

**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 05, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: June 4, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

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 Case No. 2013-0457, also concerning this Student, former Impartial Hearing Officer Erin Leff determined that Respondent District of Columbia Public Schools (DCPS) had failed to comply with the IDEA's "Child Find" requirements by not evaluating Student for special education eligibility after September 11, 2011. Hearing Officer Leff denied without

¹ Personal identification information is provided in Appendix A.

prejudice Petitioner's request for compensatory education relief, because Student had not then been determined eligible for IDEA services. Student has now been evaluated and determined eligible for special education and related services. In her present due process complaint, Petitioner seeks a compensatory education award for DCPS' failure to provide Student special education and related services over the preceding two calendar years.

On April 17, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. The hearing date was originally scheduled for May 9, 2014. The hearing was continued at the request of Petitioner due to the unavailability of one of Petitioner's witnesses. On May 6, 2014, the Chief Hearing Officer entered an Interim Continuance Order extending the due date for this decision to June 16, 2014. Pursuant to the IDEA, the due process hearing was convened before the undersigned Impartial Hearing Officer on June 3, 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. DCPS was represented by DCPS' COUNSEL. Mother testified, and called as witnesses LICENSED PSYCHOLOGIST and EDUCATIONAL ADVOCATE. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-19 and DCPS' Exhibit R-1 were admitted into evidence without objection. Counsel for both parties made opening and closing statements. 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 issue to be determined in this case is:

– Whether DCPS should be required to provide compensatory education to Student to compensate for educational harm resulting from DCPS' not complying with its Child Find obligation and not finding Student eligible for special education and related services until March 7, 2014.

For relief, Petitioner requests an order for DCPS to provide compensatory education to Student for educational harm resulting from its failure to provide special education and related services during the two-year period preceding the March 27, 2014 filing date of the complaint in this case.

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:

A. January 23, 2014 Hearing Officer Determination

On October 28, 2013, former Hearing Officer Erin Leff issued a Hearing Officer Determination in Case No. 2013-0457 (the October 28, 2013 HOD), following an October 21, 2013 due process hearing concerning Student. Exhibit P-17. During the prehearing conference in the present case, counsel for the parties stipulated that I may adopt findings of fact, which I deem relevant, from the prior HOD. Accordingly, I adopt the following findings from the October 28, 2013 HOD:

A. Student is AGE. He currently attends PUBLIC CHARTER SCHOOL Prior to the 2013-2014 school year he attended CITY ELEMENTARY SCHOOL. He is now in the GRADE.

B. Student was diagnosed as having attention deficit/hyperactivity disorder (ADHD) when in first grade. School personnel suggested Student see a psychiatrist due

to his behavior in school. Petitioner complied with the school's recommendation and took Student to a psychiatrist who diagnosed Student's ADHD. City Elementary School was aware of the ADHD diagnosis.

C. Student was hit by a car on or about May 27, 2011. Student incurred multiple fractures and a brain injury. He was hospitalized at MEDICAL CENTER. As a result of the accident Student experienced deficits in mobility, self-care skills, cognition and language/communication. He was admitted to REHABILITATION HOSPITAL on June 2, 2011. At the time of his discharge on June 16, 2011, Student continued to demonstrate impaired cognition and impaired communication.

D. Staff from City Elementary School were aware of Student's accident. They visited him at Rehabilitation Hospital and attended a meeting at Rehabilitation Hospital held sometime in August 2011. At that meeting Rehabilitation Hospital staff indicated Student might have future difficulties with headaches as well as speech and memory issues resulting from the accident.

E. When Student returned to City Elementary School at the beginning of the 2011-2012 school year Petitioner provided to a person in the counselor's office Student's discharge documents from Rehabilitation Hospital and a form requesting a special education evaluation. No evaluation occurred in the 2011-2012 or 2012-2013 school years.

F. Student was not on grade level at the beginning of the 2011-2012 school year. He was not, however, significantly behind. Student also demonstrated some minor, but not unusual, behavioral issues during the 2011-2012 school year.

