

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

---

PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: February 6, 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 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 Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not timely evaluating Student for special education eligibility and by failing to propose an individualized education program (IEP) for Student, following his October 17, 2013 eligibility determination.

---

<sup>1</sup> 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 November 29, 2013, named DCPS as respondent. The case was originally assigned to Impartial Hearing Officer James Mortenson. The parties met for a resolution session on December 11, 2013 and were unable to reach an agreement. The 45-day time limit for issuance of the Hearing Officer Determination in this case started on December 30, 2013. On December 16, 2013, Hearing Officer Mortenson convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. Mr. Mortenson issued a Prehearing Order on the same day. On December 18, 2013, the case was reassigned to the undersigned Hearing Officer. On January 2, 2014, I issued a revised Prehearing Order.

The due process hearing was convened before me on January 24, 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. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by SCHOOL COUNSELOR and by DCPS' COUNSEL.

Petitioner testified and called as witnesses, FORMER PRINCIPAL, EDUCATIONAL ADVOCATE, NONPUBLIC SCHOOL LEARNING SPECIALIST, and Student. DCPS called no witnesses. Petitioner's Exhibits P-2 through P-14, P-16 through P-20, P-25, P-36, P-37, P-39 and P-40 were admitted into evidence without objection. Exhibits P-15, P-23, P-26 through P-29, P-31 through P-34 and P-38 were admitted over DCPS' objections. DCPS' objections to Exhibits P-22 and P-35 were sustained. Exhibits P-1, P-21, P-24, and P-30 were not offered. DCPS' Exhibits R-1 through R-7 were admitted without objection. Exhibit R-8 was not offered. At the close of Petitioner's case in chief, DCPS' Counsel made an oral motion for a directed

finding against Petitioner on the grounds that Petitioner failed to make a *prima facie* showing that she had requested Student's initial eligibility evaluation before June 2013 and that Petitioner had unilaterally placed Student at Nonpublic School before his special education eligibility determination was completed. I denied DCPS' motion for a directed finding. 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.

### **ISSUES AND RELIEF SOUGHT**

The issues to be determined in this case and relief sought are:

1. Whether DCPS failed to timely evaluate the Student when the Petitioner requested an initial evaluation of the Student in December 2012 and the evaluation was not completed until October 2013;
2. Whether the Respondent denied the Student a free appropriate public education because it failed to propose an IEP and ensure the IEP team made a placement determination following the determination that the Student was eligible for special education and related services on October 17, 2013.

Petitioner is seeking reimbursement for tutoring provide Student during the 2012-2013 school year; reimbursement for the cost of the non-public school; and an offer of FAPE through an IEP she can consider. *See* Prehearing Order, December 16, 2013; Revised Prehearing Order, January 2, 2014. In addition, in her due process complaint, Petitioner requested an award of compensatory education.

### **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 young man, resides with Mother in the District of Columbia. Testimony of Mother. He is a “child with a disability” in need of special education and related services as defined by the IDEA. Exhibit R-6.
2. In 2007, when Student resided in Michigan, he was evaluated for special education eligibility. The family relocated to the state of Maryland before the eligibility determination was completed. In Maryland, Student was provided a reading program service, but Mother did not move forward with pursuing special education services because Student was proceeding nicely. Testimony of Mother.
3. Student matriculated to DC PUBLIC CHARTER SCHOOL in 8<sup>th</sup> grade. He attended CITY HIGH SCHOOL for 9<sup>th</sup> and 10<sup>th</sup> grades. Testimony of Student, Exhibit R-3.
4. In May 2012 at City High School, Student was determined eligible for a Section 504 Plan (under Section 504 of the Rehabilitation Act of 1973) to accommodate for Student’s severe allergies to peanuts and tree nuts. Testimony of Mother, Exhibit P-6.
5. On August 9, 2012, Mother sent an email to the City High School PRINCIPAL, SPECIAL EDUCATION COORDINATOR and School Counselor to request a Student Support Team (SST) meeting for Student “in light of the lack of progress and support [Student] received last school year.” Exhibit P-26.
6. An SST Meeting was convened by School Counselor at City High School on October 18, 2012. At that meeting, Mother expressed concern over Student’s poor grades, especially for his level of effort. She sought more “school-side” support. Exhibit P-10.
7. On December 15, 2012, Mother sent an email to School Counselor, in which she stated that Student’s most recent progress reports indicated he was failing all of his classes. She wrote to request to “begin the [Response to Intervention/Service and Support Team (RTI/SST)]

process to develop an action plan. After four weeks of implementing the action [following the SST meeting], should there not be a significant change in [Student's] progress, I would then like to move forward with formalized testing to see if there is a learning disability at play.” Exhibit R-1, Testimony of Mother.

