

**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
May 14, 2013

PETITIONER,
on behalf of STUDENT,¹

Date Issued: May 13, 2013

Petitioners,

Hearing Officer: Peter B. Vaden

v.

Case No:

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: May 9, 2013

Student Hearing Office, Room 2009
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 her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools (“DCPS”) has denied the Student a Free Appropriate Public Education (“FAPE”) by refusing to develop an Individualized Education Program (“IEP”) for him after he was found eligible for special education and related services in December 2012.

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 March 15, 2013, named DCPS as respondent. The undersigned Hearing Officer was appointed on March 18, 2013. The parties met for a resolution session on March 21, 2013 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on April 15, 2013. On April 9, 2013, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. On May 2, 2013, DCPS filed a motion to dismiss on the grounds that Mother had failed to participate in the resolution meeting scheduled pursuant to 34 CFR § 300.510. At the beginning of the due process hearing, after hearing representations from the parties' attorneys as to the scheduling of the resolution meeting and the parent's efforts to attend, I denied DCPS' motion.

The due process hearing was held before the undersigned Impartial Hearing Officer on May 9, 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. Respondent DCPS was represented PRO CASE MANAGER and DCPS COUNSEL.

Petitioner testified and called as her only witness ASSOCIATE HEAD OF SCHOOL. DCPS called no witnesses. Petitioner's Exhibits P-3, P-4, and P-7 were admitted into evidence without objection. Exhibits P-5, P-6 and P-14 were admitted over DCPS' objections. DCPS' objections to Exhibits P-1, P-2, and P-8 through P-12 were sustained. Exhibit P-13 was withdrawn. DCPS' Exhibit R-6 was admitted without objection. Exhibits R-2 through R-5 and R-7 were admitted over Petitioner's objections. Exhibit R-1 was withdrawn. Counsel for the respective parties made opening and closing statements. At the close of the Petitioner's case-in-

chief, counsel for DCPS made an oral motion for a directed finding against the Petitioner, which I denied. At the request of Petitioner's Counsel, counsel were permitted to file post-hearing citations of authority by May 10, 2013. Only Petitioner filed post-hearing authority.

JURISDICTION

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

ISSUE AND RELIEF SOUGHT

- WHETHER DCPS HAS DENIED STUDENT A FAPE BY REFUSING PARENT'S REQUEST TO DEVELOP AN IEP AND IDENTIFY A PLACEMENT FOR STUDENT, FOLLOWING A DECEMBER 17, 2012 ELIGIBILITY DETERMINATION.

For relief, the Parent requests that DCPS be ordered to fund the Student's ongoing placement at NON-PUBLIC SCHOOL for the 2012-2013 school year, retroactive to the end of the 2012-2013 winter break.

PRIOR ADMINISTRATIVE ADJUDICATION

On May 18, 2012, these parties appeared before Impartial Hearing Officer Bruce Ryan for a due process hearing in Case No. . In that case, Mother alleged that DCPS denied Student a FAPE, by failing to evaluate him for special education services and determine eligibility, following Mother's request in August 2011. In his May 18, 2012 Hearing Officer Determination (the "2012 HOD"), Hearing Officer Ryan found that in mid-August 2011, Parent requested that Student be evaluated for special education eligibility and that Student did not attend a D.C. public school and was not registered to attend a public school at the time of the referral. Citing Parent's "ultimate goal . . . to obtain an IEP and placement for Student that would accommodate his needs within the DCPS school system" (2012 HOD, p. 8.), Hearing Officer Ryan concluded that DCPS violated the IDEA and District of Columbia law by not

timely taking steps to evaluate Student, and determine eligibility. In the 2012 HOD, Hearing Officer Ryan ordered, *inter alia*, that DCPS fund Independent Educational Evaluations (“IEE”) of Student, and upon receipt of the evaluations, to convene Student’s MDT/IEP team to determine his eligibility for special education and related services. Exhibit P-5.

