

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

STUDENT,¹ by and through his Parent,

Petitioners,

Case No.

Bruce Ryan, Hearing Officer

v.

Hearing: January 6, 2010

Decided: January 16, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

The Due Process Complaint in this matter was filed November 17, 2009, against Respondent District of Columbia Public School ("DCPS") pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The complaint concerns a _____ year old student who resides in the District of Columbia, currently attends _____ and has been determined eligible for special education and related services under the IDEA.

An earlier complaint filed August 3, 2009, on behalf of the same Student resulted in a resolution settlement agreement dated August 14, 2009. Pursuant to the 8/14/09 settlement agreement, DCPS agreed (*inter alia*) to fund independent evaluations of the Student and to hold an MDT meeting to review the evaluations, develop an IEP, and "discuss and determine compensatory education." *Due Process Complaint Disposition, Case No.* _____ (Aug. 14, 2009), ¶ 4; *see also DCPS-1* (MDT meeting notes dated 8/14/09).

The present Complaint alleges that DCPS has denied the Student a free appropriate public education ("FAPE") by: (1) failing to develop a compensatory education plan, as warranted, in accordance with the 8/14/09 settlement agreement; and (2) failing to provide the

¹ Personally identifiable information is attached as an Appendix to this decision and must be removed prior to public distribution.

Student with speech/language related services. DCPS filed a Response to the Complaint, which asserts that (1) the Student's IEP addresses all of his current needs (including consideration of any need for compensatory education services), and (2) the MDT properly determined that the Student does not need speech and language services at this time.

A resolution meeting was held on the present complaint on or about December 10, 2009, resulting in a Due Process Complaint Disposition, whereby the parties indicated in writing that "no agreement" was possible and that the case should proceed to a due process hearing. Accordingly, the 45-day HOD timeline under IDEA started on December 11, 2009. *See* 34 CFR 300.510(c)(2); *Prehearing Order*, issued Dec. 29, 2009, ¶ 1.

A Prehearing Conference ("PHC") was then held on December 17, 2009, and a Prehearing Order was issued December 29, 2009. Petitioners elected for the hearing to be closed. Five-day disclosures were filed by both parties as directed, on or about December 29, 2009.

The Due Process Hearing was held as scheduled on January 6, 2010. At the hearing, 12 documentary exhibits submitted by Petitioners (identified as "P-1," "P-2," and "P-4" through "P-13")² and nine documentary exhibits submitted by DCPS (identified as "DCPS-1" through "DCPS-9") were admitted into evidence. Testifying at the hearing on behalf of Petitioners were the Parent-Petitioner, the Student's Educational Advocate, and Psychologist Derek Marryshow, Ph. D. Testifying on behalf of DCPS were the Special Education Coordinators at _____ and _____

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

² Exhibit P-3 (a neuropsychological evaluation dated 11/26/09) was excluded from evidence based on DCPS' objection, for the reasons stated on the record at hearing.

II. ISSUES AND REQUESTED RELIEF

At the PHC, the Hearing Officer and the parties discussed the pleadings and determined that the following two issues would be presented for determination at hearing:

- a. Compensatory education* — Whether DCPS has denied the Student a FAPE by failing to develop a compensatory education plan as warranted, pursuant to the 8/14/09 resolution settlement agreement in Case No. 1130; and
- b. Speech/language services* — Whether DCPS has denied the Student a FAPE by failing to provide needed speech/language related services, consistent with the recommendation of the independent evaluation.

As noted in the *Prehearing Order*, the relief sought by Petitioners includes: (i) that “DCPS must fund compensatory education plan devised by parent counsel”; and (ii) that “DCPS must revise the student’s IEP to include speech/language services.” *P-1*, p. 5. Petitioners seek compensatory education for the period of time during which the Student was suspected of having a disability, but DCPS failed to evaluate and develop an IEP for the Student. Petitioners’ counsel indicated at the PHC that this period should run from at least January 2009 to the date of eligibility.

III. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia, currently attends and has been determined eligible for special education and related services as a child with a disability under the IDEA.

