

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

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

OSSE
Student Hearing Office
September 06, 2013

PETITIONER,
on behalf of STUDENT,¹

Date Issued: September 6, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: [REDACTED]

v.

Hearing Date: August 27, 2013

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office, Room 2003
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the “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 (“DCMR”). In [REDACTED] Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools’ (“DCPS”) denied Student a free appropriate public education (“FAPE”) by failing to convene an Individualized Education Program (“IEP”) meeting when requested by Petitioner in March 2013.

¹ Personal identification information is provided in Appendix A.

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 24, 2013, named DCPS as respondent. The case was originally assigned to former Impartial Hearing Officer Bruce Ryan and was reassigned to the undersigned Hearing Officer on July 19, 2013. The parties met for a resolution session on July 10, 2013 and were unable to reach an agreement. The 45-day time limit for issuance of the Hearing Officer Determination in this case started on July 25, 2013. On July 25, 2013, this Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was reconvened before the undersigned Impartial Hearing Officer on August 27, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS COUNSEL.

Petitioner testified and called as witnesses, PARALEGAL and EDUCATIONAL ADVOCATE. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-16 and DCPS' Exhibits R-1 through R-5 were admitted into evidence without objection. Counsel for both parties made opening and closing statements. Although neither party requested leave to file a post-hearing memorandum, Petitioner's Counsel submitted, by email dated August 28, 2013, a commentary on authorities cited by DCPS Counsel in his closing argument.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUE AND RELIEF SOUGHT

This issue to be determined in this case is:

- Whether DCPS denied Student a FAPE by failing to convene an IEP meeting to revise Student’s IEP and make an appropriate DCPS placement, following a request by Parent in March 2013.

For relief, Petitioner seeks an order for DCPS to convene an IEP team meeting to review and revise Student’s IEP and to make an appropriate school placement. Petitioner also seeks an award of compensatory education to compensate Student for the alleged denial of FAPE resulting from DCPS’ not developing an IEP for Student and making an appropriate placement after March 2013.

FINDINGS OF FACT

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

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

Testimony of Mother.

2. Student is eligible for special education and related services under the primary disability classification, Specific Learning Disability (“SLD”). Exhibit P-10.

3. For the last several years, Student was parentally-placed in DC PRIVATE SCHOOL. Testimony of Mother. For the 2012-2013 school year, ■ was enrolled in GRADE at the private school. Exhibit P-6.

4. On May 23, 2012, a DCPS IEP team convened to develop an IEP for Student, pursuant to an order in an April 30, 2012 Hearing Officer Determination. Exhibits P-9, P-10. The May 23, 2012 IEP provided that Student would receive 5 hours per week of Specialized Instruction Outside General Education, 5 hours per week of Specialized Instruction in General

Education, 1 hour per week of Speech-Language Pathology and 60 minutes per month of Behavioral Support Services. Exhibit P-10.

5. On November 26, 2012, Petitioner filed another prior due process complaint against DCPS (Case No. 2012-0790), alleging that DCPS denied Student a FAPE by (1) refusing to provide Student with specialized instruction and related services at DC Private School, and (2) refusing to follow proper procedures in offering Student a placement after [REDACTED] May 23, 2012 IEP was developed, and then later requiring Student to attend a different placement that was not formally offered following the creation of the May 23, 2012 IEP. Following a due process hearing on [REDACTED], Impartial Hearing Officer [REDACTED] issued a Hearing Officer Determination dated [REDACTED] (the “[REDACTED]”), in which [REDACTED] concluded, *inter alia*, that DCPS had no obligation to fund Student’s enrollment at DC Private School. Hearing Officer [REDACTED] dismissed all of Petitioner’s claims with prejudice. Exhibit P-9.

6. In the [REDACTED], Hearing Officer [REDACTED] made a finding of fact that DC Private School was unable to implement Student’s May 23, 2012 IEP because, *inter alia*, DC Private School had no certified teachers and lacked a Certificate of Approval from the D.C. Office of the State Superintendent of Education (“OSSE”) to serve students with disabilities. Exhibit P-9.