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 is an AGE resident of the District of Columbia. Testimony of Mother.
2. At a November 2008 Multidisciplinary Team (“MDT”) meeting at PUBLIC SCHOOL, the DCPS MDT team found that Student did not meet DCPS guidelines for eligibility for special education, as a child with a learning disability. The team concluded that although Student was having difficulty in class with focusing, completing work and sitting still, these difficulties were not having an academic impact. Exhibit P-4.
3. In January 2009, Mother enrolled Student at PRIVATE SCHOOL A. Around June 2011, Mother enrolled Student in the summer program at PRIVATE SCHOOL B. Private School B did not accept Student for the 2011-2012 school year. Testimony of Mother.
4. In July 2011, Student was admitted to Non-Public School as a private-pay student. He has been enrolled at Non-Public School for the 2011-2012 and 2012-2013 school years. Testimony of Associate Head of School.
5. At Non-Public School, Student is in a class of 8 students, taught by a teacher certified in Special Education and an assistant teacher. Student displays a high level of distractibility. Non-Public School deals with his limited attentiveness with “movement breaks,” shortened assignments, placement of a “privacy shield” around his desk, proximity to the

teacher, and structuring classes to allow him “think-time.” He also receives a lot of social mediation to help him address his social interaction challenges. At Non-Public School, Student also receives behavioral support services in the form of counseling. Student is receiving academic and social benefit from his enrollment at Non-Public School. Testimony of Associate Head of School.

6. Non-Public School has been a good fit for Student. Student does not feel out of place there. He is happy and eager to go to school. He is making friends at school. He is at a point that he is happy about learning. Testimony of Mother.

7. Before the 2011-2012 school year ended, Mother let Non-Public School know that Student would be returning for the 2012-2013 school year. Testimony of Mother. Student is currently in the GRADE at Non-Public School. Testimony of Associate Head of School.

8. Mother has not enrolled Student in his DCPS neighborhood middle school for the current school year. Testimony of Mother.

9. Following issuance of the 2012 HOD, Parent obtained an IEE Comprehensive Psychological Evaluation of Student. Exhibit P-3. In her July 23, 2012 report, the evaluator made diagnostic impressions of Student, namely Attention-Deficit Hyperactivity Disorder, Combined Type, Math Disorder, and Educational Problems. She recommended, *inter alia*, that Student would benefit from placement in a full-time, highly structured special education academic program, given that Student’s attentional, organizational, emotional and behavioral needs required intensive remediation that could not be accommodated for in general education. Exhibit P-6.

10. On December 17, 2012, Student’s DCPS MDT/IEP team convened at CITY MIDDLE SCHOOL to review Student’s comprehensive psychological report and other data, and

to determine Student's eligibility for special education and related services. The team determined that Student was eligible for special education services under the Other Health Impaired ("OHI") umbrella. All parties at the meeting agreed with the final eligibility determination. Exhibit P-7.

11. The evidence does not establish that at the December 17, 2012 eligibility meeting, Mother requested that DCPS develop an IEP for Student. No such request is reflected in the meeting notes, Exhibit P-7. Although Mother testified that she "believes" she asked for an IEP, Associate Head of School, whose testimony I found to be very credible, also attended the meeting by telephone. She does not recall hearing Mother ask for an IEP. Testimony of Associate Head of School. No written request for an IEP was ever made to DCPS. Testimony of Mother.

12. Non-Public School is a private school located in Washington, D.C. The school has a D.C. Office of the State Superintendent of Education ("OSSE") Certificate of Approval to serve children from Pre-Kindergarten through 12th grade. The school primarily serves children with learning disabilities and/or OHI. The school's current enrollment is 290 children, including 153 children placed there by DCPS. All of the DCPS-placed students at Non-Public School have IEPs. Except for in after-school sports leagues, Students at Non-Public School do not have interaction with non-disabled peers. Non-Public School's tuition charge for DCPS-funded Students is the OSSE-approved rate of approximately \$38,000 per year. Testimony of Associate Head of School.

13. Student's enrollment at Non-Public School is supported by financial assistance from the school and from the Washington Scholarship Fund. Mother pays approximately \$4,000 per year, "out-of-pocket." Testimony of Mother.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda 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 Petitioner 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

HAS DCPS DENIED STUDENT A FAPE BY REFUSING PARENT'S REQUEST TO DEVELOP AN IEP AND IDENTIFY A PLACEMENT FOR STUDENT, FOLLOWING A DECEMBER 17, 2012 ELIGIBILITY DETERMINATION?

Petitioner asserts that DCPS has denied Student a FAPE because it has not developed an IEP for Student or provided an educational placement, since he was determined eligible for special education and related services at the December 17, 2012 MDT eligibility meeting. DCPS contends that because Student is a parentally-placed private school child, Mother is not entitled to receive a DCPS IEP or special education services for Student until she enrolls him in a DCPS public school.

DCPS is correct that 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).

Contrary to DCPS’ position in this case, 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; 2012 WL 2612776 (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).

In this circuit, U.S. District Judge Kollar-Kotelly recently 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*.

