

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	▲ COURT USE ONLY ▲
<p>[Student] a minor by and through his parents, [Father] and [Mother], Complainants,</p> <p>vs.</p> <p>DENVER PUBLIC SCHOOLS, Respondent.</p>	
DECISION ON REMAND	

Hearing in this matter was held on May 3 and 4, 2022, before Administrative Law Judge Hollyce Farrell by Google Meet. Complainants were represented by Jack D. Robinson, Esq. Respondent, Denver Public Schools (DPS) was represented by Robert P. Montgomery, Esq. At hearing the Complainant’s Exhibits 2, 6, 7, 8, 9, 12 and 13 and Respondent’s Exhibits A, B, C, D, and G through U were admitted into evidence. The ALJ also took judicial notice of Complainant’s Exhibits 1 through 6. The hearing was recorded.

This matter comes before the Administrative Law Judge (ALJ) based on an Opinion and Order on Administrative Appeal and on Motion for Summary Judgment (the District Court Order) issued by the United States District Court of Colorado (the District Court) on September 25, 2019. Hearing in this case originally took place at the Office of Administrative Courts on May 31 and June 1, 2017. The undersigned ALJ issued an order on July 17, 2017, finding that [Student]’s February 10, 2017, individualized education program (IEP) offered [Student] a free and appropriate public education (FAPE) by designating residential placement. Because the IEP and the Respondent did not identify a specific residential facility, the District Court reversed the ALJ’s determination that the February 10, 2017, IEP offered a FAPE. The District Court remanded the case back to this court to “determine the relief to which [Student] was entitled during the period the 2017 IEP was in operation.”

The parties submitted position statements regarding the scope of the hearing on remand. Having reviewed those position statements, the ALJ finds that the following issues, as agreed by the parties, are at issue at this hearing on remand:

- (1) The period of time that [Student]’s February 10, 2017, IEP was operation;

(2) The measure of harm caused by a denial of FAPE as determined by the District Court;

(3) The appropriate relief for [Student]'s denial of FAPE.

For the reasons discussed below, the ALJ finds that the February 2017 IEP was in effect between February 10, 2017, and February 12, 2018. During that time period, DPS failed to provide [Student] with a FAPE. As a result of that denial, DPS is responsible to pay Complainants \$22,344 for compensatory services.

Findings of Fact

1. [Student] is a 16-year-old boy (d.o.b. [D.O.B.]) who lives with his parents in Denver, Colorado. At all times relevant to this appeal, [Student] has lived within the boundaries of DPS. He is currently in the tenth grade. His home school is [High School], and he is enrolled there.

2. [Student] has a number of disabling conditions, including autism. He is also intellectually gifted.

3. [Student]'s IEP team developed an IEP for [Student] on February 10, 2017. The IEP team determined that the least restrictive environment (LRE) for [Student] to receive a FAPE was in a residential setting. Appellant's parents strongly disagreed with placing [Student] in a residential setting because they did not want him to leave their home. However, home schooling was not working because [Student] had gotten to the point where he would rarely come downstairs for instruction, and if he did, he often refused to engage with the teacher.

4. The February 10, 2017, IEP set five goals for [Student]: two communication goals to assist [Student] with social pragmatics and self-advocacy, a social and emotional goal to help him identify his level of anxiety and apply strategies to help calm himself, a writing goal, and a mathematics goal.

5. The IEP designated 300 minutes per week of specialized instruction from a special education teacher to work on math, 300 minutes per week of specialized instruction from a special education teacher to work on other academics, 60 minutes per week from a speech pathologist and 300 minutes per week of psychological services from a school psychologist. It also called for 120 minutes per month of indirect services with a speech language pathologist and 60 minutes per week of indirect psychological services with a school psychologist.

6. Following a hearing in 2017, the ALJ agreed with DPS that a residential setting was the LRE where [Student] could receive a FAPE, and that DPS had offered a FAPE to [Student]. The ALJ's decision was issued on July 17, 2017.

7. Complainants filed an appeal with the United States District Court. United States District Court Judge Marcia Krieger found that because Respondent had not offered a specific placement to [Student], it had not offered a FAPE to [Student]. Judge

Krieger remanded the case to the ALJ to address the issues outlined above.