7. On March 18, 2013, Paralegal sent an email to DCPS COMPLIANCE CASE MANAGER to request an IEP meeting to discuss placement for Student. In the email, Paralegal stated that in the [REDACTED], the Hearing Officer found that DC Private School and Student’s DCPS neighborhood school were both not appropriate. After receiving Compliance Case Manager’s response, on March 19, 2013, Paralegal proposed March 26 or April 2, 2013 for

the IEP meeting date. After not receiving a response to ■■■ March 19, 2013 email, Paralegal followed up with an email to Compliance Case Manager dated April 1, 2013 regarding scheduling the IEP meeting. On April 2, 2013, Compliance Case Manager responded with a request that Paralegal provide the current IEP and any evaluations for Student. On April 3, 2013, Compliance Case Manager wrote that he could not confirm a meeting date because he needed Student's IEP and evaluations. On April 3, 2013, Paralegal send an email to Compliance Case Manager, attaching Student's IEP and evaluation data. After not receiving a response to ■■■ April 3, 2013 email, Paralegal followed up with another email to Compliance Case Manager, dated April 24, 2013, requesting a response by April 30, 2013. Compliance Case Manager responded the same day that he would try to provide meeting dates by the end of the day. On May 7, 2013, Petitioner's Counsel sent an email to Compliance Case Manager complaining that DCPS had failed to act on the parent's request for a placement that could implement Student's IEP and that DCPS had failed to convene an IEP meeting. Petitioner's Counsel gave notice that the parent had been advised as to ■■■ legal options. Testimony of Paralegal, Exhibit P-9. As of the due process hearing date, DCPS had not scheduled the IEP meeting requested on behalf of Petitioner. Testimony of Paralegal.

8. Student's 2012-2013 school year grades at DC Private School declined after the first quarter. ■■■ end-of-year grades were all D's and F's except for Physical Education/Health (C), World History (C-) and Music (A+). ■■■ end-of-year Report Card was marked "RETAINED." Exhibit P-4.

9. DC Private School did not provide any special education services to Student during the 2012-2013 school year. Testimony of Mother.

10. Mother withdrew Student from DC Private School at the end of the 2012-2013

school year. Testimony of Mother.

11. By letter of July 17, 2013, a DCPS Office of Special Education staff person wrote Petitioner to notify ■■■ that the location of services for IEP implementation for Student for the 2013-2014 school year was CITY MIDDLE SCHOOL and that “no changes to your IEP are being proposed at this time.” The letter provided contact information for an LEA Representative at City Middle School and advised that Student may enroll by going directly to the school.

Exhibit P-7. Although Petitioner testified that ■■■ did not receive this notice, it was included in the due process hearing exhibit disclosures prepared by ■■■ attorney. I conclude that Petitioner and/or ■■■ legal representative timely received the notice.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. West*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

DID DCPS DENY STUDENT A FAPE BY FAILING TO CONVENE AN IEP MEETING TO REVISE STUDENT’S IEP AND MAKE AN APPROPRIATE DCPS PLACEMENT, FOLLOWING A REQUEST BY PARENT IN MARCH 2013?

Beginning on March 18, 2013, Paralegal made email repeated requests, on behalf of Petitioner, to Compliance Case Manager to convene an IEP meeting to discuss a placement for Student, because Hearing Officer Massey had found in the February 25, 2013 HOD that the

school Student was then attending, DC Private School, was unable to implement Student's IEP. Compliance Case Manager responded that he would "reach out to the school" and asked for Petitioner's available dates for an IEP meeting. However, no representative from DCPS ever convened the requested IEP meeting. Parent contends this was a denial of FAPE. DCPS argues that because Student had been parentally-placed at DC Private School, the parent had no right to an IEP meeting. I disagree with DCPS. There are two sub-issues in play here. First, did Student have a right to a DCPS IEP? Second, did Petitioner have a right to have DCPS convene an IEP meeting? I address these sub-issues in turn.

