

**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
July 17, 2014

PETITIONERS,
on behalf of STUDENT,¹

Date Issued: July 16, 2014

Petitioners,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office,
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 Petitioners (the Petitioners or PARENTS), 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 their Due Process Complaint, Petitioners allege that Respondent District of Columbia Public Schools (DCPS) denied Student a Free Appropriate Public Education (FAPE) by failing to propose an Individualized Education Plan (IEP) or educational placement for her for the 2012-2013 and 2013-2014 school years.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on May 5, 2014, named DCPS as respondent. The parties met for a resolution session on May 21, 2014 and did not reach an agreement. The 45-day period for issuance of this decision began on June 5, 2014. On May 14, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

On June 17, 2014, counsel for DCPS filed a motion to dismiss which I denied by order entered June 23, 2014. On June 17, 2014, counsel for Petitioners filed a motion for summary adjudication, which I also denied, by order entered June 23, 2014.

The due process hearing was held before this Impartial Hearing Officer on June 24, 2014 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 Petitioners appeared in person, and were represented by PETITIONERS' COUNSEL and PETITIONERS' CO-COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Petitioner FATHER testified and Petitioners called as witnesses S-L PATHOLOGIST, OCCUPATIONAL THERAPIST and HEAD OF SCHOOL. DCPS called no witnesses. Petitioners' Exhibits P-1 through P-22, P-25 through P-30, P-31 (Page 1 only), P-32, P-34 through P-49 were admitted into evidence, including Exhibits P-2 through P-22, P-25 through P-32, P-34 through P-36, P-42 through P-45 and P-49 which were admitted over DCPS' objections. Exhibits P-23, P-24, P-33 and Page 2 of P-31 were not offered. Respondent's Exhibits R-2 through R-5 were admitted into evidence, including Exhibits R-2 and R-3 which were admitted over Petitioners' objections. Exhibit R-1 was not offered. Counsel for both parties made opening

statements and closing arguments. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

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

PRIOR ADJUDICATIONS

The case is the most recent chapter in an ongoing dispute between the Parents and DCPS over public funding for Student to attend NONPUBLIC SCHOOL, a private special education day school in suburban Maryland. Student has attended Nonpublic School since the beginning of the 2010-2011 school year. In the fall of 2010, at the Parents' request, a DCPS IEP team developed an IEP for Student (the November 17, 2010 IEP). The Parents rejected the November 17, 2010 IEP and filed a due process complaint, Case No. 2011-0349, requesting DCPS reimbursement for Student's tuition expenses at Nonpublic School. In their complaint, the Parents alleged that DCPS had denied Student a FAPE for the 2010-2011 school year by failing to develop an appropriate IEP and failing to propose a proper placement. Following a decision by former Impartial Hearing Officer Bruce Ryan in favor of DCPS (DP-1), the Parents, appealed to the United States District Court for the District of Columbia (Civil Action No. 11-1695). In due process Case No. 2011-1207 (DP-2) the Parents alleged that DCPS had denied Student a FAPE by not proposing a new IEP and placement for the subsequent, 2011-2012, school year. Former Impartial Hearing Officer Jim Mortenson found that the same issues of FAPE and placement alleged in DP-2 had already been determined in DP-1, which was then pending on appeal to the federal court, and that DCPS was not required to propose a revised IEP while Student was unilaterally placed

by her Parents in Nonpublic School. Hearing Officer Mortenson dismissed the Parents' complaint in DP-2 with prejudice. The Parents appealed that determination also to the U.S. District Court (Civil Action No. 12-0322).

By an order entered September 30, 2013 in Civil Action No. 11-1695, United States District Judge Reggie B. Walton remanded the decision in DP-1 to the Hearing Officer for further evaluation and in particular to explain why certain evidence was credited in lieu of other conflicting evidence. In a separate order in Civil Action No. 12-0322, also entered September 30, 2013, Judge Walton ordered that the appeal of DP-2 be administratively closed, without prejudice, pending a new determination by the Hearing Officer in DP-1. However, because Hearing Officer Ryan was no longer serving when DP-1 was remanded, the case was reassigned on remand to a new Hearing Officer, Charles Carron. Hearing Officer Carron informed the parties that he would be unable to explain why Hearing Officer Ryan credited some evidence in lieu of other evidence, and that until Judge Walton's September 30, 2013 order remanding DP-1 was revised, there was no further action he could take. By separate motions in the U.S. District Court, the parties have requested Judge Walton to revisit his decisions in Civil Actions No. 11-1695 and No. 12-0322 due to the unavailability of former Hearing Officer Ryan. Counsel for the parties represented that, as of the due process hearing in the instant case, those motions remained pending before U.S. District Judge Walton.²

