

DC Office of the State Superintendent of Education  
Office of Compliance and Review  
Student Hearing Office

1150 5th Street, SE  
Washington, DC 20003  
Tel: 202-698-3819  
Fax: 202-698-3825

**Confidential**

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STUDENT HEARING OFFICE  
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<p>STUDENT<sup>1</sup>, by and through Parent  Petitioners,  v.  District of Columbia Public Schools  Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date: March 12, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Ellen Douglass-Dalton Counsel for Respondent: Daniel Kim</p> <p><b><u>Hearing Officer: Wanda I. Resto, Esquire</u></b></p>
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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. PROCEDURAL BACKGROUND

On January 28, 2009, a Due Process Hearing Complaint (“Complaint”) was filed against the District of Columbia Public Schools (“DCPS”) alleging the Respondent denied the Student a Free Appropriate Public Education (“FAPE”) by failing to timely identify, evaluate and determine the Student’s eligibility for special education services, by telling the Petitioner to have the Student evaluated by Mental Health or the Children’s National Medical Center’. The Petitioner further alleges the Respondent has violated the rights of the Petitioner and Student by failing to have a manifestation determination as to whether the behavior that is causing the Student suspensions, is a manifestation of the Student’s disability, and by failing to and provide the Student with an appropriate placement.

The Petitioner requests the Respondent to be found to have denied the Student a FAPE and ordered to fund an independent psychological educational evaluation, clinical evaluation that includes an Attention Deficit Hyperactivity Disorder (“ADHD”) component, and a Functional Behavior Assessment (“FBA”). The Petitioner also requests the Respondent be ordered to convene a Multidisciplinary Team (“MDT”) meeting within 10 days of the evaluations being completed to review the evaluations, determine if any additional evaluations are necessary, determine eligibility, develop an Individualized Education Program (“IEP”), discuss and determine placement, and determine the appropriate amount and form of compensatory education, if any. Additionally, the Petitioner’s request that if the MDT determines that compensatory education is warranted, the Respondent be ordered to fund a compensatory education plan based on the educational deficiency suffered by the Student over the last two school years.<sup>2</sup>

The Hearing Officer held a pre-hearing conference call with Counsel for both parties on February 25, 2009 at 5:00 PM. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing (“hearing”) to be held in a closed session and reiterated the issues as plead. The Petitioner offered three witnesses; the Respondent offered three witnesses and both Counsels provided a synopsis of their witnesses’ testimony. The parties stipulated the Student is enrolled in \_\_\_\_\_ and is a resident of the District of Columbia.

During the pre-hearing conference call the Hearing Officer’s inability to delegate compensatory education determinations to the IEP team was discussed. Counsel for the Petitioner asserted “nothing in *Reid* prohibits a hearing officer from ordering a meeting to determine compensatory education and in fact, cases interpreting *Reid*<sup>3</sup> have allowed IEP teams to make initial compensatory education determinations.” It’s the Petitioner’s position that, *Reid* simply prohibits the hearing officer from allowing an MDT to reduce or discontinue a specific award that the hearing officer previously ordered.

An Order was issued on February 26, 2009 the Order *inter alia* reiterated to the Petitioner that she must present evidence for purposes of establishing whether compensatory education is warranted, and if so, what type and amount of compensatory education is most appropriate. The Order further

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<sup>2</sup> The Pre-hearing Order indicates that the Petitioner was requesting an order for the DCPS to immediately fund and place the Student at a full-time therapeutic school of the Petitioner’s choosing, with transportation. At the preliminary matters the Petitioner requested the Hearing Officer clarified the Petitioner had not requested placement as a relief and placement was not an issue in this Complaint.

<sup>3</sup> *Reid v. District of Columbia*, 401 F.3d 516 (2005) see discussion in the Conclusion section of this HOD.

indicates that the Petitioner must the standard set out in *Reid*, which requires the inquiry to frame the award 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.

