

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
August 25, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: August 25, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Hearing Date: August 19, 2014

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution,
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 Student has been denied a free appropriate public education (FAPE) by the Individualized Education Plans (IEP) developed by PUBLIC CHARTER SCHOOL for the 2013-2014 school year.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 12, 2014, named DCPS as Respondent. The parties met for a resolution session on June 27, 2014 and did not reach an agreement. On July 2, 2014, I convened a telephone prehearing conferences with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day period for issuance of this decision began on July 13, 2014.

The due process hearing was held before this Impartial Hearing Officer on August 19, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner and Student appeared in person, and were represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. Petitioner testified and called Student and SPECIAL EDUCATION ADVOCATE as witnesses. DCPS called SPECIAL EDUCATION COORDINATOR as its only witness. Petitioner's Exhibits P-1 through P-28 were admitted into evidence without objection, with the exception of Exhibits P-17 and P-18, which were admitted over DCPS' objections and Exhibit P-6, to which DCPS' objection was sustained. Respondent's Exhibits R-1 through R-11 were admitted into evidence without objection. Counsel for both parties made 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.

ISSUE AND RELIEF SOUGHT

The following issue for determination was certified in the July 2, 2014 Prehearing

Order:

– Whether DCPS denied Student a FAPE by failing to develop appropriate IEPs on or about October 9, 2013 and May 14, 2014, in that the IEPs inappropriately reduced the number of hours of Specialized Instruction outside the General Education setting, despite Student’s lack of educational progress.

For relief, Petitioner requests that DCPS be ordered to convene Student’s IEP team to revise his IEP to increase the hours of Specialized Instruction outside of General Education to no less than 15 hours per week in the subject areas of reading, math and written expression. In addition, Petitioner seeks an award of compensatory education to compensate Student for educational harm resulting from denial of FAPE since the October 2013 IEP was developed.

FINDINGS OF FACT

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

1. Student, an AGE youth, resides with Mother in the District of Columbia. Testimony of Mother. Student is a “child with a disability” as defined by the IDEA and is eligible for special education and related services under the primary disability classification Specific Learning Disability (SLD). Exhibit P-8.

2. For the 2013-2014 school year, Student was enrolled in GRADE at Public Charter School (PCS). Testimony of Mother. PCS has elected to be treated as part of DCPS for purposes of the IDEA. Hearing Officer Notice. Therefore, with respect to children with disabilities enrolled in PCS, DCPS is responsible for meeting the IDEA requirements applicable to a local education agency (LEA). *See* 5E DCMR § 924.3.

3. Student received his first IEP when he was in Third Grade at PRIOR CHARTER SCHOOL. From Third Grade through the end of the 2012-2013 school year, Student attended Prior Charter School, a public charter school in the District.

Testimony of Mother.

4. Prior to enrolling in PCS for the 2013-2014 school year, Student's last IEP, dated May 31, 2013, had been developed at Prior Charter School. At the May 31, 2013 IEP meeting, the Prior Charter School representatives reported that Student had mixed results in school. He had failed science for the first three quarters, but had shown increased motivation throughout the year. The special education teacher reported that Student was consistently improving both his grades and his reading level. The math teacher reported that Student tended to be motivated in math, which had kept his grades up. Exhibit P-3. The Prior Charter School IEP team decided that Student should be provided 14 hours per week of Specialized Instruction, of which 6 hours per week would be provided outside General Education. Exhibit P-2.

5. Student's 2012-2013 end-of-year grades at Prior Charter School were C's in Social Studies and Math and F's in Language Arts and Science. Exhibit P-21. Student attended 2013 summer school at Prior Charter School, which helped him. Testimony of Mother.

6. For the first quarter of the 2013-2014 school year at PCS, Student received all passing grades, including C- in English, Algebra and World History, C in Earth Science and B+ in Physical Education. Exhibit P-22.

7. On October 9, 2013, PCS convened Student's IEP team for a 30-day IEP review meeting. Mother and EDUCATIONAL ADVOCATE attended the meeting. Mother reported to the IEP team that there were no concerns thus far and that Student

was enjoying school. Exhibit R-9. Educational Advocate requested that Student be provided a self-contained classroom for reading. She was told that PCS did not have that capability. The school could provide a “Resource Workshop” which was a class offered two or three times a week, of no more than 10 students, taught by a special education teacher. Testimony of Special Education Coordinator. At the IEP meeting, the PCS representatives told Mother that PCS was unable to implement 6 hours per week of Specialized Instruction outside General Education as specified in Student’s Prior Charter School IEP. The IEP team reduced Student’s services, outside General Education, to 3 hours per week and increased services inside General Education from 8 hours to 15 hours per week. Specialized Instruction outside General Education would be provided in the Resource Workshop. In practice, the Resource Workshop was scheduled in 90-minute blocks on two days or three days per week, as determined by the school’s block schedule. The October 9, 2013 IEP provided only that Student would receive 3 hours per week of instruction outside General Education. But, on those weeks when the Resource Workshop was held on three days, Student would be provided 4.5 hours (270 minutes) per week of Specialized Instruction outside General Education. Exhibits P-5, R-9, Testimony of Special Education Coordinator. Mother did not agree with the changes to Student’s IEP. Testimony of Mother.