8. Counselor “dropped the ball” on Mother’s December 15, 2012 RTI/SST request and never responded. Mother did not follow up on the request until June 2013. By email of June 17, 2013, Mother requested a meeting with school staff to consider Mother’s claim that Student’s 504 Plan had not been followed and her request for an “SST meeting for my son in December that was never replied to or honored.” Exhibit P-26. Following Mother’s request, a meeting was convened at City High School on June 26, 2013 to discuss the school’s alleged violation of Student’s 504 Plan and steps City High School would take to ensure Student’s safety and provide academic supports. Testimony of Mother, Exhibits P-13, R-2.

9. At the June 26, 2013 meeting at City High School, DCPS agreed to evaluate Student for eligibility for special education services. Mother told the school staff that the assessment could not be done until August, because Student would spend the summer with his father in Florida. Testimony of Mother. Mother executed a consent for the initial evaluation of Student on August 6, 2013. Exhibit P-36.

10. DCPS SCHOOL PSYCHOLOGIST completed a psychological evaluation of Student and issued her report on August 21, 2013. She reported that Student attained a Full Scale IQ of 94 (34<sup>th</sup> percentile), which places his overall intellectual abilities solidly within the normal range. His Perceptual Reasoning Index score indicated significant problems with processing visual stimuli and nonverbal reasoning. His scores also suggested that he may have more difficulty working under time pressure, which demands more concentration and attention

to detail. Given that Student's verbal abilities, as measured by the Wechsler Adult Intelligence Scale (WAIS-IV) were average for his age and grade level, his reading level was below what would be expected for someone of his grade and age. Student's math skills were also significantly below what would be expected for someone of his grade and age. DCPS School Psychologist concluded that Student presented characteristics of a student with a Specific Learning Disability, with additional impairments in Executive Functioning. This suggested that he will require specialized instruction, modifications, and accommodations in order to further progress with grade-level material. School Psychologist recommended that Student should be classified as a student with a Specific Learning Disability (SLD) to address his academic and executive functioning problems. Exhibit P-16.

11. Mother and Student went to visit Nonpublic School in June 2013 during the last week of school. Over the summer of 2013, the decision was made that Student would enroll in Nonpublic School. Student was offered a place at Nonpublic School in August 2013 and he enrolled in the private school, at Mother's expense, at the beginning of the 2013-2014 school year. Mother did not initially inform DCPS of her decision to place Student at Nonpublic School. Testimony of Mother.

12. On October 2, 2013, DCPS TRANSITION SPECIALIST sent an email to Mother informing her that it had come to DCPS' attention that Student was attending Nonpublic School and that Student's special education eligibility meeting, scheduled for October 3, 2013, was cancelled. Exhibit P-32.

13. City High School did convene a special education eligibility committee meeting for Student on October 17, 2013. Mother, Petitioner's Counsel and Nonpublic School's Learning Specialist attended. It was the consensus of the eligibility team that Student is eligible

for special education services under the disability classification Learning Disabled (LD). Mother was informed at the meeting that DCPS could not develop an IEP for a student who does not attend a DCPS school. The services available from DCPS for parentally-placed private school children were reviewed with the eligibility team. DCPS did not develop an initial IEP for Student because Student was not attending a DCPS public school. Exhibits R-6, R-7. Mother signed a consent that she wanted to move forward with development of an IEP. No IEP was developed for Student. Testimony of Mother.