The DCPS' Response to Parent's Administrative Due Process Complaint Notice was filed on February 12, 2009, denying the allegations that the Respondent denied the Student a FAPE by failing to evaluate him on the basis that the Respondent had authorized the Petitioner at the DCPS expense to obtain the independent evaluations requested, and that an FBA had been completed on September 24, 2008, including a behavior contract. It was also the Respondent position that because the Student was not denied a FAPE compensatory education is not warranted.

A hearing was held on March 2, 2009, the Petitioner presented a disclosure letter dated February 23, 2009 to which twenty-four documents were attached, labeled P-1 through 24 and which listed four witnesses. Two witnesses testified - the Mother and the Clinical Psychologist. The Respondent presented a disclosure letter dated February 23, 2009 identifying twelve witnesses and to which three documents were attached, labeled DCPS 1 through 3, no witnesses testified. The documents were admitted without objections.

The hearing was conducted in accordance with the rights established under the Individuals with Disabilities Education Act of 2004 ("IDEA"), 20 U.S.C. § 1400 et seq. and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

## II. ISSUE(S)

1. Did the Petitioner request in the 2007-2008 school year that the Respondent evaluate the Student for special education eligibility?
2. Did the Respondent tell the Petitioner that she had to have the Student evaluated by the Department of Mental Health and/or Children's National Medical Center?
3. Did the Respondent fail to evaluate the Student within 120 days from the time that he was referred by the SST to the MDT?
4. Did the DCPS fail to hold a manifestation determination meeting when the Student was suspended for more than 10 days after being referred to the MDT?
5. Is the Student entitled to a compensatory award?

## II. FINDINGS OF FACT

1. The Student along with the parent are residents of the District of Columbia.
2. The Student was expelled from Pre-kindergarten for his disruptive, defiant and aggressive behaviors. The Petitioner enrolled the Student at \_\_\_\_\_ at the beginning of the 2007-2008 school year, and she notified \_\_\_\_\_ of the Student's behavior problems and her concerns that the Student

was below grade level. The Petitioner made several requests for evaluations since the beginning of the 2007-2008 school year. The parent made requests to the student's teacher, school social worker and was told that she should take the student to have them evaluated by the department of mental health or children's National Medical center.<sup>4</sup>

3. In January, 2008, the school contacted the crisis intervention team to transport the Student to Children's National Medical Center because he "presented harm to self and others," that he had been "physically aggressive towards peers, teachers and principal," and that he needed a medical evaluation before returning to school.<sup>5</sup>
4. An SST request form was completed by the Student's first grade teacher, on September 8, 2008. The teacher described the Student as "easily distracted and frustrated with his school work," requiring "constant help" and performing "below basic in the areas of reading and writing." The teacher described the Student as "defiant and uncooperative," and engaging in "aggressive behavior."<sup>6</sup>
5. The SST meeting was held on September 17, 2008 and the team agreed to refer the Student to the MDT. The parent stated she would take the Student to his doctor for ADHD assessment. The report was received mid-January 2009.<sup>7</sup> A Functional Behavioral Assessment ("FBA") was completed following the SST meeting and revealed the Student demonstrates defiant and disruptive behaviors 10-15 times an hour.<sup>8</sup> An Intervention Behavior Plan ("BIP") was developed with strategies to address behavioral as well as academics. The Respondent now agrees to fund another FBA.
6. Throughout the 2007-2008 school year the Student exhibited aggressive, physical and out of control behaviors and his mother was consistently called by the Student's teacher to discuss these behaviors. Beginning early in the 2007-2008 school year, the Student's mother made requests to the Student's teacher at the time as well as the social worker at \_\_\_\_\_ and the Principal to have the Student evaluated. In response to her requests for evaluations, Petitioner was told that she should have the Student evaluated by the Department of Mental Health or Children's National Medical Center. The older daughter, who also attends \_\_\_\_\_ was at times removed from class to address the Student's behaviors. It's the Petitioners position that the testimony proved that DC PS had notice of the Student's behavior problems from the start of the 2007-2008 school year and a teacher also expressed concern about the Student's behavior and the impact on his academic performance. The Petitioner informed the SST coordinator that she would like to have the Student tested for special education services and she was not inform that she was to make the request through the special education coordinator in order to start the evaluation process.<sup>9</sup>
7. At the start of the 2008-2009 school year, the Petitioner again made requests to the school social worker, and the Student's first grade teacher, to have the Student evaluated.

