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Office of the State Superintendent of Education
Office of Review and Compliance
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OFFICE
STUDENT HEARING OFFICE
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Confidential

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: January 31, 2011</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Alana Hecht, Esq. 1220 L Street NW Suite 700 Washington, DC 20005</p> <p>Counsel for DC PCS: Linda Smalls, Esq. 1200 First Street, NW Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened January 31, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2009.

BACKGROUND:

Student or "the student" is age _____ in _____ grade at a DCPS _____ hereinafter ("School A"). On January 20, 2011, the student was determined eligible as a child with a disability under IDEA. Following the eligibility determination the team drafted an IEP. Petitioner is in agreement with the student's disability classification and the IEP including the level of services, goals, the least restrictive environment ("LRE") and the educational placement. There was discussion of compensatory education at the June 20, 2011, meeting but no agreement was reached.

The complaint in this matter was filed November 24, 2010. A pre-hearing conference was held on December 23, 2010, and pre-hearing order was issued December 28, 2010. Petitioner filed and was granted a motion to continue to allow for an eligibility meeting to be held, at which most if not all issues alleged in the complaint might be resolved. A second pre-hearing conference was held January 21, 2011, following the July 20, 2011, eligibility meeting.

Petitioner's counsel stated during the January 21, 2011, pre-hearing conference that as a result of the January 20, 2011, eligibility meeting all issues and claims for relief raised in the complaint except the allegation that the student should have been found eligible following the October 15, 2009, parental request, were resolved and withdrawn.

Petitioner alleges the parent on October 15, 2009, made a request to DCPS in writing that the student be evaluated and the student was not found eligible until January 20, 2011. Petitioner is seeking 190 hours of independent tutoring to compensate the student for the services Petitioner alleges the student would have been provided had he been found eligible within the required evaluation period following an October 15, 2009, written parental request that he be evaluated.

ISSUE(S):

The issue to be adjudicated is:

Did DCPS deny the student a FAPE by failing to timely evaluate the student following an October 15, 2009, written parental request to DCPS that the student be evaluated to determine his eligibility for special education services?

Petitioner alleges the student should have been evaluated and found eligible within 120 days of the October 15, 2009, request and the student is entitled to 190 hours of individualized tutoring

as compensatory education for the alleged failure to timely find the student eligible and timely provide him special education services.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses, the documents submitted in the parties' disclosures (Petitioner's Exhibits 1- 15 and DCPS Exhibits 1-9) that were admitted into the record and are listed in Appendix A.

FINDINGS OF FACT: ²

1. Student or "the student" is age in grade at a DCPS School A. (DCPS Exhibit 7)
2. On October 15, 2009, the student's parent provided DCPS a written request that student be evaluated for special education services. (Parent's testimony, Petitioner's Exhibit 3)
3. In May 2010, the parent took the student for an educational assessment at Based on assessments the student was operating generally on a 2.5 grade level although he was at the time completing the grade. recommended the student receive approximately 108 to 120 hours of individualized tutoring over a period of four to five months to assist him in reaching a target grade of 5.9. (Parent's testimony, Petitioner's Exhibit 13-2, 13-3, 13-5)
4. The parent, through counsel filed a due process complaint on October 15, 2010. DCPS agreed to fund independent evaluations and the complaint was dismissed without prejudice. Petitioner filed this subsequent complaint on November 24, 2010. (Petitioner's Exhibit 4)
5. An independent comprehensive psychological evaluation was conducted on December 3, 2010. The evaluation assessed the student's cognitive abilities in the low average/ average range. The evaluator diagnosed the student with a learning disability. The student's educational scores revealed his broad reading skills to be at 3.5 grade level, his math skills and written language skills at 4th grade level. (Petitioner's Exhibit 10-9, 10-10, 10-12)
6. An independent speech language evaluation was also conducted; it did not conclude the student was in need of speech and language services. (Petitioner's Exhibit 11-6)
7. On January 20, 2011, the eligibility team determined the student eligible as a child with a disability classification of specific learning disability ("SLD"). Following the eligibility

² The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may perhaps only cite one party's exhibit.

determination the team drafted an IEP. The parent was in agreement with the student's disability classification and the IEP including the level of services, goals, the LRE and the educational placement. There was discussion of compensatory education at the meeting but no agreement was reached. (Parent's testimony, DCPS Exhibits 2, 3, 4, 5)