2. The Student has a history of behavioral difficulties resulting in suspensions from school and multiple hospitalizations at the most recently in January-February 2009. *See, e.g., P-1*, p. 3; *P-6* (2/19/09 Psychiatric Report from *P-7* (2/11/09 Confidential Psychological Evaluation from *P-8* (1/27/09 Social Worker Report).

3. On or about August 3, 2009, Petitioners filed a due process complaint alleging (*inter alia*) that DCPS had denied the Student a FAPE by failing to identify and evaluate the Student in a timely manner. *See Case No.*

4. On or about August 14, 2009, the parties entered into a resolution settlement agreement, which resolved Petitioners’ complaint in Case No. DCPS agreed, *inter*

alia (1) to fund independent evaluations in the following areas – comprehensive psychological (cognitive, achievement, clinical, and social history components), neuropsychological, speech/language, occupational therapy (“OT”), and functional behavioral assessment (“FBA”); and (2) to hold an MDT meeting “to review all independent evaluations, develop IEP, develop behavioral intervention plan, discuss and determine placement, [and] **discuss and determine compensatory education.**” *Due Process Complaint Disposition, Case No.* (Aug. 14, 2009), ¶ 4 (emphasis added); *see also DCPS-1* (MDT meeting notes dated 8/14/09).

5. On the same date (8/14/09), DCPS convened a meeting of the Student’s MDT/IEP Team at the neighborhood school he then attended. The purpose of the meeting was to review the evaluations conducted by and observations conducted by the school social worker, and to determine if additional evaluations were needed. *See DCPS-1*. The team determined that the Student was emotionally disturbed and that independent assessments would be conducted as agreed during the resolution meeting. *Id.*, p. 2.

6. On or about September 25, 2009, an independent comprehensive psychological evaluation of the Student and an FBA were completed. *See P-4; DCPS-9*.

7. On or about October 8, 2009, DCPS convened a meeting of the Student’s MDT/IEP Team. *DCPS-2*. At that meeting, the team reviewed the completed evaluations and developed an initial IEP, which adopted a disability classification of Emotional Disturbance (“ED”) and established a full-time therapeutic program for the Student. *Id.*, p. 2. The team decided that compensatory education “will be discussed and determined when the other independent evaluations are done.” *Id.* The team then scheduled another MDT meeting for 11/2/09 for the purpose of considering compensatory education, reviewing the outstanding independent evaluations, and determining placement. *Id.*, p. 3.

8. On or about October 24, 2009, an independent speech and language evaluation was completed. *See P-2; DCPS-8*. The evaluation found that the Student “does present receptive and expressive language weaknesses that warrant intervention from the Speech-Language Pathologist.” *DCPS-8*, p. 6. The evaluator further concluded as follows: “It is this examiner’s opinion that the student’s receptive and expressive language concerns are distinct from his diagnosis of ADHD and ODD. It is therefore recommended that [the Student] receive language intervention to improve his receptive and expressive language skills. Skill areas needing

intervention include understanding concepts, following directions, memory, sentence formulation, phonological awareness, and vocabulary.” *Id.* The evaluation also recommended that the Student “receive direct language intervention services if and when he is a willing and cooperative participant, otherwise the therapeutic benefits of such service may be considerably diminished.” *Id.*

9. On or about October 26, 2009, DCPS completed a review of the independent speech and language evaluation. *See DCPS-7.* The reviewer completed a speech and language screener, along with several classroom observations. The reviewer recommended that the Student “does not receive direct language intervention at this time.” *Id.*, p. 2.

10. On or about November 2, 2009, DCPS reconvened a meeting of the MDT/IEP Team “for the purposes of the Settlement Agreement signed 8/14/09.” *DCPS-3*, p. 2. The Student’s 10/8/09 IEP was continued, with the goals and objectives unchanged and providing for the following services: (a) specialized instruction of 24.5 hours per week in a setting outside general education, and (b) behavioral support services of 1.5 hours per week, also outside general education. *Id.*, p. 3; *see DCPS-5*, p. 6. DCPS offered _____ as an “appropriate and suitable placement,” which was accepted by the parent. *DCPS-3*, p. 3.