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<sup>4</sup> Testimony of the Mother.

<sup>5</sup> P#14 School Pupil Health Notice -Children's National Medical Center dated January 15, 2008

<sup>6</sup> P#4 Student Support Team meeting report dated 9/8/08.

<sup>7</sup> P#6 Student Support Team meeting report dated September 17, 2008.

<sup>8</sup> DCPS # 3 FBA September 24, 2008.

<sup>9</sup> Testimony of the Mother

8. The Teachers' notes indicate that the Student has difficulty with assignments, requires much assistance to be productive, is frequently off task and is often disruptive defiant and aggressive.<sup>10</sup>
9. The Student is currently functioning at the beginning kindergarten level, but his cognitive potential corresponds to that of same age peers. There's nothing stopping the Student from achieving on his grade level. It's the evaluators' position that had the Student receive appropriate services over the past two years; he would have the cognitive ability to achieve his grade level. The Psychologist recommends the Student receive a short term program (3 to 6 months) that can provide the Student academic support in a small structured therapeutic setting, along with behavior management. The Psychologist recommends that the Student's program include onsite capacity to monitor and manage medication to address the Student's ADHD symptoms. The Student's impulsivity is so severe that the Student cannot benefit from his academic intervention without medication.<sup>11</sup>
10. The Student was suspended 3 days from September 19-23, 2008, 3 days from October 23-27, 2008 and on January 27-30, 2009 he was suspended for 4 days. Recently the Student was suspended for 5 days from February 17-24, 2009. <sup>12</sup> The Student continues to be defiant and disrupted although the behavior intervention plan was developed and should have been implemented since September 2008. <sup>13</sup>
11. The Petitioner has been trying to obtain medication for the Student through the Department of Mental Health or Children's National Medical Center since September of 2008 and she has been unsuccessful. The Doctor testified that it take close to six months to get the medication when it's done through the Department of Mental Health.<sup>14</sup>
12. On January 21, 2009, a Psychiatrist diagnosed the Student with ADHD and disruptive behavior, this information regarding the diagnosis was provided to
13. On February 12, 2009, the Respondent authorized the Petitioner to obtain an independent comprehensive psychological evaluation (which includes cognitive, educational, and clinical component as well as a social history and an ADHD testing) and a functional behavior assessment at the expense of the DCPS. <sup>16</sup>

#### IV. CONCLUSIONS OF LAW

##### **FAPE Determination**

The DCPS is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

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<sup>10</sup> P#2 Student's 1<sup>st</sup> grade teacher notes September 2008.

<sup>11</sup> Testimony of the Clinical Psychologist.

<sup>12</sup> P#7, 10,17 and, 23 Suspension Notices.

<sup>13</sup> P#12 Suspension Notice 1/6/09 (the date written is Tuesday -1/6/08 because it indicates Tuesday the Hearing Officer takes judicial notice that 1/6/09 was on a Tuesday) and P#13 Suspension Notice 1/9/09.

<sup>14</sup> Testimony of the Psychologist .

<sup>15</sup> P# 15 January 21, 2009, psychiatric diagnosis.

<sup>16</sup> DCPS#1 February 12, 2009 Letter authorizing independent evaluations.

The IDEA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living. *See id.* § 1400(d)(1)(A). The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as “special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP).”

### **Burden of Proof**

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that 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 a FAPE.

