

**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
June 17, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: June 17, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

PUBLIC CHARTER SCHOOL,

Student Hearing Office,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came for a hearing 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 seeks a compensatory education award for Respondent Public Charter School's failure to determine Student eligible for special education services and to provide him Specialized Instruction and related services in the 2012-2013 school year.

¹ Personal identification information is provided in Appendix A.

On April 21, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The due process hearing was originally scheduled for May 23, 2014. The hearing date was continued at the request of Respondent due to Public Charter School's being closed on that date. The hearing was rescheduled for May 30, 2014. On May 27, 2014, upon the consent motion of Public Charter School, I entered an order continuing the time period for issuance of this decision by ten days to June 18, 2014. Pursuant to the IDEA, the due process hearing was convened before the undersigned Impartial Hearing Officer on May 30, 2014 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. Public Charter School was represented by EXCEPTIONAL ED. COORDINATOR and by PCS' COUNSEL. Mother testified, and called as witnesses FORMER TEACHER and SPECIAL EDUCATION ADVOCATE. Public Charter School called Exception Ed. Coordinator as its only witness. Public Charter School's Exhibits R-1 through R-10 were admitted into evidence without objection. Counsel for the parties agreed that Exhibits R-3 and R-6 would be admitted as Joint Exhibits J-3 and J-6. Petitioner did not offer additional exhibits. Counsel for both parties made opening statements and closing argument. 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

- Whether Public Charter School denied Student a FAPE by failing to evaluate him and determine him eligible for special education and related services in the 2012-2013 school year.

For relief, Petitioner requests an order for Public Charter School to provide compensatory education to Student for educational harm, allegedly resulting from failure to determine him eligible for special education and related services in the 2012-2013 school year.

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, a AGE youth, resides with Mother in the District of Columbia. He is in the GRADE at Public Charter School. Testimony of Mother.
2. Student is eligible for special education and related services as a student with Multiple Disabilities (MD). Exhibit R-4.
3. Prior to the summer of 2012, Student and Mother resided in Maryland. For the 2011-2012 school year, Student attended MARYLAND SCHOOL 2. For the preceding two school years, Student attended MARYLAND SCHOOL 1. When enrolled in Maryland public schools, Student had an Individualized Education Program (IEP) beginning when he was in first grade. Testimony of Mother.
4. Respondent Public Charter School has elected to be treated as a local education agency (LEA) for purposes of the IDEA and the Rehabilitation Act of 1973, *see* 5-E DCMR § 924.2, and is as an independent LEA. Hearing Officer Notice.
5. Public Charter School is now in its second year of operation. It started with less than 500 students in 5th through 8th grades. This school year, Public Charter

School added a 9th grade level and has a current enrollment of approximately 500 children. Testimony of Exceptional Ed. Coordinator.

6. Student has attended Public Charter School since the summer of 2012. Before the beginning of the 2012-2013 school year, he took summer classes at the school. When Mother enrolled Student, she discussed with the Public Charter School administrative person Student's Maryland IEP and obtaining Student's educational records from Maryland School 2. Mother gave her consent for Public Charter School to obtain Student's records from Maryland. Mother was contacted by Maryland School 2 in November or December 2012 to inquire why Student was not coming to school (at Maryland School 2). Maryland School 2 had not received a request from Public Charter School for Student's records. Mother told Maryland School 2 that she had enrolled Student in Public Charter School. Testimony of Mother.

7. Student's academics at Public Charter School were not good for the 2012-2013 school year. His grades were D's and F's. The school offered to place him in a special class for failing children, but Mother refused, because she felt that was "tucking away" the children who were struggling academically. Testimony of Mother. After failing all of his courses, Student was retained in GRADE at Public Charter School for the 2013-2014 school year. Exhibit J-3.

8. After the 2012-2013 school year had ended, Mother met with Public Charter School SCHOOL DIRECTOR. Mother told School Director about Student's IEP when he attended school in Maryland and in late July 2013, requested that Student be evaluated by Public Charter School for special education. School Director put Mother in contact with Exceptional Ed. Coordinator. Testimony of Mother, Exhibit R-1.

9. Exceptional Ed. Coordinator has worked at Public Charter School since

April 2013. In August 2013, she received from School Director Mother's request for Student to be evaluated. Testimony of Exception Ed. Coordinator.

