of September 13, 2013, and is not repeated here. The remedy question required an evidentiary hearing because equitable factors must be considered and those facts were not yet in the record.

new hearing was set for the morning of October 28, 2013, via an Order issued October 22, 2013.³

The Respondent moved for a continuance of the hearing on October 24, 2013, asserting the hearing was not set for a mutually agreeable time and date. The Petitioners replied to the motion on October 28, 2013, objecting to the motion. At 9:00 a.m. on October 28, 2013, the hearing was convened telephonically with counsels for both parties present. The Respondent's motion for continuance was discussed and it was determined that it must be denied because: the Petitioners objected to a continuance; the HOD due date was November 2, 2013; that the hearing must be "conducted at a time and place that is reasonably convenient to the parents of the child involved[,]" not the public agency, pursuant to 34 C.F.R. § 300.515(d); and that the unavailability of a DCPS witness is presumed to not be good cause for a continuance pursuant to the *Blackman/Jones* Consent Decree (See Standard Operating Procedure § 402(A)(2)(a), (and no showing of witness unavailability was made)).⁴

The Respondent then moved for the Undersigned to recuse himself. The reason stated by the Respondent was because it felt it was not being provided "adequate access to due process because of what is happening." The Undersigned attempted to clarify the basis for the recusal motion, asking whether the Respondent was asking for recusal "because you don't like the rules I'm employing?" The Respondent replied: "Not because we don't like it, . . . it is now coming to the point we are concerned about impartiality because we made it very clear, and everyone agrees that this is unorthodox, we don't think this is allowed under the rules." Thus, the

³ The hearing was set for this date to ensure sufficient time to write a HOD within the hearing timelines, and taking into consideration the Undersigned's full-time case load of due process hearings. It is unusual to have to schedule a hearing with such short notice and timelines and creates logistical challenges. The logistical challenges were overcome in this case to ensure both a fair hearing and a timely HOD.

⁴ The Respondent offered no evidence that its witnesses, both agency employees under its direction and supervision, were unavailable. It merely argued that the time and place were not convenient and objected to the matter being heard telephonically.

Respondent was moving for recusal, as the Undersigned asked, because it did not like the rules employed to ensure the hearing was heard fairly and timely. Not only did the respondent fail to assert with any specificity what constituted impartiality on behalf of the Undersigned, it did not effectively argue or specify what rules were being violated by the IHO.⁵ Thus, the motion to recuse was denied. The hearing proceeded and concluded approximately 11:45 a.m. This HOD is due November 2, 2013, and is issued October 30, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The primary issue - whether the Respondent denied the Student a FAPE because it did not develop an IEP and propose a placement for the Student for the 2013-2014 school year? – was determined, based on motions, on September 13, 2013. The remaining question was one of remedy, specifically whether the Petitioners were entitled to reimbursement for the cost of the Attending School for the 2013-2014 school year. This question includes equitable

⁵ No rules were violated. It is the IHO's "responsibility to conduct the hearing with integrity and dignity; ensure the rights of all parties are protected; rule on procedural matters; take actions necessary to complete the hearing in an efficient and expeditious manner; to be fair and impartial, and to render a final independent administrative decision." SOP § 600.1. The Respondent inexplicably failed to articulate any specific problem demonstrating either a violation of these responsibilities or how such a violation, if it existed, rendered the IHO partial. Further, the Respondent failed to make any showing of the unavailability of its witnesses, apparently believing that the failure of the witnesses to be present was proof enough that they were unavailable. In the best light, the Respondent's Counsel was simply unprepared to proceed. In the worst, the Respondent was attempting to unreasonably delay the Petitioners' right to a hearing where the Respondent had already been found to have denied the Student a FAPE. Which of these scenarios were taking place, or some other, will likely never be known and no judgment is made with regard to the Respondent or its Counsel on this point.

considerations. The Petitioners are entitled to reimbursement for the Attending School for the 2013-2014 school year, the school being appropriate for the Student and no equitable factors weighing against the Respondent's full reimbursement.

IV. EVIDENCE

Two witnesses testified at the hearing, both for the Petitioners. The Petitioners' witnesses were: the Student's Mother (P), and the Curriculum and Technology Coordinator for the Attending School (J.D.), who provided an expert opinion as to the appropriateness of the Attending School for the Student.

Five of the Petitioners' 28 disclosures were entered into evidence. The Petitioners' exhibits are listed in Appendix A. Three of the Respondent's four disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. There were no credibility issues. The evidence in the record is uncontroverted. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a seven year old learner who was determined eligible for special education and related services by the Respondent under the definition of developmental delay when she was three years of age.⁶ The Student has significant delays in almost all areas of functioning.⁷ Her attention is poor and requires constant redirection, her distractibility resulting in her losing information in class.⁸ Her expressive and receptive language skills are delayed resulting in difficulty following directions and participating in class discussions.⁹ She is very social and outgoing, but acts at a four to five year old level with her peers and is very uninhibited, resulting in inappropriate behaviors.¹⁰ Her fine motor skills are delayed such that until recently she was scribbling her name and she is now progressing with proper letter formation.¹¹ She is academically delayed, currently working on number sense using manipulatives, and she has not yet committed basic addition and subtraction facts to memory. She is inhibited by a working memory problem and is not yet reading, is beginning to decode and work on consonant vowel consonant blending.¹²
2. The Student was enrolled by her parents at the Attending School in the fall of 2012.¹³ Her placement there was funded by the Respondent pursuant to a settlement agreement.¹⁴ She had previously been attending Respondent's schools.¹⁵
3. Student is doing very well at the Attending School and the Petitioners are satisfied with her performance and progress.¹⁶ The Attending School is a full-time special education school,

⁶ R 1.