The DCPS has not met its legal obligation under the IDEA. Here is why.

### **Child find**

The IDEIA at 20 U.S.C. 1412(a)(3), and its regulations at § 300.111, require that DCPS have in effect policies and procedures to ensure that, among other things, all children with disabilities residing in the District of Columbia, including children with disabilities who are homeless children or are wards of the state, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated.

Pursuant to D.C. Code § 38-2501, initial evaluations are to be completed “within 120 days from the date that the student was referred for an evaluation.” In conformity with *Scott v. District of Columbia*, CA No.: 03-1672 (DAR) (D.D.C. 2006) DCPS is required to identify and evaluate students in need of special education services and related services, whether or not the parents have made a request.

The IDEA regulations at 34 C.F.R. §300.301(a)(b) provides in pertinent part:

(a) General. Each public agency must conduct a full and individual *initial* evaluation, in accordance with §§300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part.

(b) Request for *initial* evaluation. Consistent with the consent requirements in §300.300, *either a parent of a child or a public agency may initiate a request for an initial evaluation* (emphasis supplied) to determine if the child is a child with a disability.

The uncontested evidence is that the Student was referred to the MDT on September 17, 2008 and should have been evaluated by mid January 2009. The Respondent contends the 120 days would expire January 17, 2009 and the law provides 30 days for the development of the initial IEP from the date of

the eligibility. Therefore argues the Respondent the IEP implementation would start approximately February 17, 2009 and the claim is premature.

The core of the IDEA is not intended to make the Student in need of services wait until the timelines have expired before services are provided. School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction. Instead, school systems must ensure that "all children with disabilities residing in the State ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." *Reid v. District of Columbia*, 365 U.S. App. D.C. 234, 401 F.3d 516, 519 (D.C. Cir. 2005) (internal citations omitted) (emphasis omitted); *Branham v. District of Columbia*, 427 F.3d 7, (D.C. Cir. 2005).

The Respondent had notice since early in the 2007-2008 school year that the Student required evaluations and failed to evaluate the Student within the prescribed 120 day timeframe. The evidence is the Student lacks skills that he should have learned in kindergarten. Suspending the Student and waiting for the Petitioner to have the Student evaluated by other public agencies was an inappropriate way of addressing the Student's behavior and academic needs. Under the current circumstances where the teacher, SST and parent all agree the Student has behavioral problems, the DCPS should have acted without delay to evaluate.

### **Manifestation Determination Meeting**

The Federal regulations required in a local education agency to hold a meeting to make a manifestation determination within 10 school days of any decision to change the placement of a child with a disability because a violation of the student's code of conduct 34 CFR §300.530(e)(1)

The Respondent argues that the Complaint was filed while the Student was serving his tenth day of suspension. Therefore the Respondent contends that the Complaint is premature and the Hearing Officer should not adjudicate matters based on facts that may ripen during the proceeding but were not ripe when the Complaint was filed and furthermore there has not been a deprivation of educational benefits.

The Petitioner asserts the Respondent had knowledge that the Student was a child with disability although he had not yet been found eligible and may assert the protections afforded under the IDEA. The Petitioner had requested evaluations, the first grade teacher expressed specific concerns regarding the Student's behaviors, in September 2008 the Student was referred to the MDT and should have been evaluated when he was suspended. The Student's suspensions during the 2008-2009 school year are now passed the 10 cumulative days of suspensions that warrant a manifestation determination meeting.

The IDEA sets forth processes by which a school may remove and/or discipline a child with a disability who violates a code of student conduct. If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to a violation of the school code is determined not to be a manifestation of the child's disability ... the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities ... although it may be provided in an interim alternative setting. See 20 U.S.C. §§1415(j)-(k).