i. Right of Parentally-Placed Private School Student to an IEP

Under the IDEA, parentally-placed private school children are normally entitled to a "services plan" from the Local Education Agency ("LEA") – not an IEP. Under the IDEA regulations, every parentally-placed private school child with a disability must have a services plan that describes the specific special education and related services that the LEA, where the private school is located, will provide to the child in light of the services that the LEA has determined it will make available to parentally-placed private school children with disabilities. *See* 34 CFR § 300.138(b). Although the services plan must, to the extent appropriate, meet IEP content, development, review and revision requirements described in the IDEA, it is not an IEP. The U.S. Department of Education's Office of Special Education and Rehabilitative Services ("OSERS") has explained in its interpretive guidance that an IEP will "generally include much more than just those services that a parentally-placed private school child with a disability may receive." *See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes*, 71 Fed. Reg. 46592-93, 46596 (August 14, 2006).

However, when, as happened in this case, a parent informs DCPS, that ■■■ intends to seek a DCPS school placement, DCPS must proceed with the IEP process, even though the child may still be enrolled in a private school. Several courts have held that when the parents of a parentally-placed private school child request an IEP from the LEA where the child resides, the LEA may not condition development of the IEP upon the child's first being re-enrolled in public school. The Sixth Circuit Court of Appeals addressed this issue in *James v. Upper Arlington School District*, 228 F.3d 764, 766 (6th Cir.2000), *cert. den'd*, 532 U.S. 995, 121 S.Ct. 1655, 149 L.Ed.2d 637 (2001). In *James*, the parents withdrew their learning disabled child from the public school system and placed him in a private school at their own expense. Subsequently, the parents requested that the district develop an IEP for him, but the district refused to provide him services until he re-enrolled. *Id.* at 766. The Sixth Circuit found that the “obligation to deal with a child in need of services, and to prepare an IEP, derives from residence in the district, not from enrollment.” *Id.* at 768. The Court held that “refusing to do an IEP pre-enrollment constitutes” a violation of the Act. It explained:

To hold otherwise would allow the school to slough off any response to its duty until the parents either performed the futile act of enrolling their son for one day and then withdrawing him as soon as the IEP was complete, or, worse, leaving the child in an arguably inadequate program for a year just to re-establish his legal rights. Neither action seems to be compelled by the statutory scheme or the case law.

Id. at 768 (internal citations omitted). *See, also, Woods v. Northport Public School*, 487 Fed.Appx. 968, 979-980 (6th Cir.2012); *Doe ex rel. Doe v. East Lyme Bd. of Educ.*, 2012 WL 4344304, 17 n.41 (D.Conn.2012); *I.H. ex rel. D.S. v. Cumberland Valley School Dist.*, 842 F.Supp.2d 762, 772 -773 (M.D.Pa.2012); *Moorestown Tp. Bd. of Educ. v. S.D.*, 811 F.Supp.2d 1057, 1069 (D.N.J. 2011).

Within this circuit, U.S. District Judge Kollar-Kotelly has observed, in *dicta*, that a school district's refusal to prepare a requested IEP for a child still enrolled in private school may constitute a violation of the IDEA:

While not squarely addressing the issue, several courts within the D.C. Circuit have signaled agreement with this interpretation by acknowledging the basic premise that “[t]he obligation to provide a FAPE ... is triggered by a child’s residency in the District—not the child’s enrollment in a public school in the District.” *D.S. v. Dist. of Columbia*, 699 F.Supp.2d 229, 235 (D.D.C.2010).

District of Columbia v. Vinyard, 2012 WL 5378122, 7 (D.D.C.2012), citing *James, supra*; *Moorestown Twp., supra*.

