

**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
December 11, 2013

PETITIONER,
on behalf of STUDENT,¹

Date Issued: December 11, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office, Room 2004
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 “Guardian”), 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 Student a free appropriate public education (“FAPE”) by failing to find him eligible for special education and related services before the current school year.

¹ Personal identification information is provided in Appendix A.

Student, an AGE boy, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on October 3, 2013, named DCPS as respondent. On October 16, 2013, the parties met for a resolution session and did not reach an agreement. The 45-day time period for issuance of this Hearing Officer Determination started on November 3, 2013. On October 30, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was convened before the undersigned Impartial Hearing Officer on December 3, 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. Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS' COUNSEL.

On November 27, 2013, Petitioner's Counsel requested leave to revise Petitioner's request for relief stated in the Prehearing Order, to add a request that DCPS be ordered conduct a Functional Behavioral Assessment ("FBA") of Student. DCPS opposed this request as untimely. At the beginning of the Due Process Hearing, DCPS' Counsel made an oral motion to bar Petitioner from pursuing the FBA request. I denied DCPS' motion on the basis that the Hearing Officer's broad authority to order appropriate, equitable relief is not limited by the relief request identified in the Prehearing Order.

Petitioners called as witnesses Guardian, EDUCATIONAL ADVOCATE 1, EDUCATIONAL ADVOCATE 2 and TUTOR. DCPS called as witness CLASSROOM TEACHER. Petitioner's Exhibits P-1 through P-22 were admitted into evidence without objection, with the exceptions of Exhibits P-9 and P-10, which were admitted over DCPS' objections. DCPS' Exhibits R-1 through R-10 were admitted without objection. Counsel for

both parties made opening and closing statements. There was no request to file post-hearing memoranda.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issue to be determined in this case is:

- Whether DCPS violated the IDEA’s child find requirements and denied Student a FAPE by failing to comprehensively evaluate him and find him eligible for special education and related services, when requested by Parent in the 2012-2013 school year.²

For relief, Petitioner requests an award of compensatory education to compensate Student for DCPS’ not providing special education services to him before November 2013. Petitioner also requests that DCPS be ordered to conduct an FBA of Student.

FINDINGS OF FACT

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

1. Student, an AGE boy, resides with Guardian in the District of Columbia. His birth parents’ parental rights have been terminated. Guardian is Student’s aunt and she had been granted full guardianship by a D.C. court. Testimony of Petitioner.
2. Student is currently enrolled in GRADE at ELEMENTARY SCHOOL 2. Classroom Teacher is his teacher. For the 2013-2014 school year, Student was first assigned to another classroom. To ease overcrowding, an additional Grade class, taught by Classroom

² The additional issue certified in the Prehearing Order, whether DCPS has denied Student a FAPE by failing, to date, to develop and implement an IEP for him, has become moot because DCPS developed an IEP for Student on November 6, 2013.

Teacher, was added on September 16, 2013. Student was moved to this class. Testimony of Petitioner, Testimony of Classroom Teacher.

3. For the prior, 2012-2013, school year, Student was enrolled at ELEMENTARY SCHOOL 1. His teacher was PRIOR TEACHER. Guardian began to have educational concerns about Student during the 2012-2013 school year. She was concerned about behavior issues, Student's learning and his not completing assignments. Guardian discussed her concerns with Prior Teacher and the Elementary School 1 special education coordinator. Prior Teacher called Guardian in for a conference in October 2012 to discuss strategies Guardian could use to help Student at home. Testimony of Petitioner.

4. In June 2009, DCPS' Early S.T.A.G.E.S. conducted a psychological evaluation and a speech-language evaluation of Student. The psychological report indicated that Student was able to benefit from interventions provided in the general education curriculum. The speech-language evaluation found Student's skills were "grossly within normal limits." Exhibit P-5. The evidence at the hearing did not establish whether, following the 2009 assessments, DCPS convened an eligibility team to determine whether Student had a qualifying special education disability.

5. Petitioner's Counsel stated at the October 16, 2013 resolution meeting in the present case that a request for evaluation of Student for special education eligibility was made on May 22, 2013. Exhibit R-4. On that date, counsel made a formal written request to the Elementary School 1 special education coordinator that Student be evaluated for special education and related services. Exhibit P-4. At the due process hearing, Guardian testified that at some point in the 2012-2013 school year she had discussed "testing" of Student with Prior Teacher, who told her she would need to discuss it with the special education coordinator.

Guardian testified that the special education coordinator advised her that she had a lot of cases piled up and it would take some time to set up testing for Student. Testimony of Guardian.