The IDEA's implementing regulations further clarify that, "for purposes of [disciplinary] removals of a child with a disability from the child's current educational placement" a "change in placement occurs if [inter alia] [t]he removal is for more than 10 consecutive school days ...." 34 C.F.R. §300.536(a). The regulations also clarify that "[a]fter a child with a disability has been removed from his or her current

placement for 10 days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of [34 C.F.R. § 300.530]." Id. § 300.530(b)(2). Similarly, where a disciplinary change in placement would exceed 10 consecutive school days and the conduct that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the school "may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of [§ 300.530]." Id. §300.530(c). In turn, paragraph (d) reiterates the services that a child is entitled to receive under 20 U.S.C. §1415(k)(1)(D), set forth above. Id. §300.530(d)(1). According to the applicable provisions, school must conduct an MDR when a special education student is going to be suspended for a period of time that will result in that student being out of school for more than ten days for that school year. 20 U.S.C. § 1415 (k) (1) (E); and 34 C.F.R. § 300.530 (e). As for the team that conducts the MDR, it is to consist of relevant members of the IEP team, which includes individuals that are knowledgeable about the Student, the behavior, and the student's needs. 20 U.S.C. § 1414 (d)(1)(B); and 34 C.F.R. § 300.321 (a).

The IDEA regulations provides in 34 C.F.R. § 300.534 a child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) Basis of knowledge. A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred—

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311 (emphasis supplied)

In this case, the DCPS staff had knowledge the parent had requested evaluations. The MDT must convene to make an eligibility decision and discuss and determine whether the behaviors the Student is manifesting are related to a suspected disability.

## **Placement**

The Petitioner did not present as an issue the educational placement for the Student, nor did she express during the pre-hearing conference that an educational placement for the Student was a relief sought. The Petitioner now requests as a compensatory education award that the Respondent be ordered to fund the Student's attendance for 3 to 6 months in a program that can provide structured, therapeutic academic and behavior interventions and supports with onsite psychiatric services to provide, monitoring and management of medication to address the Student's ADHD.

The Petitioner argues that the appropriateness of the program recommended by the Psychologist was not specifically address because a recommendation was made with regards to compensatory education, not placement and that the Psychologist provided ample evidence that the program recommended is appropriate for the Student.

According to 34 C.F.R. § 300.116 of the IDEA regulations when determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. It also states that the determination of the educational placement of a child with a disability must be based on a child's IEP. 20 U.S.C. 1412(a)(5).

Once developed, the IEP is then implemented through an appropriate placement in an educational setting suited to the student's needs. *See Roark ex rel. Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.D.C. 2006). The placement decision, in addition to conforming to a student's IEP, should also consider the least restrictive environment and a setting closest to the student's home. See: 34 C.F.R. §300.116(a), (b)

The Petitioner had an opportunity to present evidence on the appropriateness of the private placement and instead asked for the Hearing Officer to clarify that the Petitioner had not requested placement as a relief and that placement was not an issue in this Complaint. Consequently, the Petitioner cannot now claim that because the request for relief comes via a compensatory education award request, it should be held to a less rigorous standard of determination of appropriateness by the Hearing Officer. There was no opportunity for the Hearing Officer to inquire about the program how it would meet the Student's unique needs, what the specific program at the proposed school offered, what the Student's classroom would offer, and the qualifications of the Teacher and other relevant factors to determine the appropriateness of a placement.

“Although the IDEA guarantees a Free Appropriate Public Education, it does not, however, provide that this education will be designed according to the parent's desires. The primary responsibility for formulating the education to be accorded a [child with a disability] and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parent or guardian of the child. Thus proof alone that loving parents can draft a better program than a state offers does not, alone, entitle them to prevail under the Act.” *Shaw v. The District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002).

Also pursuant to 5 D.C.M.R. § 3013.1(e), Placement, “[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP.” This Student does not have an IEP nor is there a clear diagnosis of the specific disabilities affecting the Student that may require attention. There are pending evaluations necessary to adequately craft a IEP and determine an educational placement for the Student.