10. PSYCHOLOGY ASSOCIATE conducted a combined Psychological and Psycho-Educational Evaluation of Student in September 2013. In her October 16, 2013 written report, Psychology Associate reported that Student's cognitive abilities measured within the Below Average to Average ranges. Student's areas of relative strength include phonemic awareness and auditory processes such as auditory working memory and attention. Areas of relative weakness include long-term retrieval which includes visual-auditory learning and retrieval fluency as well as processing speed, and spatial relationships. Student's difficulties with the ability to store and retrieve information can have an adverse impact on academic domains such as reading, writing and mathematics. This can affect Student's ability to relate prior knowledge to new knowledge. Deficits in processing speed suggest potential difficulties with solving simple cognitive tasks automatically and sustaining attention. Academically, Student performed adequately in the following areas: reading, mathematics and oral language. His writing fluency was in the Very Deficient to Below Average range. Student's performance on this subtest may have been influenced by his difficulty with long-term retrieval and processing, because the task required him to rapidly communicate information from stored memory based on a stimulus that was provided. In addition, when provided a prompt (*i.e.*, words to include in the sentence) Student often only used the words provided – which resulted in incomplete sentences. Psychology Associate noted that Student had a preexisting diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD) and was medicated for the ADHD symptoms, that Student was performing below grade level and that he continued to struggle with distractibility,

disrupting other and remaining on-task in the classroom setting. Psychology Associate reported that Student appeared to meet IDEA criteria for Other Health Impairment (OHI) due to ADHD and presented deficits in one or more basic psychological processes that impact his academic performance, primarily writing fluency. Exhibit R-3.

11. A special education eligibility committee meeting for Student was convened at Public Charter School on November 6, 2013. The team reviewed the October 16, 2013 psychological evaluation and determined that Student was eligible for special education and related services as a student with Multiple Disabilities (Specific Learning Disability and OHI). Exhibit R-4.

12. Student's IEP team met at Public Charter School on November 6, 2013 and developed what was styled an "Initial IEP." Exhibit R-6. The IEP team did not know that Student had IEPs when he attended Maryland schools, even though Mother had provided that information to the administrative staff at Public Charter School and it was reported in the October 16, 2013 psychological evaluation report. Testimony of Exceptional Ed. Coordinator. In the November 6, 2013 IEP, the Public Charter School IEP team developed annual goals for Written Expression and Emotional, Social and Behavioral Development. The IEP provided that Student would receive five hours per week of Specialized Instruction in the General Education setting and provided classroom accommodations, including limiting classroom distractions, provision for ensuring that Student paid attention, teacher check-in with Student after instructions were given, accompanying visual demonstrations with oral explanations, and breaking up spatial tasks into component parts with verbal instructions for each part. Exhibit R-6.

13. At Public Charter School, Student is currently receiving pull-out services

on a daily basis and is pulled-out for test taking. Testimony of Exceptional Ed. Coordinator.

14. On March 6, 2014, Public Charter School convened a meeting with Mother to review Student's data over the first three quarters of the 2013-2014 school year. The math teacher reported that Student's grades were dropping because he did not do his homework and never attended the teacher's "student hours" for extra attention. The biology teacher reported that Student was repeatedly tardy, did not turn in all of his homework assignments, did not have his journal, skipped most tutoring hours, did not complete a study plan document, and did not turn in a completed study guide. The music teacher reported that Student does not turn in his homework. The chemistry teacher said that Student was not doing as well as he could because he was not completing and turning in homework assignments. The English teacher reported that Student's tardiness and his missing materials and homework were hampering him. She stated he needed to come to her student hours. The Latin teacher said that Student's not turning in his homework accounted for why his grade was not much higher, that Student had not taken advantage of the opportunity to retake tests and he had not attended any of her student hours. Student's physics teacher reported that Student had not turned in a single homework assignment and had not attended student hours.

Exhibit R-7.

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

- Did Public Charter School deny Student a FAPE by failing to evaluate him and determine him eligible for special education and related services in the 2012-2013 school year?

For most of his school years before moving to the District in 2012, Student was provided special education services under IEPs in Maryland public schools. When Mother and Student moved to the District in summer 2012, Mother enrolled Student in Public Charter School. Mother's unrebutted testimony at the due process hearing established that in the summer of 2012, when she initially enrolled Student at Public Charter School, she told the school staff that Student had an IEP at his Maryland school, and she executed a consent for Public Charter School to obtain Student's educational records from his last Maryland school. For whatever reason, Public Charter School did not obtain Student's records from the Maryland school and during the 2012-2013 school year, neither adopted the Maryland IEP nor developed a new IEP for him. At the end of July 2013, Mother requested that Student be evaluated for special education. Only then was Student determined eligible for special education and provided an IEP by Public Charter School. Public Charter School began providing special education services to Student in November 2013.