² Prior to the issuance of my Hearing Officer Determination in this case, Judge Walton entered an order in Civil Action No. 11-1695 again remanding the determination in DP-1, with instructions to provide a new hearing on the Parents' claims in DP-1. Judge Walton ordered that the new hearing officer assigned to the case be directed to include in his or her written determination reasoned and specific findings of fact, and to address any evidence presented by the Parents that conflicts with the hearing officer's findings. *See M.O. et al. v. District of Columbia*, Civil Action No. 11-1695, Order entered July 15, 2014. Judge Walton also entered an order in Civil Action No. 12-0322 that this case shall remain administratively closed pending the issuance of a new

The instant case asserts claims corresponding to those asserted by the Parents in DP-2, namely that DCPS denied Student a FAPE by not proposing new IEPs or educational placements for Student for the 2012-2013 and 2013-2014 school years.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the May 14, 2014

Prehearing Order:

- Whether DCPS denied Student a FAPE by failing to propose any educational program for her for the 2012-2013 and 2013-2014 school years; and
- Whether DCPS denied Student a FAPE by failing to propose any placement for her for the 2012-2013 and 2013-2014 school years.

For relief, Petitioners seek reimbursement from DCPS for Student’s private placement at Nonpublic School for the 2012-2013 and 2013-2014 school years, with all related services and costs.

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 youth, resides with Petitioners in the District of Columbia. Student is currently enrolled in GRADE at Nonpublic School. Testimony of Father.
2. Student is a “child with a disability” as defined by the IDEA and eligible for special education and related services under the primary disability classification Specific Learning Disability (SLD). Exhibit P-16.
3. Since the beginning of the 2010-2011 school year, Student has attended

determination by a new hearing officer in DP-1. *See M.O. et al. v. District of Columbia*, Civil Action No. 12-0322, Order entered July 15, 2014. These orders do not alter my analysis and conclusions of law in the instant case.

Nonpublic School as a parentally-placed private school student. The parents have paid all of Student's tuition and other school charges. Testimony of Father.

4. At IEP meetings in November 2010, attended by the Parents, Petitioners' Counsel and the Parents' educational consultant, the CITY NEIGHBORHOOD SCHOOL IEP team developed an IEP for Student which would have provided Student Specialized Instruction and Related Services in a combination of General Education and Outside General Education settings at City Neighborhood School. Exhibits P-19, P-20, P-21. By letter of November 23, 2010, the Parents, by counsel, served notice on DCPS that they rejected DCPS' proposed IEP. Exhibit P-22. Student continued to attend Nonpublic School. Testimony of Father.

5. By letter of August 5, 2011, Petitioners' Counsel gave notice to DCPS that the Parents intended to continue Student's placement at Nonpublic School for the 2011-2012 school year and to seek DCPS funding for the private placement because the Parents believed that DCPS had failed to provide Student an appropriate IEP or placement. Exhibit P-26.

6. By letter of August 21, 2012, Petitioners' Counsel provided notice to DCPS that the Parents intended to continue Student's placement at Nonpublic School for the 2012-2013 school year. The letter stated that "The parents make this decision because they believe that DCPS has failed to offer [Student] an appropriate IEP or placement. They will be seeking public funding for this placement." Exhibit P-49. Father does not recall whether DCPS responded to this notice. Testimony of Father.

7. By letter of August 13, 2013, Petitioners' Counsel provided notice to DCPS that the Parents intended to continue Student's placement at Nonpublic School for the 2013-2014 school year. The letter stated, "[w]e hereby notify [DCPS] that our client,

[Student], will attend [Nonpublic School] for the 2013-2014 school year. This decision was made to provide her the free appropriate public education to which she is entitled to under the [IDEA]. We hereby request that DCPS place and fund her at this placement. Our clients do not believe that an appropriate special education program has been identified or offered by DCPS for the upcoming year, despite our client's best efforts and intentions to procure such a program and placement. We want to emphasize that we are not seeking equitable services under the IDEA, but the provision of FAPE." Exhibit P-36.

8. DCPS responded to Petitioners' August 13, 2013 notice by letter of August 23, 2013 from PROJECT COORDINATOR. In that letter, Project Coordinator advised the Petitioners that the District did not agree to bear the cost of a private placement for Student and that it was the District's position that it had made a FAPE available to Student with an appropriate IEP and a placement for the Least Restrictive Environment (LRE). Exhibit P-37.

