

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Student Hearing Office
810 First Street, N.E., 2nd floor
Washington, D.C. 20002

STUDENT, a minor, by and through
her Parent¹

Petitioner,
v.

Erin H. Leff, Hearing Officer

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

OSSE
STUDENT HEARING OFFICE
2012 MAR 22 AM 9:30

HEARING OFFICER DETERMINATION

STATEMENT OF THE CASE

On January 6, 2012, Parent, on behalf of her child ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"), HO 1,² requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education ("FAPE") to Student by District of Columbia Public Schools ("DCPS") and by the District of Columbia Office of the State Superintendent of Education ("OSSE") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). Respondent, DCPS, filed a Response to Parent's Administrative Due Process Complaint Notice (HO 6) on February 6, 2012. A resolution meeting was held on January 24, 2012. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form on the

¹ Personal identifying information is provided in Appendix A, attached hereto.

² Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; and Respondent's Exhibits will be referred to as "R" followed by the exhibit number.

same date so indicating. HO 5. The 45 day timeline began to run on February 5, 2012, and my Hearing Officer Determination is due on March 21, 2012.

I held a telephone prehearing conference on February 7, 2012. HO 7. By agreement of the parties, the hearing was scheduled for March 13, 2012. The hearing was held as scheduled in Room 2006 of the Student Hearing Office.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUE

The issue is whether DCPS failed to provide Student an appropriate placement when it changed Student's placement from _____ to _____ School _____ at a meeting held on March 25, 2011.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner are:

- P 1 IEP dated 3/25/11
- P 2 MDT/IEP Meeting notes of 3/25/11
- P 3 RCA request for Transfer dated 3/3/11
- P 4 Email correspondence dated 2/23/11
- P 5 Incident Reports
- P 6 Prior Written Notice dated 3/25/11
- P 7 Attendance Summary for February and March 2011
- P 8 Service Trackers

- P 9 Resolution Session Meeting Notes dated 6/15/11
- P 10 Resolution Session Meeting Notes dated 1/24/12
- P 11 Withdrawn at hearing
- P 12 Case No. 2011-0658 due process complaint of 5/31/11
- P 13 Report Card of 2/11/11

Exhibits admitted on behalf of Respondent are:

- R 1 IEP of April 16, 2010
- R 2 CV of Sharon Millis

Exhibits³ admitted by the Hearing Officer are:

- HO 1 Administrative Due Process Complaint Notice of January 6, 2012
- HO 2 Notice of Hearing Officer Appointment dated January 10, 2012
- HO 3 Prehearing Conference Scheduling letter dated January 12, 2012
- HO 4 Prehearing Conference Notice dated January 20, 2012
- HO 5 Resolution Period Disposition Form executed January 24, 2012
- HO 6 DCPS Response of February 6, 2012 to Administrative Due Process Complaint
- HO 7 Prehearing Conference Order dated February 9, 2012
- HO 8 Order of Dismissal dated July 27, 2011 re case # 2011 - 0568 involving the same parties as the matter
- HO 9 Miscellaneous emails
email chain re Resolution Disposition Form
- HO10 Proposed Hearing Officer Exhibits
- HO11 Petitioner's Proposed Compensatory Education Plan

B. Testimony

Petitioner testified and presented the following witnesses:

- Sharon Millis, admitted as an expert in the development of special education compensatory education plans⁴

▪ _____, Assistant Education Director, _____ Academy
DCPS presented the following witness:

- Nicole Garcia, currently DCPS Co-locations classroom coordinator; served as DCPS program monitor at _____ in 2010-2011 SY.

³ HO 11 was added to the exhibits at hearing. It had been inadvertently omitted from the list of proposed exhibits provided to counsel prior to the hearing.

⁴ Ms. Millis testified as both a fact witness and as an expert.

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. Student is _____ years old. He receives special education and related services under the IDEA as a student with multiple disabilities. He currently attends the _____ Academy, a separate, private, special education school, as a ninth or tenth grade student.⁵ P 1; R 1.
2. In the 2010 – 2011 school year, Student was enrolled in _____ a separate, private, special education school. On March 25, 2011 an IEP meeting was held at _____ It was called to discuss changing Student's placement to a different school at the request of _____ Testimony of Millis; Testimony of Garcia; R 1; R 4.
3. During the March 25, 2011 meeting, there was discussion of the need to institute a behavior plan for Student. The team also discussed assigning Student a dedicated aide. R 2. The IEP developed on that date, however, does not include a dedicated aide. R 1. It also does not include a behavior plan though the prior IEP (dated April 16, 2010) had included a Behavior Intervention Plan. R 1; R 2; P1.
4. Student's is on the academic track. He is to take regular statewide assessments with accommodations. He has IEP goals in the areas of reading, math, written expression, emotional/ social/behavioral development and motor skills/physical development. He is to receive 25 hours of specialized instruction, one hour of occupational therapy, and one and one half hours of behavioral support services outside the regular education environment each week. He requires a full rime therapeutic educational setting. R 1; P 1.