Citing the IDEA's Child-Find requirement², Mother contends that Student was denied a FAPE because, taking account of Student's poor academic performance, Public Charter School should have evaluated him and found him eligible for special education in the fall of 2012. I find that Student was indeed denied a FAPE, but for a different reason than that advanced by Petitioner. When a child with a disability, who had an IEP that was in effect in another state, transfers to an LEA in the District, the new LEA in the District must provide the child with FAPE, including services comparable to those described in the child's IEP from the other state. *See* 34 CFR § 300.323(f).³ However this IDEA interstate transferee requirement is generally not applicable for Students who transfer between jurisdictions over the summer. Notwithstanding, an LEA needs to have a means for determining whether children who move into the LEA's jurisdiction during the summer are children with disabilities and for ensuring that an IEP is in effect

² Under the IDEA, states, as well as the District of Columbia, 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 Act's Child Find provision requires that 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).

³ IEPs for children who transfer from another State. If a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency—

(1) Conducts an evaluation pursuant to §§300.304 through 300.306 (if determined to be necessary by the new public agency); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§300.320 through 300.324.

34 CFR § 300.323(f).

at the beginning of the school year. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46682 (August 14, 2006).

Public Charter School violated the IDEA's procedural requirements by failing to have an IEP in effect for Student at the beginning of the 2012–2013 school year. *See* 20 U.S.C. § 1414(d)(2)(A); *K.E. v. District of Columbia*, 2014 WL 242986, 7 (D.D.C. Jan. 23, 2014) (Plain mandate of the IDEA that a district should have an IEP in place “[a]t the beginning of each school year.”) Although a procedural violation may rise to the level of a denial of a FAPE, “an IDEA claim is viable only if those procedural violations affected the student’s substantive rights.” *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006); *K.E.*, *supra* at 5-6. Clearly Public Charter School’s failure to develop and implement an IEP for Student until his second year at the school affected Student’s substantive rights and he was denied a FAPE.

Compensatory Education

Petitioner seeks an award of compensatory education for Public Charter Schools’ failure to provide Student a FAPE for the 2012-2013 school year. 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*, 2013 WL 3324358, 10 -11 (D.D.C. July 2, 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).

In my April 21, 2014 Prehearing Order in this case, I alerted counsel that to establish a basis for a compensatory education award, the Petitioner must be prepared at the hearing to document with exhibits and/or testimony “the correct amount or form of compensatory education necessary to create educational benefit” to enable the hearing officer to project the progress Student might have made, but for the alleged denial of FAPE, and further quantitatively defining an appropriate compensatory education award. I informed the parties that if an adequate record were not established, the Hearing Officer could be obliged to deny a compensatory education award or to continue the hearing for the Petitioner to offer additional evidence sufficient to support the claim for compensatory education.

The evidence in this case is that when Student was finally evaluated in the fall of 2013, his IEP team determined that he needed five hours per week of Specialized Instruction in the General Education setting. However, the evidence from the due process hearing sheds no light on what additional educational benefits likely would have accrued if Student had been provided those services from the beginning of the 2012-2013 school year or what services he would need to compensate him for being deprived of these services. Petitioner called Special Education Advocate as a witness in support

of her compensatory education claim. However this witness' testimony offered no insight on "the educational benefits that likely would have accrued" had Public Charter School provided Student special education services from the beginning of the 2012-2013 school year or what services he should receive now to elevate him to that position. I find, therefore, that Petitioner has failed to support her claim for compensatory education for this denial of FAPE. *See, Gill v. District of Columbia*, 770 F.Supp.2d 112, 118 (D.D.C.2011), *aff'd.*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011) (Due to the lack of evidentiary support, the Court is compelled to find that Plaintiffs have failed to support their claim for compensatory education.) While a court has discretion to take additional evidence concerning the appropriate compensatory education due a student, *see Gill*, 751 F.Supp.2d at 114, I am constrained under the DCMR to issue my final Hearing Officer Determination in this case no later than June 18, 2014. *See* DCMR tit. 5-E, § 3030.11. Therefore, based on the record before me, I will deny, without prejudice, Petitioner's request for a compensatory education award. Under the D.C. Circuit's decision in *Reid*, a hearing officer may not delegate his authority to an IEP team to formulate a compensatory education award. Therefore, I strongly encourage, but do not order, Public Charter School to convene Student's IEP team to consider what educational deficits resulted to Student from his not receiving special education services during the 2012-2013 school year and to determine what supplemental programming and services Student now needs "to elevate him to the position he would have occupied absent [Public Charter School's] failures." *See, Stanton, supra.*

ORDER

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

ORDERED:

1. Petitioner's request for a compensatory education award is denied without prejudice. I encourage, but do not order, the parties to endeavor to reach a voluntary agreement on appropriate compensatory education for the failure of Public Charter School to provide Student Specialized Instruction services during the 2012-2013 school year; and
2. All other relief requested by the Petitioner in this matter is denied.

Date: June 17, 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).