In the present case, Mother placed Student in Non-Public School in July 2011, and he has been enrolled there continuously for the 2011-2012 and 2012-2013 school years. Student is, therefore, a parentally-placed private school child within the meaning of 34 CFR § 300.130, *et seq.* In the 2012 HOD, Hearing Officer Ryan found that DCPS had denied Student a FAPE by frustrating Mother’s objective to obtain an IEP for Student and a placement that would accommodate his needs within the DCPS public school system. Hearing Officer Ryan ordered DCPS to convene Student’s MDT/IEP team to determine Student’s eligibility for special education and related services. In compliance with the 2012 HOD, DCPS funded IEE evaluations of Student and determined on December 17, 2012 that Student was eligible for

special education. DCPS was on notice from the 2012 HOD, if not before, of Mother's objective to obtain an IEP and DCPS placement for Student. Having found that Student needed special education and related services, DCPS was required by the IDEA to ensure that a meeting to develop an IEP for Student was conducted within 30 days. *See* 34 CFR § 300.323(c)(1).

Although jurists in the D.C. Circuit have not yet “squarely addressed” the issue, *Vinyard, supra*, I conclude that courts in this jurisdiction would follow the reasoning of the Sixth Circuit Court of Appeals in *James, supra*, that where the parent of a parentally-placed private school child requests an IEP from the LEA where the child resides, “refusing to do an IEP pre-enrollment constitutes” a violation of the IDEA. I find that in the present case, DCPS had notice of Mother's objective to obtain an IEP for Student and a placement that would accommodate his needs within the DCPS public school system. DCPS' refusal to develop an IEP for Student, after he was determined eligible for special education, constituted a denial of FAPE. *See, e.g., G.G. ex rel. Gersten v. District of Columbia*, 2013 WL 620379, 7 (D.D.C.) (D.D.C.2013) (Failure to develop an IEP is essentially a denial of a FAPE.)²

Reimbursement Remedy

For her remedy in this case, Petitioner seeks reimbursement for Student's private school tuition incurred since the end of the 2012-2013 winter break and an order for DCPS to pay for Student's attendance at Non-Public School for the remainder of the 2012-2013 school year. Under the IDEA, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, “do so at their own financial risk.”

² DCPS asserted a second argument in defense of its not developing an IEP for Student – that Mother delayed executing a consent for an additional Occupational Therapy evaluation. Whether or not the additional evaluation was needed, DCPS' duty, to ensure that a meeting to develop an initial IEP for Student was conducted within 30 days, was triggered by the affirmative December 17, 2012 eligibility determination. *See* 34 CFR § 300.323(c)(1). The IDEA does not authorize extension of the 30-day period even if additional evaluations are requested.

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). Parents may receive tuition reimbursement only upon a finding that the LEA “violated the IDEA, that the private school placement was an appropriate placement, and that [the] cost of the private education was reasonable[.]” *Holland v. District of Columbia*, 71 F.3d 417, 425 (D.C.Cir.1995) (citing *Florence County School District Four v. Carter*, 510 U.S. at 15, 114 S.Ct. 361). I have found that DCPS violated the IDEA and Student was denied a FAPE by the LEA’s failure to develop an IEP for him after the December 17, 2012 eligibility determination. Under *Holland, supra*, Mother’s right to reimbursement now turns on whether Student’s placement at Non-Public School was appropriate and whether the tuition cost is reasonable.

I find that Petitioner has established that Student’s placement at Non-Public School was appropriate. In the July 23, 2012 comprehensive psychological report, the evaluator diagnosed Student with Attention-Deficit Hyperactivity Disorder, Combined Type, Math Disorder, and Educational Problems. She recommended that Student would benefit from placement in a full-time, highly structured special education academic program, focused on Student’s attentional, organizational, emotional and behavioral needs. Non-Public School primarily serves children, like Student, with learning and attention deficit disorders. It offers small class size, low student-to-teacher ratio, and is able to focus on addressing Student’s attention deficit and social interaction issues. The evidence establishes that Student fits in at Non-Public School and is making educational progress there. The evidence also establishes that the tuition fee at Non-Public School is set at the OSSE-approved rate. I find that the cost is reasonable. I conclude therefore that Student’s placement at Non-Public School is proper and appropriate under the U.S.

Supreme Court's *Burlington-Carter* criteria and that Parent should be reimbursed by DCPS for covered tuition expenses.