9. Since offering the November 17, 2010 IEP which the Parents rejected, DCPS has not proposed a new IEP or educational placement for Student. Testimony of Father.

10. The Parents were the losing parties in DP-1. As of the hearing date in this case, the Parents' appeal of the Hearing Officer Determination against them in DP-1 remained pending in the U.S. District Court for the District of Columbia. Hearing Officer Notice, Representation of Counsel.³

³ See Note 2, *supra*.

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 normally the responsibility of the party seeking relief – the Petitioners in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 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 propose any educational program for her for the 2012-13 and 2013-14 school years?
- Did DCPS deny Student a FAPE by failing to propose any placement for her for the 2012-13 and 2013-14 school years?

In this case, the issue before me is whether DCPS has denied Student a FAPE, and whether the Parents are entitled to tuition reimbursement for school years 2012-2013 and 2013-2014, because DCPS has not offered Student new IEPs or educational placements since developing the November 17, 2010 IEP. The IDEA regulations require that a child's IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate. *See* 34 CFR § 300.324(b). However, DCPS maintains that it was not required to develop new IEPs for Student because she is a parentally-placed private school child, and because in DP-1 the Hearing Officer determined that Parents had not shown that DCPS' proposed IEP was inappropriate and in DP-2, the Hearing Officer dismissed the Parents' claims for failure to develop a new IEP.

DCPS errs in asserting it was not required to continue developing IEPs for Student after it prevailed in DP-1. In DP-1, the Hearing Officer determined that the Parents were not entitled to reimbursement from DCPS for their private placement of Student at Nonpublic School for the 2010-2011 school year, because the Parents had not met their burden of proof to show that the November 17, 2010 IEP, which DCPS offered for Student, was not reasonably calculated to provide some benefit to her. *See Exhibit R-2* (citing *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). The Parents appealed that administrative decision to the U.S. District Court for the District of Columbia. As explained in the procedural background of this decision, U.S. District Judge Walton has remanded the determination in DP-1 for a new due process hearing.

It is well-established that a school district is required to continue developing IEPs for a disabled child, no longer attending its schools, when, as in this case, a prior year's IEP for the child is under administrative or judicial review. *See Andersen by Andersen v. District of Columbia*, 877 F.2d 1018, 1022-1023 (D.C.Cir. 1989); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 794 (1st Cir.1984), *aff'd sub nom. Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); *Amann v. Stow Sch. Sys.*, 982 F.2d 644, 651 n. 4 (1st Cir.1992); *MM ex rel. DM v. School Dist. of Greenville County* 303 F.3d 523, 536, (4th Cir.2002); *County School Bd. of Henrico County, Va. v. R.T.* 433 F.Supp.2d 657, 691 -692 (E.D.Va.2006). In *Town of Burlington* the First Circuit Court of Appeals noted that a school district should continue to review a child's IEP and revise his placement during the administrative and judicial review of a contested placement. Without these annual reviews, "the court is faced with a mere hypothesis of what the [school district] would have proposed and effectuated during the

subsequent years, an hypothesis which at the time of trial would have the unfair benefit of hindsight.” *Id.* at 794. The First Circuit suggested that this ongoing process might promote settlement of the pending litigation and that the IEPs and proposed placements would provide useful evidence when the court considered the relief appropriate for later years. *Andersen, supra* at 1022.

Applying the *Andersen* holding to this case, I find that DCPS was required to continue developing annual IEPs for Student while the DPC-1 determination against the Parents as to the appropriateness of the November 17, 2010 IEP remained on appeal.⁴ However, because the Parents were the losing parties in DP-1, DCPS’ failure to develop new IEPs for Student after the Parents appealed DP-1 does not suffice to entitle the Parents to DCPS reimbursement for Student’s private school tuition for subsequent school years. This case is on all-fours with the D.C. Circuit’s decision in *Andersen*. In that case, the plaintiff parents objected to DCPS’ proposed public school placements for their children. In the administrative proceeding, the Hearing Officer found the public school placements appropriate. The parents appealed to the U.S. District Court, which upheld the administrative decisions. The parents next asked the district court to order DCPS to bear the financial responsibility for the children’s private school educations in the years following the ones directly relevant to the litigation. Just like the Parents in this case, they argued that such relief was warranted because the school district had failed to participate in annual reviews of the students’ IEPs or to propose placements each year. The D.C. Circuit upheld the District Court’s decision which rejected the parents’ claims. The D.C. Circuit wrote,

⁴ This finding applies only to the school years before me in this proceeding, the 2012-2013 and 2013-2014 school years.