⁵ The March 25, 2011 IEP identifies Student as a ninth grader. There was no evidence provided on his current grade level.

5. Student was not engaged in the educational program at [redacted] and had significant behavior problems. Student has a history of non attendance. He also has a history of eloping from his assigned classroom. In the 2010 -2011 school year, he did not attend approximately 80% of his classes at [redacted]. Student also had several incarcerations that interfered with his school attendance. For example, he was incarcerated for approximately three months prior to the March 25, 2011 IEP meeting. R 2; R 5; R 7; Testimony of Petitioner; Testimony of Garcia.

6. On March 25, 2011, DCPS issued a Prior Written Notice changing Student's school of attendance from [redacted] to [redacted] School [redacted] Student's neighborhood school. Petitioner was not in agreement with the new school placement. R 1; R 6; Testimony of Petitioner.

7. Petitioner did not enroll Student at [redacted] following receipt of the March 25, 2011 prior written notice. Petitioner filed a due process complaint on or about May 31, 2011 contesting the placement at Spingarn. This case was dismissed without prejudice by Order dated July 27, 2011. R 11; R 12; Testimony of Petitioner.

8. Student did not attend school in the 2011 – 2012 school year until he began attending Accotink Academy on February 28 or 29, 2012. Petitioner did not like the proposed placement at Spingarn. She did not attempt to enroll Student in a different DCPS school. Student was incarcerated at the Youth Services Center from December 26, 2011 through February 9, 2012. Student received some IEP based services when incarcerated from December 26, 2011 through February 9, 2012. R 8. Testimony of Petitioner.

9. The Proposed Compensatory Education Plan requests:

- a. Four hours of consultation with an independent vocational counselor;

- b. Funding for one year of full-time vocational education or the equivalent through a vocational training program or school; and

Funding for four hours of tutoring per week for one year to assist the student with his work in the vocation training school or program.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. The witness testimony presented in this matter, with the exception of Petitioner, who I found to be forthcoming and direct, and who I also found to be credible, raised credibility concerns for me. The two remaining witnesses offered self contradictory testimony in some instances and in others appeared to be constructing responses that were truthful but not totally candid. I do not think either of these witnesses was overtly dishonest. I do think, however, that the two witnesses efforts to present their party's case lead to convoluted and twisted testimony. In such instances my usual practice is to rely on the documentary evidence as support for the testimonial evidence. In the instant matter, however, that evidence was not as helpful as usual. For example, the March 25, 2011 IEP presented by Respondent appears to be incomplete and the minutes from the meeting do not address the missing information, such as the behavior plan that was attached to the 2010 IEP and also discussed at the March 25, 2011 meeting.

A. Whether DCPS failed to provide Student an appropriate placement when it changed Student's placement from Academy to at a meeting held on March 25, 2011.

After a school district develops an IEP that meets all of a student's educational needs, it must identify a placement in which to implement the IEP. The placement is to be in the least

restrictive environment in which the IEP can be implemented. 34 C.F.R. §§ 300.114 – 300.118. *See also*, D.C. Code §§ 30.3011 – 30.3013. In the instant matter, Petitioner argues DCPS' proposal to place Student at _____ does not offer him an appropriate placement because Spingarn is not able to implement Student's IEP. Petitioner further argues that Spingarn cannot provide the full time, therapeutic educational setting identified on Student's current IEP. DCPS asserts Spingarn can implement Student's IEP.

In support of her position, Petitioner offered the testimony of Sharon Millis, Educational Advocate. Ms. Millis, who has known Petitioner and Student for three or four years, testified _____ is not an appropriate placement for Student. She made this statement based on her visits to Spingarn. She stated that there is no program at Spingarn that can meet Student's needs as identified in his IEP. She further testified that Dr. Priscilla Ohouha, _____ Special Education Coordinator, told the witness that _____ could not meet Student's needs. In contrast, Respondent's witness, DCPS Progress Monitor, Ms. Garcia, stated that Dr. Ohouha had told this witness⁶ that Spingarn was able to meet Student's needs as identified on his IEP. The contradiction in this testimony leaves me, as the trier of fact, with no support for either position. Each witness alleges that the school can or cannot, depending on who called the witness, implement the IEP and each witness asserts that the same person told her _____ could or