14. Nonpublic School is a private day school located in the District of Columbia, serving students in 6<sup>th</sup> through 12<sup>th</sup> grades. Its total enrollment is 61 students. The average class size is eight to ten students with a teacher and an intern or aide assistant. The annual tuition at Nonpublic School is approximately \$28,000. Nonpublic School does not have a Certificate of Approval from the D.C. Office of the State Superintendent of Education (“OSSE”) for instruction of special education students. Testimony of Learning Specialist.

15. The majority of the students at Nonpublic School have some sort of learning or emotional issues, but none [other than Student] has a documented IDEA disability. None of the students at Nonpublic School is a special education student and no student has an IEP. Nonpublic School cannot currently provide specialized instruction in any subject. None of the teachers at Nonpublic School is a special education teacher and none of Student’s teachers is certified in special education. Learning Specialist, who works for Nonpublic School, is certified in special education, but she is not a classroom teacher. She works with students individually and in small groups, does testing, reviews students’ files and provides feedback to teachers. Testimony of Learning Specialist.

16. Student is doing well at Nonpublic School. Both the school staff and Student are happy with his progress there. Testimony of Learning Specialist, Testimony of Student.

17. On December 4, 2013, Petitioner’s Counsel wrote DCPS’ Counsel to provide notice that Mother “invokes her rights, under the IDEA and related provisions, to a **unilateral placement** at DCPS expense. She insists that DCPS fund the student’s placement at the **[Nonpublic School]**, an independent non-public school providing services to students with disabilities located in Washington, D.C.” (Emphasis in original.) Exhibit P-37.

### **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**

##### **Reimbursement for Private School under the IDEA**

In this case, the Petitioner seeks reimbursement from DCPS to pay for sending Student to Nonpublic School. Under the IDEA, if necessary to provide a FAPE, “[i]f no suitable public school is available, the school system must pay the costs of sending the child to an appropriate private school.” *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005) (citation and alterations omitted). In his recent decision in *K.E. v. District of Columbia*, 2014

WL 242986 (D.D.C. Jan. 23, 2014), U.S. District Judge Walton explained the circumstances under which parents must be reimbursed for private school tuition:

Under the IDEA, parents who unilaterally place their child at a private school without the consent of school officials do so at their own financial risk. *Florence Cnty. Sch. Dist. 4 v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284, (1993) (citation omitted). Parents in such situations may be reimbursed only if “the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate,” 34 C.F.R. § 300.148(c) (2012); *see also Florence Cnty.*, 510 U.S. at 15, 114 S.Ct. 361 (parent may only receive tuition reimbursement “if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act”); *Holland v. District of Columbia*, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that the circuit has ordered reimbursement “where the public agency violated [the IDEA] and the parents made an appropriate placement”).

*K.E.*, 2014 WL 242986 at 5. “[I]f there is an appropriate public school program available, *i.e.*, one reasonably calculated to enable the child to receive educational benefits, the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child. *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991). The Petitioner’s burden in this case is, therefore, two-fold. She must show that DCPS did not make a FAPE available to Student and, if that is established, that her unilateral placement of Student at Nonpublic School was proper under the IDEA.

1. Did DCPS fail to timely evaluate Student when Mother allegedly requested an initial evaluation of the Student in December 2012?

In her due process complaint, Petitioner alleged that DCPS had denied Student a FAPE, because she had requested that DCPS conduct an initial evaluation of Student for special eligibility in December 2012, and DCPS’ evaluation was not completed until October 2013. DCPS maintains that Mother did not request an evaluation until the June 26, 2013 MDT meeting and that the assessment could not be started until Student returned to the District in August 2013, after spending the summer in Florida with his father. 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 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 *Reid*); 20 U.S.C. § 1412(a)(3). “As 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 District must conduct initial evaluations to determine the child’s eligibility for special education services “within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment.” *Id.* (quoting D.C.Code § 38–2561.02(a)). 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*, 924 F.Supp.2d 273, 279 (D.D.C. 2013).