8. Student’s grades at PCS plummeted after the first quarter of the 2013-2014 school year. His grades for the end of the first semester were all F’s, except for an A- in physical education and a P in Advisory. Exhibit P-22. His grades for the last quarter of the school year were all F’s. Exhibit R-4. Student was retained in the Grade for the 2014-2015 school year. Testimony of Mother.

9. Student’s IEP team at PCS convened on March 5, 2014 to discuss Student’s

current grades and IEP. Mother and Educational Advocate attended the meeting. Mother expressed concern over Student's failing his classes. Educational Advocate wanted to look at hours of services and ways to help Student pass his courses for the year. Special Education Coordinator stated that there was no resource class for English at PCS. The IEP team agreed to institute "student success sheets" as a self-completed checklist to be signed by Student's teachers, to help keep Student on task. The team agreed to reconvene at the end of the month to review the student success sheets.

Exhibit R-8.

10. Student's IEP team met again on March 17, 2014. Student had not been consistent in using the student success sheets. Exhibit R-8. The success sheets concept was not successful in improving Student's academic performance. Testimony of Mother.

11. The PCS IEP team met on May 14, 2014 for the annual review of Student's IEP. Mother and Educational Advocate, as well as Student's godmother, attended the meeting. Testimony of Mother. Student was not making progress under his October 9, 2013 IEP. Testimony of Special Education Coordinator. Educational Advocate requested that all of Student's Specialized Instruction be provided in a special education classroom. Exhibit P-4. The IEP team decided to continue to provide Student 15 hours per week of Specialized Instruction in General Education and 3 hours per week outside General Education because this was the level of services Public Charter School was able to provide. Testimony of Special Education Coordinator.

12. Since the May 14, 2014 IEP meeting, Mother has provided her consent for DCPS to conduct a special education reevaluation of Student. Testimony of Special Education Advocate.

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 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

Did DCPS deny Student FAPE by failing to develop appropriate IEPs on or about October 9, 2013 and May 14, 2014, in that the IEPs reduced the number of hours of Specialized Instruction outside General Education, despite Student's lack of educational progress?

Petitioner contends that Public Charter School's October 9, 2013 and May 14, 2014 IEPs were inappropriate because the IEP team reduced Student's hours of Specialized Instruction, outside General Education, to three hours per week – based upon what the school was able to provide rather than upon Student's needs. I agree. To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). "The IEP is a written statement of the student's educational goals and required services, 20 U.S.C. § 1414(d)(1)(A), that 'must, at a minimum, provid[e]

personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Walker v. District of Columbia*, 2014 WL 3883308, 4 (D.D.C. Aug. 6, 2014), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005) (internal quotation and citation omitted.) “Stated differently, the IEP ‘should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Walker, supra*, quoting *Dist. of Columbia v. Wolfire*, No. 12–01527, 2014 WL 169873, at 1 (D.D.C. Jan. 16, 2014) (internal quotation and citation omitted).

Student matriculated to PCS for the 2013-2014 school year after attending Prior Charter School six years. The IEP team at Prior Charter School determined on May 31, 2013 that Student required 6 hours per week of Specialized Instruction outside General Education, in addition to 8 hours per week in General Education. On October 9, 2013, when Student’s IEP team convened at PCS for a 30-day review, the IEP team halved Student’s Specialized Instruction outside General Education to 3 hours per week. As Special Education Coordinator testified, the change was made because that was what the school was able to provide – not because Student’s needs had changed. In fact, Special Education Coordinator agreed that as of the 30-day review meeting, she already knew Student was having a hard time. I find that the IEP team’s decision to reduce Student’s Specialized Instruction services outside General Education from 6 hours per week to 3 hours per week – because that was all of that PCS was able to provide – violated the IDEA. *See, e.g., Pinto v. District of Columbia*, 938 F.Supp.2d 25, 30 (D.D.C.2013) (IEP must be “tailored to the unique needs” of each child;) Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46588 (August 14, 2006) (Placement decisions must be individually determined on the basis of

each child's abilities and needs and each child's IEP, and not solely on factors such as availability of special education and related services.)

Following the October 9, 2013 IEP revision, Student's school performance plummeted and he failed all of his academic courses for the school year. To what extent this academic decline was due to the IEP team's reducing Student's outside General Education services was not established by the evidence. However, I conclude that Student's lack of progress in the mostly General Education setting at PCS further establishes the inappropriateness of cutting Student's outside General Education services in the October 9, 2013 IEP. *See A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 167 (D.D.C.2005) (Highly relevant whether student was making progress and experiencing meaningful educational benefit from his placement.)