⁶ Dr Ohouha's statements to Ms. Garcia were admitted to show Ms. Garcia's understanding at the time she developed the Prior Written Notice to place Student at Spingarn. Petitioner's counsel argued that I must take as true Ms. Millis' report of Dr. Ohouha's view of the program at Spingarn, but I decline to do so. In my view either party could have called Ms. Ohouha but chose not to do so. Thus, neither side presented me with evidence that substantiates the party's position regarding the proposed placement at Spingarn. Instead each asks that I rely on the report of a person's view of the proposed placement. Both Petitioner's counsel and Respondent's counsel argued that opposing counsel could have called Dr. Ohouha as a witness thereby suggesting I should use the other sides failure to call this witness as an indication her testimony would be damaging to that side's position. Assuming I were willing to do this, which I am not, that argument would be a wash as neither side called Dr. Ohouha. Moreover, the failure to present a witness is not evidence. I do not know, and cannot infer, what Dr. Ohouha's opinion of the placement is. Instead I know that two different individuals spoke with her and came away with two different understandings of her view of the proposed placement. Each witness used her understanding of Dr. Ohouha's statements. Ms. Garcia acted on her understanding by proposing to place Student at Spingarn, and Ms. Millis used her understanding in formulating her view of the proposed placement. I take no meaning from Dr. Ohouha's alleged, and apparently contradictory, statements.

could not implement the IEP. Petitioner argues that I should accept his witness' testimony because it is a declaration against interest. I cannot agree. This position assumes Dr. Ohouha's interest is the same as DCPS. While she is an employee of DCPS, I cannot assume her interests are synchronous with the district's interests. She did not testify. There was no opportunity to hear her position directly and assess her credibility. On this point the parties' evidence stands in equipoise.

Petitioner's own testimony does not support my finding DCPS had not offered Student an appropriate placement. Petitioner testified that she did not like . She said she thought it was dangerous. She also testified that had not implemented the IEP of another of her children. None of this information means DCPS could not nor would not implement the instant student's IEP. Petitioner's experience with a different child only means that child's IEP was not implemented. There is no evidence suggesting the other child's IEP was similar to Student's nor that failure to implement the other child's IEP involved the same staff and/or administration that currently exists at Spingarn. It does not support my finding that the instant student's IEP could not be implemented. Petitioner's statement that the school is dangerous does not address the school's ability to implement the student's IEP. I do not question Petitioner's judgment in making this statement. I simply cannot agree that alleged dangerousness is a basis for not attending the school. It is a DCPS high school. Many students attend school there each day. Were Student to attend it is the school's, and ultimately the district's, responsibility to keep him safe. Finally, Petitioner testified she did not try to enroll Student in any other DCPS high school. Rather she chose to look for, and find another, private school to provide Student's education.⁷

⁷ As of the date of the hearing, Student was reported to be attending Accotink for approximately three weeks, and adjusting to Accotink. Student's adjustment to, and participation in, the school for approximately a three-week

At the March 25, 2011 IEP meeting held at _____ Student stated there was nothing he liked about the school. Testimony at hearing suggested Student actually indicated he did not like school in general. The IDEA ensures students will receive special education and related services that address their needs in the least restrictive environment. Recourse to private school placement is to occur only when the public school system is unable to meet the student's IEP. In the instant matter, DCPS was not given the opportunity to provide Student a FAPE. Petitioner did not enroll him in Spingarn nor did she contact DCPS to request another public placement. Instead, she informed DCPS that she did not want her son to attend Spingarn and then began a search for a private school.⁸ This process is not what IDEA intends.

Parents who unilaterally place their child in a private school do so at their own financial risk. *See, School Comm. of Town of Burlington, Mass. v. Dept. of Educ. of Mass.*, 471 U.S. 359, 373-74 (1985). They are entitled to reimbursement *only* if the public placement violated IDEA and that the private school placement was proper. *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993). Here, Petitioner has not demonstrated by a preponderance of the evidence that _____ is not an appropriate placement for Student. Petitioner has provided testimony from an educational consultant stating _____ cannot implement Student's IEP and testimony from Petitioner, herself, based on past experience with another child with a different IEP. There is no objective evidence suggesting _____ is unable to implement the IEP. Moreover, Student is entitled to private placement only if DCPS is unwilling or unable to provide him an appropriate public placement. Petitioner has not shown

period does not demonstrate that he will continue to do so. Student has a well-established history of noncompliance with school rules and with societal rules. He has repeatedly stated he would comply with a set of rules and then not complied in actuality. I therefore cannot see his current status at Accotink as indicative of appropriateness of the placement.