G. During the 2012-2013 school year Student demonstrated difficulties in school. Teachers reported difficulties with academics as well as behavior. He acted

inappropriately, getting into some squabbles with other students. He also struggled with finding the correct details to answer questions, did not complete in-class assignments or turn in all of his homework. He also struggled with writing assignments. Student did not have patience and would not return to a task if he decided it was complete. Petitioner frequently reminded Student's teachers of his brain injury and asked about evaluation. She was told none was needed. Petitioner was notified of Student's proposed retention in the PRIOR GRADE at a meeting in May 2013. Petitioner indicated her opposition to the retention, stating Student should have been evaluated for eligibility for special education and related services.

B.

Additional Findings of Fact from the June 3, 2014 Due Process Hearing

Based upon the evidence adduced at the June 3, 2014 due process hearing in the instant case, I make the following additional Findings of Fact:

1. Student resides with Mother in the District of Columbia. He continues to attend Public Charter School. Testimony of Mother.
2. Student is eligible for special education and related services as a student with a Traumatic Brain Injury (TBI) disability. Exhibit P-1.
3. Licensed Psychologist, with a Psychology Resident, conducted an independent Neuropsychological Evaluation of Student in October 2013. Student was administered the Woodcock-Johnson III Tests of Cognitive Abilities (Cognitive) on which his scores were: General Intellectual Ability - 81 (Low Average); Verbal Ability - 83 (Low Average); Thinking Ability - 88 (Low Average); Cognitive Efficiency - 79 (Low). Student evidenced particular difficulty on the Visual Matching subtest, which measures visual motor processing speed, and on the Visual-Auditory Learning subtest, which

measures long-term retrieval, memory, and reading fluency. On the Woodcock-Johnson III Tests of Achievement (Achievement), Student's scores were: Broad Reading - 94 (Average); Broad Math - 104 (Average); and Broad Written Language - 95 (Average). Although the Broad Reading score was in the Average range, Student received a Low Average score on the Passage Comprehension subtest (grade equivalent of 2.9), and therefore, met criteria for Learning Disorder, Not Otherwise Specified (NOS). Neuropsychological testing revealed deficits in reading as well. Neuropsychological testing also indicated that Student struggles with visual spatial and visual-motor integration. Student also evidenced rote memory deficits. Neuropsychological testing further revealed deficits in understanding and following complex commands. Licensed Psychologist diagnosed Student with Cognitive Disorder NOS, Learning Disorder NOS in Reading and Attention-Deficit/Hyperactivity Disorder, Combined Type. She recommended that Student be determined eligible for special education under the categories Specific Learning Disability and Other Health Impaired due to his ADHD diagnosis. Exhibit P-7.

4. Student was also assessed with a Functional Behavioral Assessment (January 2014), a Speech-Language Assessment (January 2014) and an Occupational Therapy Assessment (February 2014). Exhibits P-4, P-5 and P-6.

5. On March 7, 2014, a Multidisciplinary Team (MDT) at Public Charter School convened for an initial eligibility meeting and to develop Student's Individualized Education Program (IEP). The meeting was postponed from earlier scheduled dates due to weather closings. Testimony of Educational Advocate. Student was found eligible for special education and related services as a child with a TBI disability. In the initial March 7, 2014 Public Charter School IEP, Student was provided

five hours per week of Specialized Instruction in the General Education setting, 11.25 hours per week of Specialized Instruction outside General Education and 30 minutes per week, each, of Behavioral Support services and Speech-Language Pathology. Exhibit P-1.

6. Mother has noticed a “big difference” since Student began receiving IEP services. Student’s test scores are a lot better and he is doing better in school. According to Mother, Student is doing “pretty good” in math, but needs more help in reading. Testimony of Mother.

7. On his Public Charter School Report Card for the Third Quarter of the current school year, Student received Basic grades on 4 subparts and Proficient grades on 2 subparts for Reading. In Mathematics, he received Basic grades on two subparts and Proficient grades on two subparts. “Basic” means demonstrates mastery 51-69% of the time. “Proficient” means demonstrates mastery 70-90% of the time. Exhibit P-8.

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

- Should DCPS be required to provide compensatory education to Student to compensate him for educational harm resulting from DCPS' not complying with its Child Find obligation and not finding Student eligible for special education and related services until March 7, 2014?