8. After receiving the ALJ's 2017 decision, [Associate Director], who was the Associate Director of Special Education at DPS, emailed [Student]'s parents on July 25, 2017. [Associate Director] wrote that DPS stood "ready, willing and able" to implement the February 10, 2017, IEP. [Associate Director] further wrote that he wanted to arrange a meeting with [Student]'s parents to discuss the appropriate location for [Student] to receive his educational services. [Associate Director] included DPS's Director of Special Education, [Director of Special Education], on the email, and indicated that [Director of Special Education] would participate in the proposed meeting.

9. While [Student]'s parents did not respond to [Associate Director], they did email [Director of Special Education] on September 5, 2017. In the email, [Student]'s parents wrote numerous times that [Student] was receiving no educational services. They communicated that the family was declining a meeting as offered by [Associate Director], and they requested that all further communications from DPS were to be in writing.

10. In their email to [Director of Special Education], the parents wrote that DPS had provided no legitimate offers of FAPE and compensatory services after the February 10, 2017, IEP meeting and they would never permit [Student] to be "incarcerated" by DPS. They further wrote that it was their hope that [Student] would receive an education designed to meet his unique needs.

11. [Director of Special Education] responded to the parents' email on September 21, 2017. She wrote that DPS was "ready, willing, and able" to serve [Student] under his IEP, which identified residential placement as the LRE. In the email, [Director of Special Education] invited the family to provide suggestions regarding locations, but DPS could not move forward with implementing the IEP without the parents' consent and participation.

12. [Student]'s parents did not respond to [Director of Special Education]'s email.

13. At hearing, [Student]'s father testified that residential treatment is not possible for [Student] because he has never spent a night away from his parents. He also testified that he and his wife did not want [Student] to go to residential treatment based on the placement offered by DPS following the February 10, 2017, IEP was developed, and they did not trust Respondent to find an appropriate placement for [Student].

14. The parents, in numerous communications, made it imminently clear to DPS that they would never accept residential treatment as a placement for [Student], regardless of the location or facility.

15. Had [Student] been placed in a residential treatment facility, he would have been there 24 hours per day, 7 days per week. It is unknown how long his placement would have been because the goal of residential treatment facilities is to provide services that enable students to return to a less restrictive environment.

16. [Student]'s father testified that [Student] needs independent evaluations to

develop educational programs for him. He also testified that [Student] would need homebound education online with a mentor and a tutor who understand him. He further testified that [Student] is very sad and anxious regarding his lack of educational services.

17. [Student]’s father further testified that [Student] needs extensive therapies to be educated.

18. On February 10, 2018, Respondent sent [Student]’s parents notice of an IEP meeting, to be held for [Student] on February 12, 2018, along with a draft of the 2018 IEP. DPS wrote to the parents that the “purpose of the meeting is to review and update [[Student]]’s present levels of academic achievement and functional performance, needs, and goals to develop a plan to provide special education and related services.”

19. The February 12, 2018, IEP meeting was held as scheduled. [Student]’s father participated in the IEP meeting, and the Complainants’ attorney was present for the meeting. The 2018 IEP was based on the previous evaluations and information provided by the parents regarding [Student]’s levels of functioning.

20. While the parents disagreed with the 2018 IEP, DPS considered it to be a final IEP for 2018. The ALJ finds that the 2018 IEP was a final IEP for [Student].¹

21. [Student]’s parents’ attorney communicated at the February 12, 2018, IEP meeting that the parents were requesting an Independent Educational Evaluation (IEE) for [Student] at DPS’s expense. Respondent agreed to the request.

22. DPS’s attorney, Amber Elias, sent an email to Complainants’ attorney on February 20, 2018, reiterating DPS’s agreement to pay for the IEE. Ms. Elias included DPS’s procedure and fees for an IEE.

23. Sometime between February 20, 2018, and May 21, 2019, DPS sent Complainants a release that would allow [Student]’s IEP team to communicate with [Student]’s outside specialists.

24. On May 21, 2019, DPS sent [Student]’s parents a consent for an evaluation so it could best ascertain [Student]’s needs.