### **Compensatory education**

“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.” See, *G. ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308 (4th Cir. 2003). More specifically, as the Fourth Circuit has explained, “[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student.” *G. ex rel. RG*, 343 F.3d at 309.

In *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the D.C. Circuit held, once a finding has been made that a student has been denied FAPE, the student is entitled to compensatory education services. The *Reid* Court held, with respect to compensatory education, that, "In every case, 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."

The Circuit Court in *Reid* considered a fact pattern in which a hearing officer had ordered compensatory education and in the order, empowered the MDT to "reduce or discontinue" the compensatory education that had been ordered. The D.C. Circuit held that a hearing officer may not authorize an MDT to reduce or discontinue compensatory education awards. The *Reid* court found that the hearing officer could not delegate decisions about compensatory education to the MDT because the MDT includes employees of the education agency involved in the education of the child, and such employees are barred by the IDEA from conducting due process hearings and from being empowered to make the decisions that a hearing officer must make at a due process hearing, including decisions about compensatory education. <sup>17</sup>

The court indicated that such a rule is required because hearing awards "shall be final" unless modified through administrative appeal or judicial action, and to permit an MDT to reduce or discontinue an award of compensatory education would run afoul with this requirement. Thus, under the reasoning of the *Reid* court, a hearing officer who cannot delegate to an MDT decisions to reduce, discontinue or increase compensatory education likewise cannot delegate to an MDT other decisions about compensatory education, including whether it is appropriate and if it is, what should be the content and amount.

It's the Petitioner's assertion that the pleadings and testimony have met the *Reid* standard for a compensatory award. The Petitioner alleges that the proposed compensatory education plans are reasonably calculated, based on the unique individual needs of the Student, to provide the educational benefits to the Student that he should have received from the Respondent in the first place.

The Petitioner requests in the alternative to an educational placement as suggested by the Psychologist that the MDT be ordered to determine the appropriate amount and form of compensatory education after the initial IEP is developed and an appropriate placement is determined. The Respondent alleges that compensatory education is not warranted because the Student has not been denied a FAPE.

The Petitioner alleges that *Reid* does not prohibit a hearing officer from ordering the MDT to determine compensatory education when compensatory education has not yet been ordered.<sup>18</sup>

The Petitioner contends that in a recent decision, Magistrate Judge Kay addressed the question directly: "Nothing in *Reid* however prohibits a hearing officer from ordering a meeting to determine

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<sup>17</sup> See 20 U.S.C. Section 1415(f)(3) and § 1414(d)(1)(B)(iv)

<sup>18</sup> The Petitioner asserts that at least four United States District Court judges and one magistrate judge in this jurisdiction have either held that a hearing officer may order such a meeting, or have themselves ordered such a meeting. In an August 12, 2008 order issued in *Gage v. District of Columbia*, Judge Sullivan ordered, inter alia, DCPS to "convene an MDT meeting...to discuss and determine whether compensatory education is warranted for T.G., and if so, [to] develop an appropriate compensatory education plan." Civil Action No. 08-1159 (EGS) (D.D.C. 2008).

compensatory education and in fact, cases interpreting Reid have allowed IEP teams to make initial compensatory education determinations.” *Friendship Edison Pub. Chartered Sch. v. Suggs, et al.*, Civil Action No. 06-1284 (PLF)(AK), Report and Recommendation of April 21, 2008 at 15)(adopted in full by *Friendship Edison Pub. Chartered Sch. v. Suggs, et al.*, 2008 US Dist. LEXIS 48388 (June 26, 2008). Judge Friedman specifically ordered DCPS “to hold an MDT/IEP meeting to determine the appropriate scope and amount of compensatory education to which [the child] is entitled.” *Blackman v. Dist. of Columbia*, 374 F. Supp. 2d 168, 172 (D.D.C. 2005).