Procedurally, this is an unusual case. In the October 28, 2013 HOD, Hearing Officer Leff determined that DCPS had failed in its Child Find obligations with respect for Student. However, at the time of October 21, 2013 due process hearing, it had not yet been determined whether Student was eligible for special education as a child with an IDEA disability. Therefore, Hearing Officer Leff dismissed, without prejudice, the Mother's request for compensatory education relief. Having now established that Student is eligible for IDEA services, Petitioner seeks compensatory education for DCPS' denial of FAPE to Student prior to the eligibility determination.

Under *Reid v. District of Columbia*, 401 F.3d 516 (D.C.Cir. 2005), hearing officers have "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid*, 401 F.3d at 522-523. "A hearing officer, upon a finding that a child eligible for special education services has been denied FAPE, must undertake a fact-specific exercise of discretion designed to identify those services that will compensate the student for that denial. However, in doing so, the hearing officer has broad discretion to fashion relief to serve the Act's remedial purposes." *District of Columbia v. Oliver* 2014 WL 686860, 4 (D.D.C.2014) (citations and internal quotation marks omitted). "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, 43 (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).

In cases in which a compensatory education award is sought, “the hearing officer first determines whether there is sufficient evidence of an IDEA violation that entitles the student to a compensatory education.” *Banks ex rel. D.B. v. Dist. of Columbia*, 720 F.Supp.2d 83, 90 (D.D.C.2010) (citation omitted). “If the hearing officer determines there was such a violation, then the hearing officer applies the *Reid* standard to craft an award.” *Id.* Here, I find that Petitioner has established that there has been an IDEA violation that entitles Student to compensatory education. When Student’s MDT team at Public Charter School considered Student’s evaluation data in March 2014, it determined that Student is a child with a TBI disability in need of special education and related services. In her October 22, 2013 Neuropsychological Evaluation report, Licensed Psychologist stated that Student’s underlying Cognitive Disorder is presumed to be due to the direct physiological effect of the fracture of Student’s skull in the May 2011 automobile accident. (The Neuropsychological Evaluation report states, erroneously, that the accident was in May 2012.) Hearing Officer Leff found, as a matter of law, that Student should have been evaluated for special education eligibility, beginning on September 11, 2011, after Student returned to school following the serious

automobile injury.² I find that Petitioner has established if DCPS had timely evaluated Student in September 2011 after the automobile accident, he would have been determined then to be a child with a disability in need of special education and related services. Therefore, Student was denied a FAPE by DCPS' failure to evaluate him in the fall of 2011 and by its failure to ensure he was provided an appropriate IEP for the 2011-2012 and 2012-2013 school years. I conclude that there is sufficient evidence of an IDEA violation to entitle Student to compensatory education.

Petitioner requests that DCPS be ordered to provide compensatory education to compensate Student for denial a FAPE from March 2012 through March 2014, when Petitioner filed her due process complaint in this case. DCPS, however, maintains that it is not responsible for any denial of FAPE following Student's transfer to Public Charter School this school year. Student transferred to Public Charter School at the beginning of the 2013-2014 school year. It is not disputed that Public Charter School has elected to

² That determination is binding on the parties under the doctrine of collateral estoppel. The doctrine of collateral estoppel – which is also known as issue preclusion and estoppel by judgment – bars relitigation of the same issues between the same parties in connection with a different cause of action. The doctrine thus comes into play in a case when, in an earlier proceeding involving a different cause of action, the same parties litigated the same issues that are presented once again for decision. The judgment in the first suit estops the parties from litigating in the second suit issues-that is to say points and questions-common to both causes of action and which were actually adjudicated in the prior litigation. The determination must be essential to the prior adjudication in order to be given preclusive effect. The doctrine is applicable to administrative proceedings. *See* Restatement (Second) of Judgments § 83 (1982). Ordinarily, a determination that has become final in a prior case will be given preclusive effect even if it has not been subjected to appellate review. *See* Restatement (Second) of Judgments §§ 27, 28(1), cmt. a.; *see also* Restatement (Second) of Judgments § 83. *M.C.G. v. Hillsborough County School Bd.*, 927 So.2d 224, 226-227 (Fla. App. 2006) (Citations omitted). *See, also, Friendship Edison Public Charter School v. Suggs*, 562 F.Supp.2d 141, 150 (D.D.C. 2008) (The elements of collateral estoppel are: 1) identity of issue in a prior case; 2) full litigation of issue in a prior case; and 3) necessity of resolution of the issue to the decision in the prior case.) All three elements are present here.