25. By May 21, 2019, DPS had not received a signed release from the parents.

26. DPS had a meeting on July 15, 2019, to review [Student]’s 2018 IEP. Prior to the meeting, [Staff person] of DPS met with [Student]’s parents and received input from them regarding [Student]’s needs and educational status. A new IEP was developed.

27. DPS sent [Student]’s parents another consent to evaluate [Student] on February 21, 2020. [Student]’s mother signed the consent on March 9, 2020. After receiving the signed consent form, it took over a year for DPS to complete the evaluations because it had difficulty getting in touch with [Student]’s family. There is insufficient

¹ Although the ALJ has made findings regarding dates after February 2018, any allegations of a denial of FAPE beyond that date are outside the scope of this case because the ALJ has found that the 2017 IEP ended with the development of the 2018 IEP.

evidence to establish whether a new IEP was developed in 2020.

28. In the Spring semester of 2020, as a result of the Covid-19 pandemic, [High School] provided remote learning available to all of its students, including [Student]. [Student] was able to participate in remote learning, and attended three classes, earning high school credits towards graduation.

29. After students returned to school, a teacher and a mental health professional continued to work with [Student] at his home.

30. After DPS was able to reevaluate [Student] in 2021, a new IEP was developed to address his needs in a homebound setting. While the evaluations showed that [Student] needed assistance in some areas, they also showed that he is above 12.9 grade level in math problem solving and basic reading comprehension.

Compensatory Education Between February 2017 and February 2018

31. Because the ALJ has found that the 2017 IEP ended in February of 2018, the ALJ has limited the remedy of a denial of FAPE to the 2017-2018 school year.

32. [Student] has been out of school for several years. Therefore, the best and most appropriate measure of educational loss during the 2017-2018 school year is a comparison of the supports and services offered in the 2017 IEP with his most recent 2021 evaluation.

33. For the 2017-2018 school year, there were 38 school weeks. As stated previously, [Student]'s February 2017 IEP called for 300 minutes per week of special education in math. [Student]'s 2021 evaluation shows that [Student] is beyond his grade level for math; therefore, the ALJ finds that [Student] does not need services beyond what he is receiving in his current IEP. Accordingly, no compensatory education is awarded for math services.

34. [Student] is currently functioning beyond grade level in basic reading comprehension. Therefore, no compensatory education is awarded toward basic reading comprehension.

35. However, according to the 2021 evaluations, [Student] still needs support in the following areas: listening comprehension; occupational therapy; social emotional; and speech/communication. The evaluations did not assess [Student]'s knowledge in other school subjects.

36. Rather than ordering DPS to provide services in this areas, the ALJ is awarding monetary compensation because given [Student]'s current IEP, he would not be able to take advantage of additional instructional hours.

37. The February 2017 IEP called for 300 minutes per week of special education academic subjects other than math. If the instruction was at home, the cost of a homebound teacher is \$40.40 per hour. Three hundred minutes multiplied by 38 weeks equals 11,400 minutes; 11,400 minutes divided by 60 equals 190 hours. One hundred ninety hours multiplied by \$40.40 equals \$7,676.

38. The 2017 IEP called for 360 minutes per week of direct services from a school psychologist. If the services are provided at home, the cost of a school psychologist is \$56 per hour. Three hundred sixty minutes multiplied by 38 weeks equals 13,680 minutes; 13,680 minutes divided by 60 minutes equals 228 hours. Two hundred twenty-eight hours multiplied by \$56 equals \$12,768.

39. The 2017 IEP called for 60 minutes per week of direct services from a speech pathologist. [Senior Manager], Senior Manager for Special Education at DPS, testified that the cost of services for a school psychologist if services are provided at home was a little less than a school psychologist, but more than a teacher. The ALJ estimates the cost of a speech language pathologist is \$50 per hour if the services are provided at home. Sixty minutes multiplied by 38 weeks equals 2,280 minutes or 38 hours. Thirty-eight hours multiplied by \$50 equals \$1,900.

40. The ALJ finds that [Student] is entitled to receive the value of the services outlined above, which the ALJ calculates to be \$22,344 (\$7,676 + \$12,768 + \$1,900 = \$22,344).