While I found Guardian to be a credible witness, her testimony was vague as to when she orally requested testing and as to the nature of her request. Counsel's May 22, 2013 letter makes no reference to a prior oral request having been made. I find that Petitioner has met her burden of proof to establish that on May 22, 2013, she requested an initial evaluation to determine if Student is a child with a disability. However, the evidence is insufficient to establish that Guardian initiated such a request earlier in the school year.

6. At a Student Evaluation Plan ("SEP") meeting at Elementary School 1 on June 17, 2013, Guardian informed the participants that Student had been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") in May 2013. Guardian stated that she would provide documentation of the ADHD condition from Student's medical doctor. Exhibit P-11.

7. At the June 17, 2013 SEP meeting, the special education coordinator agreed to have Student assessed with a comprehensive psychological evaluation and a speech language assessment. Exhibit P-11.

8. A comprehensive speech-language reevaluation was conducted on July 17, 2013. The DCPS examiner reported that Student presents with a mild/borderline language disorder, characterized by mild weaknesses in knowledge or ordinal and inclusionary/ exclusionary concepts, forming semantic associations and general vocabulary weaknesses. The examiner further reported that while Student demonstrates specific weakness, "the gestalt of his communication profile is not indicative of a disabling communication disorder that would prevent him from accessing or gaining benefit from the general education curriculum." Exhibit P-6.

9. A DCPS school psychologist conducted a psychological evaluation of Student on September 13 and 17, 2013. In her September 20, 2013 report, the school psychologist concluded that:

Considering all relevant data and current teacher reports, there is supporting evidence that suggests [Student] does present as a student who exhibits significant achievement delays in all areas of reading. These delays keep him from meeting age and state-approved grade level standards in the area of reading. Despite documented responses to academic intervention with the Wilson Foundations reading program, he will require special education services to address his unique educational needs. Therefore given [Student's] overall test results, record review, and observations, available documented past and present academic history provide support for an educational classification under IDEA 2004 of Specific Learning Disability.

Exhibit P-5.

10. On October 16, 2013, Student's Multidisciplinary Team ("MDT") at Elementary School 2 met for an initial eligibility determination. The MDT team was in agreement with identifying Student with an educational disability of Specific Learning Disability ("SLD") in the area of reading. Exhibits R-3, R-5.

11. On November 6, 2013, Student's Individualized Education Program ("IEP") team met to develop Student's initial IEP. Guardian and Educational Advocate 1 attended the IEP meeting. In the November 6, 2013 IEP, the IEP team identified annual goals for Reading and provided 1 hour per day of Special Education Services in Reading outside of General Education. Exhibit R-16.

12. At the November 6, 2013 IEP meeting, behavioral concerns were discussed and a FBA and behavior intervention plan ("BIP") were requested by Guardian. Although Guardian does not now recall whether she requested a BIP, Educational Advocate 1 confirmed that she did. I found his testimony credible on this point. Notwithstanding, Guardian agreed with the

IEP team's determination of what should be in Student's IEP. Testimony of Guardian, Educational Advocate 1.

13. Student is now assigned to Classroom Teacher's general education classroom at Elementary School 2. There are 14 students, of varying abilities, in the class. For reading, Student is using the Foundations phonics program which is proving to be very successful. He participates in after school tutoring once a week. His math skills are very good. His main deficiencies are in reading and writing. Student is showing slow and steady progress. He has positive interaction with his peers and is respectful to adults. Student has no problems at all behaviorally. Testimony of Classroom Teacher.

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 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

The only continuing issue in this case is whether Student has been denied a FAPE by DCPS' not timely completing initial eligibility evaluations, when requested by the Guardian in the 2012-2013 school year and by the resulting delay in starting Student's IEP services. Under the IDEA, states that receive federal educational assistance, must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of*

Columbia, 401 F.3d 516, 519 (D.C.Cir.2005). The District must “ensure that ‘[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.’” *Scott v. District of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (citing *id.*); 20 U.S.C. § 1412(a)(3). Under the IDEA’s child-find requirements, “[a]s soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process.” *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). “The evaluation component of the Child Find obligation specifies that the District must conduct an initial evaluation of a child to determine two things: (1) whether he qualifies as a ‘child with a disability’ within a timeframe specified by the state, which the District has provided as ‘120 days from the date the student was referred for an evaluation or assessment,’ D.C. Code § 38–2561.02, and (2) ‘to determine the educational needs of a child,’ including ‘the content of the child’s individualized education program.’ §§ 1414(a)(1)(C), (b)(1)(2)(A).” *DL v. District of Columbia*, 730 F.Supp.2d 84, 96 (D.D.C.2010). Once the eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days. 34 CFR § 300.323(c)(1); *G.G. ex rel. Gersten v. District of Columbia* 2013 WL 620379, 5-6 (D.D.C. Feb. 20, 2013).