With regard to the May 14, 2014 IEP, the IDEA requires an LEA to ensure the IEP team revises a student's IEP, as appropriate, to address, *inter alia*, a student's lack of expected progress toward the IEP annual goals and in the general education curriculum. *See* 34 CFR § 300.324(b). At the May 14, 2014 IEP annual review meeting, the IEP team failed to revise Student's Specialized Instruction services even though Special Education Coordinator recognized that Student had not made progress under his October 9, 2013 IEP. The IEP team continued Student's Specialized Instruction at 15 hours per week in General Education and 3 hours per week outside General Education. I find that by not revising Student's Specialized Instruction services and placement in the May 14, 2014 IEP, the IEP team failed to address Student's lack of progress under the prior IEP. The May 14, 2014 IEP was, therefore, not reasonably calculated to provide some educational benefit to Student. *See J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010). This was a denial of FAPE.

Remedy

Petitioner has proposed a compensatory education plan for Student (Exhibit P-24), devised by Special Education Advocate, to compensate Student for the denials of FAPE in this case. The IDEA gives Hearing Officers “broad discretion” to award compensatory education as an “equitable remedy” for students who have been denied a FAPE. *See Reid v. District of Columbia*, 401 F.3d 516, 522-23 (D.C.Cir. 2005). The award must “provide the educational benefits that likely would have accrued from special education services” that the school district “should have supplied in the first place.” *Id.* at 524. A compensatory education award must “rely on individualized assessments” after a “fact specific” inquiry. *Id.* “In formulating a new compensatory education award, the hearing officer must determine ‘what services [the student] needs to elevate him to the position he would have occupied absent the school district’s failures.’” *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) (quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527.) *See, also, e.g., Turner v. District of Columbia*, 952 F.Supp.2d 31 (D.D.C.2013). 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. *Gill v. District of Columbia*, 770 F.Supp.2d 112, 116-117 (D.D.C.2011), *aff’d.*, *Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011).

Special Education Advocate proposes a compensatory education award of 250 hours of 1:1 tutoring in the areas of language arts, math, science and social studies/history. She explained in her testimony that her recommendation is based upon her conclusion that Student should have been provided 20 hours per week of “pull-out”

special education services at PCS because his academic achievement is now 4 to 5 grade levels below expectations for his age. However, the denials of FAPE, which the Petitioner alleged in this case, concern the PCS IEP team's reducing Student's hours of Specialized Instruction outside General Education. Obviously, the harm from those denials of FAPE bears no relation to Student's being 4 to 5 grade levels behind in school, if such is the case. Student has only attended PCS for one year and the special education services which PCS "should have supplied in the first place," *Reid, supra*, at 524, do not include remedying a preexisting 4 to 5 grade level gap in achievement. Therefore I find Special Education Advocate's compensatory education proposal wholly unpersuasive.

Unfortunately, Petitioner offered no evidence of what services Student needs "to elevate him to the position he would have occupied" had PCS not reduced his outside General Education Specialized Instruction over the 2013-2014 school year. While a trial court has discretion to take additional evidence concerning the appropriate compensatory education due a student, *see Gill v. District of Columbia*, 751 F.Supp.2d 104, 114 (D.D.C.2010), *aff'd.*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011), I am constrained under the DCMR to issue my final Hearing Officer Determination in this case no later than August 26, 2014. *See* DCMR tit. 5-E, § 3030.11. I find that the evidence before me does not provide a "fact-specific" evidentiary basis for a compensatory education remedy. *See Reid, supra*. Therefore, I will deny, without prejudice, Petitioner's request for a compensatory education award.

Because I have found that Public Charter School's May 14, 2014 IEP, developed near the end of the school year, was not reasonably calculated for Student to receive educational benefits, I will order DCPS to ensure that Student's IEP is appropriately revised to assess and address Student's unique needs and to provide an appropriate

placement that meets those needs. *See D.K. v. District of Columbia*, 983 F.Supp.2d 138, 141 (D.D.C.2013) (Local school officials utilize the IEP to assess the student’s needs and assign a commensurate learning environment.) At the due process hearing, Petitioner did not offer any competent evidence of what special education and related services Student now needs “to benefit educationally.” *See Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012). I, therefore, decline Petitioner’s request to decide the hours of Specialized Instruction which Student must be provided or the setting for those services. At the hearing, it was established that Mother has given her consent for Student to be reevaluated to determine his special education needs. Therefore, I will allow DCPS a reasonable period to complete the reevaluation in order to better enable the IEP team to determine the appropriate content of Student’s revised IEP.

ORDER

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

1. Within 30 days of entry of this order, DCPS shall convene Student’s IEP team to review Student’s needs that result from his disability and revise the IEP, as appropriate, in accordance with this decision and 34 CFR § 300.324(b), including, but not limited to, providing an appropriate placement;
2. Petitioner’s request for an award of compensatory education is denied without prejudice; and
3. All other relief requested by the Petitioner herein is denied.

Date: August 25 , 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).