11. The 11/2/09 MDT/IEP Team reviewed the independent speech/language evaluation, but determined that no speech/language therapy services were needed as part of the IEP. According to the meeting notes, “based on scores student would qualify, but scores [are] invalid.” *DCPS-3*, p. 2. The notes indicate that the DCPS speech/language pathologist “says that this S+L evaluation isn’t valid due to student’s frustration during tests.” *Id.*

12. With regard to compensatory education, the 11/2/09 meeting notes indicate that _____ team feels that Comp. Ed. is not warranted” and that “Comp. Ed. is determined by _____ team to be unnecessary and unwarranted.” *DCPS-3*, p. 3 (noting “discrepancy as to when reports were sent and received”).

13. The parent disagreed with the team’s determinations regarding speech/language services and compensatory education, and the case thus proceeded to a due process hearing.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; see *Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to provide an appropriate IEP and/or placement.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.3. The standard generally applied is preponderance of the evidence. *E.g.*, *N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); see also 20 U.S.C. §1415(i)(2)(C)(iii).

B. Issues/Alleged Denials of FAPE

3. The Hearing Officer concludes that Petitioners failed to carry their burden of proof on Issue (a) (Compensatory Education), but have carried their burden of proof on Issue (b) (Speech/language Services) to the extent set forth below.

Issue (a): Compensatory education pursuant to 8/14/09 SA

4. Petitioners claim that DCPS has denied the Student a FAPE by failing to develop a compensatory education plan, as warranted, in accordance with the 8/14/09 settlement agreement. Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to grant “appropriate” relief under IDEA. Governing case law also recognizes that a parent may challenge the appropriateness of an MDT’s determination of a compensatory education plan under a settlement agreement like the one at issue here. See, e.g., *Gregory-Rivas v. District of Columbia*, 108 LRP 51949 (D.D.C. Sept. 8, 2008) (affirming Hearing Officer decision that reviewed and upheld MDT’s determination not to award compensatory education services; entitlement to compensatory education ruled properly before Hearing Officer where settlement agreement required MDT to “discuss and determine” the amount, if any, that the student was due).

5. “Under the theory of ‘compensatory education,’ courts and hearing officers may award ‘educational services...to be provided prospectively to compensate for a past deficient

program.” *Reid v. District of Columbia*, 401 F. 3d at 521 (quotations omitted). “In every case, however, the inquiry must be fact-specific and, to accomplish IDEA’s purposes, 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.” 401 F.3d at 524. *See also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “‘qualitative, fact-intensive’ inquiry used to craft an award ‘tailored to the unique needs of the disabled student’”).

6. The Hearing Officer concludes that Petitioners have failed to meet their burden of proving that compensatory education services were warranted in this case through a fact-specific evidentiary showing under *Reid*. Petitioners agreed to settle, rather than litigate, their previous child-find claim in Case No. _____ in exchange for DCPS’ agreeing to hold an MDT meeting to “discuss and determine” compensatory education. Petitioners have not shown that the resulting team decision was in error. They have not demonstrated a denial of FAPE, nor shown any specific educational harm sufficient to prove entitlement to an award of compensatory education services. For example, Petitioners “did not show the educational level [the Student] would have progressed to but for DCPS’ alleged violation or that the desired compensatory education services would bring [him] to that educational level.” *Gregory-Rivas v. District of Columbia*, 108 LRP 51949, slip op. at 5. Thus, Petitioners have not proven that the Student was entitled to compensatory education under the pertinent standards set forth in *Reid. Id.*³