⁸ While the search for another private school continued, Student did not attend school. He was not in school for at least the first semester of the 2011-2012 school year.

there is no other DCPS public placement that can implement Student's IEP. No effort was made to contact DCPS to secure another public placement. *N.T. v. District of Columbia*, Civ. Action 11-676 (D. C. Dist. Ct. 2012). Instead, Petitioner immediately sought private placement.

Whether Accotink is an appropriate placement is not at issue here in that Petitioner has not met her burden of demonstrating that DCPS is unable to provide Student an appropriate placement at Spingarn, or in the alternative, another DCPS public school.

For these reasons I find Petitioner has not met her burden of proof. Petitioner has not shown by a preponderance of the evidence that DCPS failed to provide Student an appropriate placement when it proposed that Student be placed at Spingarn. DCPS did not fail to provide Student an appropriate placement when it proposed that Student be placed at Spingars.

B. Compensatory Education

Under *Reid*, a hearing officer may award compensatory education services that compensate for a past deficient program. *Reid v. District of Columbia*, 401 F. 3d 516, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003). IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* “. . .the inquiry must be fact-specific and . . . 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.” *Reid* at 524. In other words, compensatory education is intended to put the student in the position he would have been had the district provided the student FAPE, as required by IDEA.

In the instant matter, Petitioner submitted a Compensatory Education Plan requesting:

- 1) Four hours of consultation with an independent vocational counselor;

- 2) Funding for one year of full-time vocational education or the equivalent through a vocational training program or school; and
- 3) Funding of four hours of tutoring per week for one year to assist the student with his work in the vocation training school or program.

Petitioner's expert witness testified she developed this plan which is intended to compensate Student for missing approximately one year of school between March 25, 2011 and early March 2012. To develop the plan, she reviewed Student's last two IEPs and current evaluations from 2009. She stated the plan is intended to help Student get on with his life and to place him in the position he would have been had he not missed a year of school. She also testified that the vocational training would help provide him skills he needs.

According to the expert, the four hours of consultation with a vocational expert are intended for assessment of Student's interests. Under IDEA transition needs are to be included on a student's IEP not later than the first IEP to be in effect when the child turns 16. 34 C.F.R. §300.320(b); *See also* 5E DCMR §§ 3009.3 & 3009.4. These transition needs are to be based on appropriate assessments related to, among other items, training and employment. Student will not be 16 until July 27, 2012 and, therefore, Student was not required to have had such an evaluation or services on his IEP between March 2011 and March 2012. During this period of time Student's IEP indicated he was a diploma track student taking academic courses. Moreover, and perhaps more importantly, Student did not attend school between March 25, 2011 and February 28 or 29, 2012 for reasons outside the control of DCPS. Student's parent did not want him to attend Spingarn and did not enroll him in that school. She also did not seek to enroll him in any other DCPS school. Beginning December 26, 2011 and continuing through February 29, 2012 Student was incarcerated at the Youth Services Center. During this time period,

Respondent provided documents showing he received some IEP based counseling services.⁹

With the exception of this one and one half month period, there is no evidence suggesting Student was in school or available to receive services during the time period at issue here. I find, therefore, that Student is not eligible for compensatory services.

I further note, that even if Student were eligible for such services, the Proposed Compensatory education Plan provided by Petitioner would not meet the *Reid* standard. This Plan is not intended to put Student in the position he would have been had he attended school. Rather it is intended to provide direction for his future. The inappropriateness of this plan is further implicated by Petitioner's counsel's statement that this plan was to be implemented after Student finished high school. A compensatory education plan is not a post-secondary plan for a student in the beginning years of college. When needed a compensatory education plan is supposed to place a student in the position he would have been if services had not been missed and thereby improve the student's education in the coming years. Here Petitioner proposed a compensatory education plan that was not directed at the academic services he missed but rather proposed to provide Student vocational services (with some academic support) that were not included on the IEP in effect at the time Student missed services between March 2011 and March 2012.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that DCPS did not fail to provide Student an appropriate placement when it changed Student's

⁹ Petitioner noted that these documents were not authenticated, and they were not. However, Respondent's documents do not suggest Student received the full range of IEP required services during this time and I, therefore, conclude that they support DCPS' position in that Student received some, but not all of his required service.

placement from Academy to School at a meeting held on
March 25, 2011.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that
Petitioner's Due Process Administrative Complaint be DISMISSED with prejudice.

IT IS SO ORDERED:

March 21, 2012
Date


Erin H. Leff
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).