The authority cited by DCPS counsel in closing argument is not to the contrary. In U.S. District Judge Boasberg’s recent decision in *K.S. v. District of Columbia*, 2013 WL 4506969, 10 (D.D.C. August 26, 2013), adopting the Magistrate Judge’s Report and Recommendation, the Court declined to reach the issue of whether DCPS was required to develop an IEP for a parentally-placed private school child because, in that case, DCPS had developed an appropriate IEP. *Id.* The Fourth Circuit’s decision in *D.L. ex rel. K.L. v. Baltimore Bd. of School Com'rs*, 706 F.3d 256, 261 (4th Cir .2013) affirms that Section 504 of the Rehabilitation Act of 1973 does not require that public schools provide access to children who opt out of the program by enrolling in private schools. Assuming, but not deciding, that the same rule would apply under the IDEA, the child in the instant case is not opting out of the DCPS program. ■■■ mother expressly requested a DCPS placement. The Office of Special Education Programs’ (“OSEP”) *Letter to Champagne*, 22 IDELR 1136 (OSEP August 16, 1995), does not appear to be on point. In its guidance, the Department of Education opined that, because parentally-placed private school children are not entitled to FAPE, parents of such children do not have a right to due process on matters regarding the provision of FAPE to their children. However, the letter

affirms that parents who place their disabled children in private schools have the right to initiate an impartial due process hearing on matters regarding the identification, evaluation, or educational placement of their child by the public agency. In the instant case, Mother's due process complaint does concern the identification and placement of Student by DCPS.

I conclude that under the facts in this case, where DCPS was on notice from the [REDACTED] that DC Private School could not implement Student's IEP and where Parent had requested a DCPS school placement for Student, Student had a right to a DCPS IEP, even though [REDACTED] was still enrolled at DC Private School when the request was made.

ii. Parent's Right to an IEP Meeting

Although Student had been parentally-placed at DC Private School for several years, DCPS developed an IEP for Student on May 23, 2012, pursuant to an April 30, 2012 Hearing Officer Determination. *See Exhibits P-9, P-10.* Therefore, at the time Paralegal requested DCPS to convene an IEP meeting in March 2013, Student had an operative DCPS IEP. Because individual IEPs must be "tailored to the unique needs" of each child, *Bd. of Educ. v. Rowley*, 458 U.S. 176, 1817, 102 S.Ct. 3034 (1982), the IEP must be revised regularly in response to new information regarding the child's performance, behavior, and disabilities. *Pinto v. District of Columbia*, 2013 WL 1445344, 4 (D.D.C. Apr. 10, 2013), citing 20 U.S.C. § 1414(d)(4). *See, also*, 34 CFR § 300.324(b)(ii). In this case, DCPS was on notice from the February 25, 2013 HOD that DC Private School could not implement Student's May 23, 2012 IEP. From the repeated emails from Paralegal and Petitioner's Counsel, DCPS was also on notice that Mother was seeking a DCPS school placement where Student's IEP could be implemented. I find that this "new information" obligated DCPS to convene an IEP meeting to review and revise, as appropriate, Student's IEP. DCPS' failure to convene an IEP meeting for Student after Mother's

March 18, 2013 request was a procedural violation of the IDEA. *See, e.g., Williamson County Bd. of Educ. v. C.K.* 2009 WL 499386, 18 -19 (M.D.Tenn. Feb. 27, 2009) (affirming hearing officer's conclusion that school's refusal to convene an IEP meeting to draft an IEP as requested repeatedly by parent was a procedural violations of the IDEA.)

Procedural violations of IDEA do not, in themselves, mean a child was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006), *citing C.M. v. Bd. of Educ.*, 128 Fed.Appx. 876, 881 (3d Cir.2005) (*per curiam*). However, DCPS' failure in this case to schedule an IEP meeting when requested by Paralegal eliminated Mother's ability to participate in the IEP formulation process. *See, e.g., J.N. v. District of Columbia* 677 F.Supp.2d 314, 323 -324 (D.D.C.2010); *A.I. ex rel. Iapalucci*, 402 F.Supp.2d at 164 (noting that procedural violations that seriously infringe upon the parents' opportunity to participate in the IEP formulation process clearly result in a denial of a FAPE). As U.S. District Judge Roberts observed in *J.N., supra*, "Congress placed every bit as much emphasis upon compliance with procedures giving parents . . . a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Id.*, quoting *Rowley*, 458 U.S. at 205-06, 102 S.Ct. 3034. Furthermore, DCPS was on notice from the February 25, 2013 HOD that DC Private School was not providing special education or related services to Student. DCPS' failure to convene an IEP meeting and provide a new location of services meant that Student did not receive ■■■ IEP services for the rest of the 2012-2013 school year. Therefore, I find that DCPS' failure to convene an IEP meeting, after receiving Mother's meeting request in

March 2013, resulted in a denial of FAPE to Student.