be treated as its own local education agency (LEA) for purposes of IDEA and has elected to be responsible for ensuring the provision of special education services for children with disabilities enrolled in its school. *See* DCMR, tit. 5-E, § 92.4.³ Petitioner's Counsel argues that DCPS is also responsible for Public Charter School's not providing Student a FAPE until March 2014, because if DCPS had provided an IEP to Student in the 2012-2013 school year, then Public Charter School would have continued to provide Student a FAPE under its obligation as an intra-state transferee LEA. *See* 34 CFR § 300.323(e). However, beyond counsel's conclusory argument, Petitioner has identified no evidence in the record, to support this speculation. I conclude that DCPS cannot be held responsible for any ongoing denial of FAPE to Student after he transferred from a DCPS school to Public Charter School. I find, therefore, that DCPS denied Student a FAPE by not providing him special education and related services from approximately September 2011 through the end of the 2012-2013 school year. Since Petitioner has only requested compensatory education for the period from March 27, 2012 forward, I find that Student is entitled to compensatory education for DCPS' denial of FAPE for the period March 27, 2012 through the end of the 2012-2013 school year.

At the due process hearing in this case, Licensed Psychologist testified that based upon her testing in the fall of 2013, Student's deficit was in reading and that based upon Student's most recent grades at Public Charter School, he still struggles with reading. Student's current grades at Public Charter School indicate that in most reading categories, he is at the Basic level (demonstrates mastery 51-69% of the time). Licensed Psychologist opined that if Student has been provided appropriate Specialized Instruction services in the 2011-2012 and 2012-2013 school years, there is no reason to

³ Public Charter School was not named as a party respondent in this case.

believe that he would not now be reading at the Proficient level (Demonstrates mastery 70-90% of the time.) Licensed Psychologist recommended that Student be provided 144 hours of tutoring to elevate him to the Proficient level in reading.

Educational Advocate, who also testified for Petitioner, recommended that Student receive 201 hours of Specialized Instruction as well as 18 hours each of speech, OT and counseling as compensatory education. Educational Advocate's recommendation appeared to be based on a mathematical formulation derived from the hours of IEP services not provided to Student between September 15, 2011 and the August 14, 2013 filing of the due process complaint in Case No. 2013-0457. However the *Reid* standard avoids such mathematical formulations. *See, e.g., Mary McLeod Bethune Day Academy Public Charter School v. Bland*, 534 F.Supp.2d 109, 115 (D.D.C.2008) ("In *Reid*, the Court rejected 'cookie-cutter' or mechanical remedies, such as awarding one hour of compensatory instruction for each hour that the student was denied FAPE, and stressed that the Hearing Officer must take into account individual assessments of the student and focus on the student's individual needs. *Reid*, 401 F.3d at 523-24.") Nor was there any persuasive evidence at the due process hearing that Student needs compensatory services in speech, OT or counseling. I discount Educational Advocate's compensatory education proposal as not well-founded.

Although Licensed Psychologist's background is in psychology, not pedagogy, she is knowledgeable of Student's needs through her recent Neuropsychological evaluation. I found her opinion of what Student needs "to elevate him to the position he would have occupied," had DCPS provided him appropriate Specialized Instruction beginning in the 2012-2012 school year, to be well-reasoned. Accordingly, I will order DCPS to provide Student, as compensatory education, 144 hours of 1:1 tutoring by a qualified reading

specialist, to be implemented over Public Charter School's 2014 summer vacation.

ORDER

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

ORDERED:

DCPS shall provide Student 144 hours of one-on-one academic tutoring by a reading specialist in reading and other academic areas, as reasonably determined by Mother and Student's educators would be most beneficial to Student. Provision of the tutoring services shall be completed before the beginning of the 2014-2015 school year; and

All other relief requested by Petitioner in this matter is denied.

Date: June 4, 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).