In this case, contrary to the allegation in the due process complaint, Mother did not request an evaluation to determine Student’s eligibility for special education services in December 2012. In December 2012, Mother made a request to School Counselor to “begin the RTI/SST process to develop an action plan. In her December 15, 2012 email, Mother was explicit that she would decide whether to move forward with formalized testing for a learning disability after the effectiveness of the requested action plan was known. She wrote, “After four weeks of implementing the action, should there be not significant change in [Student’s] progress, I would like to move forward with formalized testing to see if there is a learning disability at play.” [*sic*] The evidence establishes that Mother did request an initial special education

eligibility evaluation at the June 26, 2013 MDT meeting. But Mother specified that the assessment could not be conducted until after Student returned in August from spending summer break in Florida with his father. Mother signed the written consent for Student's initial evaluation on August 6, 2013. I find that in this case, for purposes of the 120-day requirement of D.C. Code § 38–2561.02(a), the consent date was the referral date. Student's eligibility as a child with a disability was determined on October 17, 2013 – well within the District's 120-day requirement. I conclude, therefore, that DCPS did not fail to timely complete Student's initial eligibility evaluation.

2. Did DCPS deny Student a FAPE because it failed to propose an IEP and ensure the IEP team made a placement determination following the determination that the Student was eligible for special education and related services on October 17, 2013?

After the DCPS eligibility committee determined on October 17, 2013 that Student was eligible for special education services as a child with an LD disability, Mother signed a consent and stated that she wanted to move forward with development of an IEP. Mother was informed at the meeting that DCPS could not develop an IEP for student because he was not attending a DCPS school. No IEP has been developed for Student. Petitioner contends that DCPS' failure to develop an IEP for Student was a denial of FAPE. I agree. As Judge Kollar-Kotelly explained in *District of Columbia v. Vinyard*, 2013 WL 5302674 (D.D.C. Sep. 22, 2013), *appeal dismissed*, *District of Columbia v. Vinyard*, 2013 WL 6818236 (D.C.Cir. Dec. 26, 2013), “the District is not required to implement an IEP for a student whose parents unilaterally maintain a student's enrollment at a private school when an IEP provides for a public placement. But nothing in [20 U.S.C. § 1412(a)(10)] authorizes the school district to ignore a parent's request that an IEP be developed for a child simply because the child is presently enrolled in a private school.” *Id.* at 7. *See, also, District of Columbia v. Wolfire*, 2014 WL 169873, 5 (D.D.C. Jan.

16, 2014) (Congress has unambiguously required plaintiff to offer a FAPE – which includes the development of an IEP – to child enrolled in private school, because his parents have requested a reevaluation, he is a resident of the District of Columbia, and he is a student with a disability.) Mother’s unrebutted testimony established that she requested an IEP for Student after he was found eligible for special education services on October 17, 2013. DCPS’ failure to develop an IEP was a denial of FAPE.

### Remedy

#### Reimbursement for Enrollment at Nonpublic School

In this case, Petitioner seeks reimbursement from DCPS for her expenses for Student to attend Nonpublic School. As explained above in this decision, even though DCPS’ failure to develop an IEP for Student was a denial of FAPE, Mother is only entitled to reimbursement if Student’s placement at Nonpublic School was appropriate. *See K.E. v. District of Columbia*, 2014 WL 242986, 8 (D.D.C. Jan. 23, 2014) (citing *Holland v. District of Columbia*, 71 F.3d 417, 420 n. 3 (D.C.Cir.1995) (noting that this circuit has ordered reimbursement “where the public agency violated [the IDEA] and the parents made an appropriate placement”)). In *Florence County*, the U.S. Supreme Court set forth the following standard for determining whether a unilateral placement is appropriate:

[W]hen a public school system has defaulted on its obligations under the Act, a private school placement is “proper under the Act” if education provided by the private school is “reasonably calculated to enable the child to receive educational benefits.”

*Id.*, 510 U.S. at 11, 114 S.Ct. 361 (citations omitted). *See, also, Knable ex rel. Knable v. Bexley City School Dist.*, 238 F.3d 755, 770 (6<sup>th</sup> Cir.2001).