In *Town of Burlington* the First Circuit noted that a school district should continue to review a child's IEP and revise his placement during administrative and judicial review of a contested placement. Without these annual reviews, "the court is faced with a mere hypothesis of what the [school district] would have proposed and effectuated during the subsequent years, an hypothesis which at the time of trial would have the unfair benefit of hindsight." *Id.* at 794. It suggested that this ongoing process might promote settlement of the pending litigation and that the IEPs and proposed placements would provide useful evidence when the court considered the relief appropriate for later years. *Id.*

The court nevertheless held that where the school district failed to meet these obligations "the losing party in the dispute over the [contested] IEP [or placement] will have the *burden of producing evidence and persuading the court of changed circumstances* that render the district court's determination as to the initial year inappropriate for guiding its order of relief for subsequent years." *Id.* at 795 (emphasis added, footnote omitted). We are persuaded, as was the district court, that the *Town of Burlington* test is the proper one to apply when attempting to fashion appropriate relief for subsequent years. If the handicapped child's circumstances continue unchanged, any placement that was appropriate for him in the initial year would continue to meet his educational needs in succeeding years. Although circumstances obviously may change, and often do, the nature or direction of change is unpredictable (except for the children's inevitable aging), so that a presumption of continuity seems most practical.

When we apply the test to the cases before us, we find no error in the district court's decisions. It clearly understood and applied *Town of Burlington* to the facts of these cases. It found that plaintiffs had produced insufficient evidence to prove that the circumstances of any of the students had changed during the pendency of the litigation. Nothing we have seen persuades us otherwise; thus we affirm the district court's decisions to deny relief for the later years.

Andersen, 877 F.2d 1022-1023.

I conclude that the *Town of Burlington* test, adopted by the D.C. Circuit in *Anderson*, likewise applies to the Parents' claims for tuition reimbursement for the years subsequent to the decision against them in DP-1.⁵ Under that test, if Student's

⁵ The U.S. District Court decisions in *District of Columbia v. Vinyard*, 971 F.Supp.2d 103 (D.D.C.2013) and *District of Columbia v. Wolfire*, 2014 WL 169873 (D.D.C.) (D.D.C.2014) are inapposite to the present matter. In those cases, parents of children with disabilities, enrolled in private schools, requested that DCPS develop an

circumstances continue unchanged, any placement that was appropriate for her in the 2010-2011 school year would continue to meet her educational needs in succeeding years. *See Anderson* at 1022. At the due process hearing in this case, the Petitioners offered no showing of changed circumstances since the Hearing Officer's determination in DP-1 that the Parents had not shown that the November 17, 2010 IEP was inappropriate for Student. In the subsequent years, DCPS has stood by the appropriateness of the November 17, 2010 IEP and its proposed placement of Student at City Neighborhood School, Student has continued to attend Nonpublic School and the Parents have regularly served notice on DCPS that they intended to continue Student's placement at Nonpublic School because they believe that DCPS' proposed IEP and placement were inappropriate. I find, that because the Petitioners have not shouldered their burden of producing evidence and persuading this Hearing Officer of changed circumstances since DP-1 was issued, they have not met the *Town of Burlington* test and they are not now entitled to reimbursement from DCPS for Student's tuition at Nonpublic School in the succeeding years.

Notwithstanding, were the Parents ultimately to prevail on their appeal of DP-1, there is precedent for the Court to order DCPS to pay for Student's attendance at Nonpublic School for subsequent school years, including the 2012-2013 and 2013-2014 school years at issue in this case. *See Town of Burlington, supra*, 736 F.2d 773 at 795. I find, therefore, that because the Parents' appeal of DP-1 remains under judiciary and

IEP for their child, and DCPS declined the IEP requests, stating that it was not obligated to provide a child with an IEP until the child was enrolled in a DCPS school. In each case, the Court held that DCPS was obligated to offer the student a new IEP when his parent made the request. Here DCPS' obligation to develop IEPs stemmed from the fact that DP-1 has been pending on appeal – not from a request by the parents. In the instant case, it does not appear that the Parents requested DCPS to develop new IEPs for Student after the 2010-2011 school year.

administrative review, their reimbursement claims in this case should be denied without prejudice.

ORDER

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

All relief requested by Petitioners herein is denied without prejudice.

Date: July 16, 2014

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).