Although Student was previously assessed in June 2009 by DCPS Early S.T.A.G.E.S., there was no evidence that DCPS convened an eligibility team in 2009 to determine Student’s eligibility for special education, as required by the DCMR. *See* 5E DCMR § 3005.4. Therefore, for purposes of this case, I find that the 120-day period for an initial eligibility determination – not the “reasonable period” time frame for completion of reevaluations – is applicable. *Cf. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259-60 (D.D.C.2005) (IDEA silent about the time frame within which an agency must conduct parentally requested reevaluation).

Reevaluations should be conducted in a “reasonable period of time,” or “without undue delay,” as determined in each individual case.) In the above Findings of Fact, I have found that Petitioner has established that, on May 22, 2013, she requested that Student be evaluated for special education eligibility. Although DCPS agreed on June 17, 2013 to conduct the evaluations, the evaluations were not completed until September 20, 2013 and the MDT team did not determine whether Student qualified as a child with a disability until October 16, 2013.

Under the 120-day time frame in D.C. Code § 38–2561.02, Student should have been determined eligible for special education services no later than September 19, 2013 and his IEP developed by October 19, 2013. Because an evaluation and eligibility determination is a prerequisite to preparing an IEP, DCPS’ failure to evaluate Student and determine his eligibility by the September 19, 2013 deadline ensured that he would not receive a timely IEP, thus, denying him a FAPE. *See G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 280 (D.D.C. Feb. 20, 2013) and cases cited therein; *Latynski-Rossiter v. District of Columbia*, 928 F.Supp.2d 57, 60 (D.D.C.2013) (An IDEA violation occurs at the moment that the District fails to provide an appropriate placement for the child.)

Here DCPS did not develop an IEP for Student until November 6, 2013, over a month after the due process complaint was filed. Due to DCPS’ delays, Student’s IEP, which provided that Student would receive 1 hour per day of special education reading services, was developed over three weeks beyond the outside limits of the District’s deadline for initiating services. As a result, Student missed some 11 hours of pull-out reading services in the current school year.³ This was a denial of FAPE.

³ Under the DCPS school calendar, there were 11½ school days between October 19, 2013 and November 6, 2013. Hearing Officer Notice.

Remedy

In this decision, I have found that DCPS denied Student a FAPE by failing to timely determine him eligible for special education services and develop his initial IEP, resulting in Student's missing some 11 hours of special education services. Petitioner seeks an award of compensatory education.⁴ 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, supra*, 401 F.3d at 522-23. 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*, 2013 WL 3324358, 10 -11 (D.D.C. July 2, 2013).

Petitioner's compensatory education proposal to provide Student 200 hours of math, reading and written expression tutoring, a plan advanced by Tutor, bears no relation to the benefit that would have accrued, had DCPS provided the 11 hours of additional pull-out reading

⁴ At the due process hearing, Petitioner also sought an order for DCPS to conduct a Functional Behavioral Assessment ("FBA") of Student and to develop a Behavior Intervention Plan ("BIP"). The evidence at the due process hearing did not support Student's need for an FBA or a BIP. *See, e.g., Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011) (FBA essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP.) Classroom Teacher, whose testimony I found credible, testified that Student has no problems at all behaviorally.

services which Student should have received. I find more helpful guidance in Classroom Teacher’s testimony. She testified that Student participates in after school tutoring one day per week and, with his classroom instruction, pull-out services and tutoring, Student is showing slow and steady progress. I find, therefore, that additional after school tutoring is an appropriate remedy “to provide the educational benefits that likely would have accrued from special education services” that DCPS should have supplied Student beginning October 19, 2013. *See Reid, supra*, at 524. An appropriate, equitable, remedy in this case will be to order DCPS to provide Student an additional hour weekly of 1-on-1 tutoring, for 10 weeks, as compensation for DCPS’ failure to timely provide and implement an IEP for Student. Since DCPS is already providing Student after school tutoring on a voluntary basis, I will not order DCPS to make up, hour-for-hour, Student’s missed services. *See, Reid, supra*, at 423 (rejecting “cookie-cutter” approach.)

ORDER

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

1. DCPS is ordered to provide Student, as compensatory education, 10 hours of 1:1 after school academic tutoring in reading and writing. These services shall be provided in addition to the after school tutoring Student already receives. Within 10 school days of entry of this Order, DCPS shall arrange with Guardian a mutually convenient schedule for implementation of these services; and
2. All other relief requested by Petitioner herein is denied.

Date: December 11, 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).