In August 2013, at the request of Mother, Student was evaluated to determine if he was a child with a disability. According to the August 21, 2013 psychological evaluation report,

Student presents as a student with a Specific Learning Disability with additional impairments in Executive Functioning, which suggests that he would require specialized instruction, modifications and accommodations in order to further progress with grade-level material. The City High School eligibility team determined on October 17, 2013 that Student is a “child with a disability” under 34 CFR § 300.8, based upon a learning disability. That established, for the purposes of the IDEA, that Student is a child evaluated as having a specific learning disability, and who, by reason thereof, needs special education and related services. *See id.* (emphasis supplied). I conclude, therefore, that for a private school education to be reasonably calculated to enable Student to receive educational benefits, it must be able to provide him specialized instruction to address his needs resulting from his LD disability. Specialized instruction “means adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child’s disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

*See* 34 CFR § 300.39(b)(3) (Definition of “Specially designed instruction”).

As the 6<sup>th</sup> Circuit noted in *Knable*, parents who have not been treated properly under the IDEA and who unilaterally withdraw their child from public school will commonly place their child in a private school that specializes in teaching children with disabilities. *Id.* at 770. That is not what happened in this case. Here, Mother selected a regular education private school that offers no special education component. Although Student has reportedly received educational benefit at Nonpublic School, the school cannot currently provide Student specialized instruction in any subject area and none of Student’s teachers is certified in special education. *Cf. K.E.*,

*supra* (Since the IDEA does not require a school district to pay for a private school education simply because that opportunity would be ideal for a student, the Court is unpersuaded by the plaintiff's contention that any private school that provides a child an educational benefit is appropriate. *Id.* at 9.) I find that, owing to the absence of special education teachers and specialized instruction programming, the education offered by Nonpublic School was not reasonably calculated to enable Student to receive educational benefits. Petitioner is, therefore, not entitled to tuition reimbursement because Student's private school placement at Nonpublic School was not "proper" under the IDEA.<sup>2</sup>

#### Compensatory Education

Petitioner has requested an award of compensatory education in this case. It is appropriate to consider compensatory education because I have found that Student was denied a FAPE by DCPS' failure to develop an IEP for him. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 239 (D.D.C.2011) (Once a student has established a denial of the education guaranteed by the IDEA, hearing officer must undertake a fact-specific exercise of discretion designed to identify those services that will compensate the student for that denial.) The courts have recognized that there may be situations where a student, who was denied a FAPE, may not be entitled to an award of compensatory education. *See, e.g., Thomas v. District of Columbia*, 407 F.Supp.2d 102, 116 (D.D.C.2005) (Conceivable that no compensatory education is required for the denial of FAPE because it would not help or because student has flourished in his current placement); *Gill v. District of Columbia*, 751 F.Supp.2d 104, 113 (D.D.C.2010). In the present case, there was no evidence that Student suffered any educational deficit as a result of DCPS'

---

<sup>2</sup> If Petitioner's choice of private school has been proper under the IDEA, any reimbursement would potentially be subject to being reduced, because Mother did not give prior written notice to DCPS that she was removing Student from public school. *See* 34 CFR § 300.148(d)(2).

failure to provide him an IEP. First, under the IDEA, DCPS would be allowed up to 30 days – until November 17, 2013 – to convene a meeting to develop an IEP after the October 17, 2013 eligibility determination. *See* 34 C.F.R. § 300.343(b)(2). That was only eight school days before the complaint in this case was filed. More importantly, Student has attended Nonpublic School since the beginning of the 2013-2014 school year and according to Learning Specialist and Student, he is flourishing there. Therefore, I decline to make a compensatory education award. Notwithstanding, in accordance with *Vinyard, supra*, I will order DCPS to convene an IEP team to develop an IEP for Student, although DCPS may not be required to provide services under the IEP, if Mother elects not to enroll Student at a suitable school identified by DCPS pursuant to the placement in the IEP.<sup>3</sup>

#### ORDER

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

1. Within 15 school days of entry of this Order, DCPS shall convene an IEP team to develop an IEP for Student pursuant to 34 CFR § 300.320 *et seq.*; and
2. All other relief requested by the Petitioner herein is denied.

Date: February 6, 2014

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

---

<sup>3</sup> Petitioner offered no evidence at the due process hearing in support of the claim, in her due process complaint, for reimbursement for tutoring of Student during the 2012-2013 school year.

**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).