⁷ Testimony (T) of J.D.

⁸ T of J.D.

⁹ T of J.D.

¹⁰ T of J.D.

¹¹ T of J.D.

¹² T of J.D.

¹³ T of P, T of J.D.

¹⁴ T of P.

¹⁵ T of P.

¹⁶ T of P, T of J.D.

with classes no larger than ten students and with approximately a one to one or two to one instructional ratio.¹⁷ It provides a small, safe setting for the Student to provide her with structure and the direction she requires to obtain content.¹⁸ She is progressing academically and she is no longer experiencing anxiety going to school, as she had previously.¹⁹ She receives speech and language services among other special education services.²⁰

4. The Respondent last proposed an IEP for the Student in November 2011.²¹ In November 2012 the Respondent informed the Petitioners that it would not propose an IEP for the Student because she was enrolled at the Attending School.²² The Petitioners refused to remove the Student from the Attending School in order to obtain an IEP proposal, and no IEP has been proposed subsequent to the November 2011 IEP.²³ The Petitioners attempted to convene and participate in IEP team meetings to develop an IEP for the Student prior to the 2013-2014 school year and did not even have a response from the Respondent until it proposed an IEP team meeting for October 1, 2013.²⁴ The Respondent subsequently cancelled the meeting because the Student was still not enrolled in a Respondent school.²⁵
5. The Attending School creates its own individualized education plans for its students, including the Student, and does not follow all IDEA requirements for such plans (such as having them in place prior to the start of the school year).²⁶ The Attending School does have

¹⁷ T of J.D.

¹⁸ T of J.D.

¹⁹ T of P.

²⁰ T of J.D., P 13.

²¹ R 2.

²² T of P.

²³ T of P.

²⁴ T of P.

²⁵ T of P.

²⁶ T of P, P 7, P 11, P 13.

a current certificate of approval (COA) from the Office of the State Superintendent of Education (OSSE).²⁷ It also aligns its standards with the common core State standards.²⁸

6. The Petitioners have paid two of ten monthly installments for the 2013-2014 school year, of approximately \$3,300.00 each and a \$2,000.00 deposit for the year.²⁹

VI. CONCLUSIONS OF LAW

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

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. The recognized standard is a preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. The analysis to apply in a case such as this is to first determine whether the agency "complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982)

²⁷ T of J.D.

²⁸ T of J.D.

²⁹ T of P.

(footnotes omitted). IDEA's grant of equitable authority empowers a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." Florence County School Dist. Four v. Carter By and Through Carter, 510 U.S. 7, 12 (1993) *citing* School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 369 (1985). When considering the appropriateness of parental placement and reimbursement IDEA's and State FAPE requirements do not apply, only that "Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required[.]" when considering the equities in fashioning relief for a denial of FAPE. Carter at 16 (1993).

3. The denial of FAPE has been established, based on the motions made early in the process, and the remaining question is whether the Petitioners are entitled to reimbursement for their placement of the Student at the Attending School for the 2013-2014 school year. The Petitioners have demonstrated conclusively that the Student has benefitted from her education at the Attending School with no evidence to the contrary. Further, the Petitioners have shown they attempted to obtain a new IEP from the Respondent, including a placement, to consider for the 2013-2014 school year, and the Respondent refused. This is the basis for the underlying denial of FAPE and was not in any way reasonable. This further supports reimbursement for the Petitioners. Finally, there is no evidence that the approximate \$35,000 annual cost of the Attending School is not appropriate. By virtue of its certificate of approval, the District of Columbia has determined the rate to be reasonable. Therefore, the Petitioners are entitled to full reimbursement for the cost of the 2013-2014 school year for the Student at Attending School.

VII. DECISION

The Petitioners are entitled to reimbursement for the cost of the Attending School for the Student for the 2013-2014 school year.

VIII. ORDER

The Respondent will reimburse the Petitioners for the cost of the Attending School for the 2013-2014 school year. Reimbursement will be provided for the educational and related services costs within 30 calendar days of the Respondent's receipt of proof of payment (e.g. receipts or cancelled checks) by the Petitioners. The Respondent will notify the Petitioners of the individual and address to send the proof of payment within 10 calendar days of this Order.

IT IS SO ORDERED.

Date: October 30, 2013



Jim Mortenson, Esq.
Independent 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 USC §1415(i).