8. The student's IEP prescribes the following weekly services: ten hours of specialized instruction per week in an out of general education setting. The IEP has academic goals in the areas of Math, Reading and Written Expression. The target is for the student to master the goals by January 20, 2012. (Petitioner's Exhibit 6)
9. Had the student been evaluated promptly following the October 15, 2010, parental request the student should have been evaluated within 120 days of the written request pursuant to D.C. Code §38-2561.02. Thus, the student presumably would have been found eligible by February 15, 2010. The student would have presumably received 10 hours of specialized instruction for the four remaining months of school in SY 2009-2010 for an approximate total of 165 hours. From the start of SY 2010-2011 through his eligibility meeting the student would have received approximately four months of services for a total of another 165 hours of specialized instruction for a grand total of 330 hours of specialized instruction missed.³ (Petitioner's Exhibit 6, DC Code §38-2561.02)⁴
10. Petitioner engaged the services of an educational specialist to draft a proposed compensatory education plan to compensate the student for the missed services. The specialist reviewed the student's educational records, the assessments and met with the student and his parent. The specialist recommended the student be provided 110 hours of Reading instruction and 80 hours of math instruction for a total of 190 hours of individualized tutoring. The student is generally operating at a basic level and with the intensive tutoring services recommended the student should be able to master or nearly master his current IEP goals within a one-year period. testimony, Petitioner's Exhibit 2)
11. The student has struggled academically for several years and as a result has not developed critical academic skills. He has difficulty writing sentences, has a limited vocabulary and thus has difficulty reading. The student should have progressed far more than he has had he been timely evaluated, found eligible and provided special education services. This is a critical period for the student to regain the skills he has missed and the

³ The parties agreed at the hearing the student had missed 330 hours of specialized instruction.

⁴ §38-2561.02. Assessment and placement of a student with a disability-- General. (a) DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment. (b) DCPS shall place a student with a disability in an appropriate special education school or program in accordance with this chapter and the IDEA. (c) Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA and this chapter: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia.

parent is concerned that if the student is not provided intensive services now he may never recoup the skills he should have obtained in the last few years had he received his IEP and special education services earlier. (Parent's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁵ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Issue: Did DCPS deny the student a FAPE by failing to timely evaluate the student following an October 15, 2009, written parental request to DCPS that the student be evaluated to determine his eligibility for special education services? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

There was sufficient and credible evidence the parent requested the student be evaluated for special education services on October 15, 2009. Pursuant to DC Code §38-2561.02 DCPS had an obligation to evaluate the student within 120 days of the parental request. The student was ultimately determined eligible on January 20, 2011, with a disability classification of SLD and provided an IEP that prescribed 10 hours of specialized instruction per week. Petitioner presented sufficient and credible evidence based on _____ and the parent's testimony as well as the student's evaluations and the _____ assessment that the student is operating significantly below grade level. This significant academic deficit is evidence the student was harmed by not receiving the 330 hours of specialized instruction he would have received had he been timely evaluated and timely found eligible and provided services. This Hearing Officer concludes, therefore, the student was denied a FAPE by not being timely evaluated, found eligible and provided special education services.

Petitioner has requested the student be provided 190 hours of individualized tutoring as compensatory education. Under the theory of "compensatory education," courts and hearing officers may award "educational services . . . to be provided prospectively to compensate for a

⁵ Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

past deficient program." 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. *Reid v District of Columbia*, 401 F.3d 516, 526 (D.C. Cir. 2005).

A violation of the IDEA and a subsequent denial of a free and appropriate public education satisfies the plaintiff's burden of proving entitlement to a properly crafted compensatory award under *Reid*. The District of Columbia Circuit established in *Reid* that the crafting of "compensatory education awards fit comfortably within the 'broad discretion' of courts fashioning and enforcing IDEA remedies." *Id.* 401 F.3d at 523 (citing *Florence County Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 15-16 (1993)).

Moreover, it has been consistently held that when the IDEA is violated through a denial of a free and appropriate public education, the injured party is entitled to compensatory education. See *The Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 115 (D.D.C. 2008) (Kay, Mag. J.) ("Compensatory education is the remedy for a denial of [a free appropriate public education]," and therefore "if a parent presents evidence that her child has been denied a free and appropriate public education, she has met her burden of proving that [the child] is entitled to compensatory education."); see also *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt* ("Nesbitt I"), 532 F. Supp. 2d 121, 123 (D.D.C. 2008)

"*Reid* certainly does not require [a] plaintiff to have a perfect case to be entitled to a compensatory education award"; on the contrary, "[o]nce a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with *Reid*." *Stanton*, 680 F. Supp. 2d at 207.

credibly testified the student should be able to master his current IEP goals within a year. However, because the student is operating at least 1 to 2 grade levels below his current grade and would have presumably progressed academically had he been provided special education services timely, the facts in this case warrant an award of compensatory education. The assessment and recommendation is that with at least 108 hours of tutoring the student would be able to achieve his current grade level. This Hearing Officer concludes based on an analysis of this student's missed services, his current level of academic skills and the recommendation that with 108 to 120 hours of tutoring from he would reach grade level; this Hearing Officer concludes that the student reaching grade level within four to five months by being provided 108 hours of tutoring in Math, Reading and Written Expression is a reasonable, equitable and fact specific compensation to the student for the 330 hours of missed specialized instruction.

Although this Hearing Officer found testimony credible as to the student's deficits this Hearing Officer's was not convinced that her recommendation of 190 hours of tutoring was based on any reasonable personal assessment of the student's current skills and his rate of academic progression. This Hearing Officer found the assessment and recommendation was due far more weight and credibility as to what would compensate the student for the missed services and place him in position he likely would have been had he not missed services.

ORDER:

DCPS shall fund for the student 108 hours of independent individualized tutoring (at the DCPS approved rate) as compensatory education for the 330 hours of missed specialized instruction the student should have been from February 2010 to present.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: February 9, 2011