Parent seeks tuition reimbursement retroactive to the end of the 2012-2013 winter break. Under the IDEA, DCPS was required to have developed an IEP for Student within 30 days of its December 17, 2012 affirmative eligibility determination. Allowing 30 days for DCPS to have convened an IEP meeting, I find that an appropriate start date for reimbursement of Parent's tuition expenses is January 22, 2013. (On January 21, 2013, DCPS schools were closed for Martin Luther King, Jr. Day.) In this case, Parent did not, herself, pay the full cost of Non-Public School tuition. She testified that her out-of-pocket cost was approximately \$4,000 per year. The remainder was covered by a scholarship from the Washington Scholarship Fund and financial assistance from Non-Public School.

A number of court decisions hold that a school district may be ordered to pay the private school directly and retroactively for expenses already incurred when Parents lack the financial resources to "front" the costs of private school tuition. As the U.S. District Court for the Southern District of New York explained,

Section 1415(i)(2)(C)(iii) [of the IDEA] authorizes a direct retroactive tuition remedy for the same reasons that the *Burlington* court found that the Act authorizes a tuition reimbursement remedy. Given the nature of the administrative and judicial review process, parents who request an impartial hearing will rarely, if ever, be able to obtain a ruling prior to the onset of the school year. Accordingly, denying parents the opportunity to seek retroactive relief is tantamount to denying them any relief at all under the Act. Where parents have the financial resources to enroll their child in an appropriate private school, they may do so and seek retroactive reimbursement in a due process hearing. Where, as here, parents lack the financial resources to "front" the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the *Burlington* factors have a right to retroactive direct tuition payment relief.

Mr. and Mrs. A. ex rel. D.A. v. New York City Department of Educ. 769 F.Supp.2d 403, 427-428

(S.D.N.Y.2011). In the present case, it has not been established that Parent is obligated to pay Non-Public School the difference between the school's regular tuition charge and her out-of-pocket costs. However, the absence of such an agreement does not change the fact that DCPS denied Student a FAPE, that Non-Public School was an appropriate placement, that the equities favor payment of tuition, and that § 1415(i)(2)(C)(iii)³ is sufficiently broad to encompass the retroactive direct tuition payment relief to Non-Public School. Accordingly I will order DCPS to reimburse Student's tuition costs for enrollment at Non-Public School retroactive to January 22, 2013, less the amount of the Washington Scholarship Fund grant for this period. To the extent Mother can document that she has paid, in part, the tuition for this period beginning January 22, 2013, the reimbursement shall be divided, *pro rata*, between the private school and Mother to reimburse mother for her payment. There was no evidence that Mother is under any duty to repay the Washington Scholarship Fund for Student's scholarship. Therefore, DCPS shall not be required to make reimbursement for the portion of Student's tuition paid for by the Washington Scholarship Fund.

Parent also seeks payment by DCPS for Student's ongoing enrollment at Non-Public School for the remainder of the 2012-2013 school year. For the same reasons that Student's placement at Non-Public School was proper for reimbursement in this case, Student's continued placement at Non-Public School is appropriate under the factors for prospective placement set forth in *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C.Cir.2005). The evidence establishes that Non-Public Placement is a good fit for Student and he is making progress there. To change his school this close to the end of the current school year would be inappropriate. *Cf. Holmes v. District of Columbia*, 1988 WL 21696, 1 (D.D.C.1988) (In light of student's complete

³ [T]he court, basing its decision on the preponderance of the evidence, "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii).

adjustment to the environment of current school, to send him to different school to complete the last semester of his schooling would not only be inappropriate, but would also be insensitive and indefensible.) Accordingly, although I will order DCPS to convene Student's IEP team to develop an initial IEP for him, DCPS must ensure that Non-Public School remains Student's placement or location of services for the rest of the 2012-2013 school year.⁴

ORDER

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

1. DCPS shall pay the costs of Student's tuition at Non-Public School for the period January 22, 2013 through the end of the 2012-2013 school year, less such portion as has been covered by scholarship grants from the Washington Scholarship Fund. Upon receipt of an appropriate accounting and receipts, DCPS shall promptly reimburse Petitioner for tuition costs she has paid for this period and shall make direct payment to Non-Public School for the remainder.
2. Within 15 school days of the date of this Order, DCPS shall convene Student's IEP Team, as provided in 34 CFR § 300.324, to develop an initial IEP which conforms to this decision. Representatives of Non-Public School shall be invited to attend the IEP meeting.
3. All other relief requested by the parties herein is denied.

Date: May 13, 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).

⁴ There has been no request in this case for Extended School Year services ("ESY") and I make no finding as to whether Student requires ESY for summer 2013.