Discussion and Conclusions of Law

A. Effective Dates of February 2017 IEP

Colorado Regulation 1 CCR 301-8, § 4.03(3) provides, “Meetings to review and revise each child’s IEP and to determine the child’s placement shall be initiated and conducted at least once every 365 days.” Likewise, CFR § 300.324(b)(1)(i) requires a child’s IEP team to periodically review the child’s IEP to determine the annual goals for the child, and whether those goals are being achieved. DPS convened and held an IEP meeting in February 2018 to review [Student]’s IEP. The parents and their attorney participated in the IEP meeting, and provided input. At that meeting, Complainant’s requested DPS to pay for an IEE for [Student], and DPS granted that request. An IEP was developed for [Student] in February 2018. The 2018 IEP was based on the previous evaluations and information provided by the parents regarding [Student]’s levels of functioning. Therefore, the ALJ finds that [Student]’s February 2017 IEP ended on February 12, 2018.

The ALJ’s finding regarding the termination of February 2017 IEP is supported by *D.B. ex rel. E.B.*, 966 F. Supp. 2d 315 (SDNY 2013). In that case, the school district had not evaluated the student since 2007 when it created his IEP in 2010. The court in that case found that the failure of the New York Department of Education to conduct a statutorily mandated psychological reevaluation of the student did render the 2010 IEP procedurally defective. The Court wrote in that case found that the purpose of the formal evaluation is to ‘provide relevant information that directly assist persons in determining the educational needs of the student.’” The Court found that the information provided at the child’s IEP meeting was sufficient because the district’s Committees on Special Education had adequate information from evaluations, reports and observations regarding the student to determine the student’s present levels of performance in preparing the IEP. In this case, DPS had the information from the 2017 IEP, as well as relevant information from his parents, rendering the February 2018 IEP valid.

B. Compensatory Education

Awarded pursuant to 20 U.S.C. § 1415(i)(2)(C)(iii), compensatory education is an “equitable remedy that provides in-kind special education and other related services for denials of free and appropriate public education . . . or replacement education services of that the student should have received in the first place. Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 291 Educ. L. Resp. (2013) internal quotation marks omitted); *Collingswood Borough Bd. Of Educ.*, 694 F.3d 488, 497 (3rd Cir. 2012) (“[C]ompensatory education is an equitable remedy that compensates a special needs student’s rights the district already denied him.”

Compensatory education can take a number of forms. For example, a court may order a district to pay for the student to receive services from a private school or provider. See e.g., *Draper v. Atlanta Indep. Sch. Sys.*, 49 IDELR 211 (11th Cir. 2008), cert denied. 110 LRP 57226, 131 S.Ct. 342 (2010). Compensatory education may include awards of services themselves. *Reid v. District of Columbia*, 43 IDELR 32 (D.D. Cir. 2005). While awards of compensatory education typically take the form of prospective services, they may also take the form of reimbursement for private services that the student has already received. See, e.g. *I.T. v. Department of Educ., State of Hawaii*, 62 IDELR 178, (D. Hawaii 2013).

In this case, DPS argues that because [Student]’s parents refused to consider placing [Student] in a residential setting to receive his education, [Student] should not receive any compensatory education. In support of that position, DPS cites to *Garcia v. Board of Educ. of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008). While it is true that [Student]’s parents would never have sent [Student] to a residential placement, this case is distinguishable from *Garcia*. In *Garcia*, the student was capable of attending school, and had demonstrated her ability to do well at school when she attended. The student in *Garcia* had significant disciplinary problems, and she, herself, refused to attend school. [Student] is not responsible for his failure to receive an education, and it is he who suffers the consequences of not having educational services. The ALJ finds it is inequitable to deny [Student] compensatory services for the 2017 denial of FAPE. Additionally, there has already been a determination by the U.S. District Court that the February 2017 IEP failed to provide FAPE. Therefore, between February 2017 and February 2018, Complainants have established that they are entitled to relief for the denial of FAPE to [Student]. For the reasons outlined in the findings of fact, the ALJ finds that [Student] is entitled to \$22,344 as reimbursement for compensatory education during the 2017-2018 school year.

Order

The ALJ therefore directs DPS to pay Complainants \$22,344 as a remedy of compensatory services.

So Ordered

June 1, 2022

/s/ Hollyce Farrell
HOLLYCE FARRELL
Administrative Law Judge