REMEDY

IEP Meeting

Petitioner requests that DCPS be ordered to convene an IEP meeting to develop an appropriate IEP for Student and make a suitable educational placement. On July 17, 2013, without convening an IEP meeting, DCPS made a “location of services” designation for Student at City Middle School for the 2013-2014 school year. No evidence was offered by either party as to the suitability of this placement. I will order DCPS to convene Student’s IEP team to review and revise, as appropriate, ■■■ IEP, pursuant to 34 CFR § 300.324(b), and to match Student with a school capable of fulfilling ■■■ IEP needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C.Cir. 1991). I make no finding as to whether City Middle School is a suitable placement or location of services.

Compensatory Education

Petitioner also seeks an award of compensatory education to compensate Student for the educational harm, allegedly suffered as a result of DCPS’ not convening an IEP meeting following Mother’s March 18, 2013 request and not matching Student with an suitable placement. Once a student has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake “a fact-specific exercise of discretion” designed to identify those compensatory services that will compensate the student for that denial. Compensatory education is educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA. Compensatory education is designed to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA. The proper amount of compensatory education, if any, depends upon how

much more progress a child might have shown if ■ had received the required special education services and the type and amount of services that would place the child in the same position ■ would have occupied but for the LEA's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid v. District of Columbia*, *supra*, 401 F.3d at 518.)

Petitioner's evidence was uncontested that Student did not receive any of ■ IEP services for the rest of the school year, after Mother's March 18, 2013 request for an IEP meeting. Petitioner's expert, Educational Advocate, who has participated in many IEP team meetings since 1990, testified that within two to four weeks of Mother's request, DCPS should have been able to convene an IEP meeting and offer a location to implement Student's IEP. Accepting the outside time period, four weeks, I am persuaded that by about April 18, 2013, DCPS should have been able to offer Student a new location of services to implement ■ May 23, 2012 IEP. In that time period, approximately 9 weeks preceding the end of the 2012-2013 school year, if Student had received ■ IEP services, ■ could have benefitted from some 90 hours of Specialized Instruction, 9 hours of Speech-Language Pathology and 2 hours of Behavioral Support services.

In ■ written compensatory education plan, Petitioner's expert, Educational Advocate, recommended that Student receive up to 50 hours of academic tutoring, 15 hours of Speech-Language Pathology and 10 hours of counseling. The expert opined in ■ hearing testimony that an award of approximately 20 hours of academic tutoring would be an appropriate compensatory education remedy. I am persuaded that there is reasonable support for this latter recommendation. I will also award Student 9 hours of Speech-Language Pathology services, as compensation for those services missed during the last 9 weeks of school. I find that there was

insufficient showing of any educational harm resulting from Student's not receiving some 2 hours of Behavioral Support services in the last 9 weeks of school. In sum, I find that an appropriate compensatory education remedy would be to order DCPS to fund 20 hours of 1:1 academic tutoring and 10 hours of Speech-Language Pathology, to be provided to Student in the first half of the 2013-2014 school year.

ORDER

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

1. DCPS shall convene Student's IEP team within 10 school days of this Order to review and revise Student's IEP pursuant to 34 CFR § 300.324 and DCPS shall match Student with a school capable of meeting ■ IEP needs; and
2. As compensatory education, DCPS shall provide Student 20 hours of 1:1 academic tutoring and 9 hours of 1:1 Speech-Language Pathology services, to be completed before the DCPS 2013-2014 winter break.

All other relief requested by the Petitioner herein is denied.

Date: September 6, 2013

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).