³ Petitioners’ compensatory education plan with respect to specialized instruction is largely “derived from a formula that takes into consideration the number of hours of special education services [the Student] was entitled to receive over the last two years (approximately 2000) and adjusted for the one to one tutoring in the compensatory education setting (2000 hours divided into 10 students)” and other factors. *P-9*, p. 2. *Cf. Reid*, 401 F. 3d at 523-24 (rejecting “cookie-cutter” or mechanical-formula remedies). Moreover, this formulaic approach assumes that “[g]iven [the Student’s] behavioral and academic difficulties, two years ago he would have require[d] the same educational services and setting,” and that “over the two-year period, he would have received over 2000 hours of special services in a classroom of at least a 1/10 teacher student ratio.” *Id.*; *see also Psychologist Testimony*. As noted above, however, a denial of FAPE was never litigated and proven under the previously settled complaint, much less a denial of FAPE over a two-year period. And in this hearing, the evidence does not appear to establish any referral or other sufficient justification for DCPS to conduct an initial evaluation before approximately late January 2009, when the Student was admitted to _____. Pursuant to D.C. law, DCPS would have had 120 days from the date of referral (or until approximately late May 2009) to complete the initial evaluation and determine eligibility. The evidence shows that DCPS determined the Student’s eligibility by mid-August 2009 and developed an initial IEP by the beginning of October, thus resulting at most in approximately two months of missed services.

Issue (b): Speech/language services

7. Under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982). See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 (“while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit.”). The issue of whether an IEP is appropriate is a question of fact. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

8. Petitioners contend that the 11/2/09 IEP is inappropriate because the Student needs direct speech and language therapy as a related service under the IEP, based on the findings and recommendations of the 10/24/09 independent evaluation. The Hearing Officer agrees. Petitioners presented the testimony of an independent expert speech/language pathologist (Ms. Deniece Payne, M.S., M. Ed.), who testified concerning the Student’s documented receptive and expressive language deficits and the benefits the Student would derive from specific types of speech/language therapy services, including improvements in behavior and social/emotional functioning. According to Ms. Payne, without such speech/language therapy, the Student would likely continue to decline in his receptive and expressive language skills, which would adversely impact his classroom performance. See *Payne Testimony*. The DCPS speech/language pathologist was not called as a witness to rebut that testimony, or to explain the findings and recommendations contained in her 10/26/09 review, including her reported concern with “invalid” test scores as noted by the MDT.

9. Petitioners’ expert also testified that speech/language services “should not be ruled out” based merely on the Student’s frustrations during testing. *Payne Testimony*. Rather, the school should strive “to find a way to work with him so that he can become a ‘willing and cooperative participant’.” *Id.* (quoting *DCPS-8*). Where there is a demonstrated need for providing particular services to a disabled student, those services should be included in the IEP and the IEP should be attempted to be implemented in an appropriate educational setting; DCPS

should not simply assume that the student will not “avail himself of educational benefit,” *Hinson v. Merritt Educational Center*, 579 F. Supp. 2d 89 (D.D.C. 2008).⁴

C. Appropriate Relief

10. The IDEA authorizes district courts and hearing officers to fashion “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In this case, the Hearing Officer has exercised his discretion to issue appropriate equitable relief based on the findings and conclusions herein. The relief is in the form of the Order set forth below.

V. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ordered:

1. Within **10 school days** of this Order (*i.e.*, by approximately **February 1, 2010**), DCPS shall convene a meeting of the Student’s MDT/IEP team for the following purposes:
 - a) to review and revise the Student’s 11/2/09 IEP to include the additional related service of **Speech and Language Therapy for not less than 60 minutes per week**, based on the recommendations contained in the 10/24/09 independent speech and language evaluation previously submitted to the Student’s MDT; and
 - b) to review all other relevant and updated information, including but not limited to the Student’s experience to date in the areas of receptive and expressive language at
2. Petitioners’ other requests for relief, including compensatory education, shall be, and hereby are, **DENIED**; and.
3. This case shall be, and hereby is, **CLOSED**.

Dated: January 16, 2010



Impartial Hearing Officer

⁴ The DCPS S/L examiner, who did not testify at the hearing, observed that the Student refused to participate in the first evaluation attempt at _____ but that the “second attempt to evaluate [the Student] was successfully accomplished at the office of his advocate” where the Student “entered the test area willingly and cooperated with this examiner.” *DCPS-8*, p. 2. Even DCPS’ SEC at _____ conceded that she and the S/L pathologist believe that the Student’s S/L needs should be monitored and reviewed at an upcoming MDT meeting at the new school. *See SEC Testimony*.