While Reid does not explicitly address whether a hearing officer may delegate an initial determination of compensatory education to an MDT, the reasoning of the court in holding that the hearing officer could not allow the MDT the discretion to reduce or discontinue the compensatory education award applies equally to both situations. The court found that the hearing officer could not allow the MDT to amend the ordered compensatory education because the IDEA prohibits an employee of the educational agency from conducting a due process hearing, and every MDT must include a representative of the local education agency. The hearing officer cannot delegate his/her authority to devise a compensatory education plan to remedy denial of FAPE any more than he/she can authorize the MDT to change the ordered compensatory education.

This Hearing Officer is guided by the decision of the highest court to address the issue—the DC Circuit Court in Reid. Neither the magistrate nor the District Court’s decision address why an initial determination of compensatory education should be distinguished from a change to an order from compensatory education and both delegations run afoul of 20 USC 1415 (f)(3).

Both the IDEA and Reid, bar the Hearing Officer from delegating compensatory education awards to an MDT because it is an improper delegation to an unauthorized group. The rule established in Reid, precludes the delegation of the hearing officer’s authority to determine compensatory education to any other entity, and remains the rule within the District of Columbia notwithstanding the trial court cases cited by the Petitioner.

Furthermore, in a September 8, 2008 decision issued precisely on point in this matter <sup>19</sup> *In re Gregory –Rivas v. District of Columbia*, Civil Action No. 06-563 (JR) Judge Kennedy stated “HO Banks determined, correctly, that Reid prevents a hearing officer from determining that a student is entitled to compensatory education services but then delegating the authority for deciding the type and amount of those services to a MDT.

The Petitioner failed to persuade the Hearing Officer that she can delegate the determination of the compensatory education plan to the MDT.

The Petitioner had the burden of showing that the requested compensatory education award of an educational placement was an appropriate placement for the Student’s unique needs. The Petitioner did not put forth any evidence to meet any of the elements necessary to determine if the placement will address the unique needs of the needs of this Student who does not have and IEP. Additionally, the placement decision must be made after evaluations, data and specific placement information is reviewed by the Hearing Officer.

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<sup>19</sup> *In re Gregory –Rivas v. District of Columbia*, Civil Action No. 06-563 (JR)

A Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides her/him with "insight about the precise types of education services [the student] needs to progress." *Branham v. D.C.*, 427 F.3d 7, 12 (D.C. Cir. 2005).

## V. SUMMARY OF DECISION

The Respondent will convene a meeting within 10 school days of the completion of the reports of the evaluations to review the reports, determine the Student's eligibility for special education, if necessary develop an appropriate IEP, discuss and determine placement. The MDT must also make an eligibility decision and discuss and determine whether the behavior the Student is manifesting is related to a suspected disability. The Petitioner failed to persuade the Hearing Officer that she can delegate the determination of the compensatory education plan to the MDT. The Petitioner met the denial of FAPE standard. However the Petitioner failed to provide the Hearing Officer with sufficient information to allow a determination that the request for an educational placement as a compensatory education award is proper.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the DCPS has denied the Student a FAPE and issues the following:

## VI. ORDER

**ORDERED**, the Respondent will convene an MDT meeting within 10 days of the completion of the comprehensive psychological evaluation, social history, ADHD testing and the functional behavior assessment to determine the Student's eligibility, develop an IEP and discuss and determine placement. The MDT at that time will also discuss if the Student's behavior is a manifestation of the Student's suspected disability, and make the necessary adjustments to the BIP. In the event it determines that the behavior was a manifestation of his disability, the MDT shall comply with the provisions of 34 C.F.R. §300.530(f).

**IT IS FURTHER ORDERED** that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

This order resolves all issues raised in the Petitioner's January 28, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

## NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. Final decisions of special education Hearing Officer may be appealed to a state or federal district court of competent jurisdiction. (20 U.S.C. §1415(i)(2) and 34 C.F.R. §300.516)

  
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Wanda I. Resto - Hearing Officer

Date: 3/12, 2009