STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS') Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Date: July 6, 2009 <u>Representatives:</u> Counsel for Petitioners: Joy Freeman Coulbary, Esq. 5885 Colorado Avenue, NW Suite #102 Washington, DC 20011 Counsel for DCPS: Daniel Kim, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

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STUDENT HEARING OFFICE
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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* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened July 6, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on April 22, 2009, alleging the issues outlined below.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-10 and DCPS Exhibits 1 – 6) which were admitted into the record.

ISSUE(S): [2]

Is the student entitled to compensatory education for the failure of School C and/or School D to timely identify and find the student eligible as a child with a disability under IDEA? And if so, what is the compensatory education the student is due?

INDINGS OF FACT [3]:

1. The student is years old, currently attends School A, a private full time special education placement. The student's tuition at School A is funded by DCPS. The student resides in the District of Columbia with his parent(s) and has been identified as a "child with a disability" and eligible for special education services. (Parent's testimony, Petitioner's Exhibit 5)

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[2] Petitioner stated the issue(s) in the complaint as the failure to timely identify the student. This issue had previously been adjudicated in a previous HOD. However, the claim for relief in the complaint was compensatory education for the failure to identify. Petitioner, therefore, asserted the complaint was not barred by res judicata and/or collateral estoppel because the claim for relief of compensatory education was never adjudicated and granted by the previous HOD. This argument was made in DCPS' pre-hearing motion to dismiss which the Hearing Officer took under advisement and has denied based on the finding and conclusions of this HOD.

[3] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding.

2. During the 2008-09 School Year ("SY") the student attended School B, a District of Columbia ("DC") public charter school which is its own local educational agency ("LEA") for IDEA purposes. During SY 2007-08 the student attended School C, which is a DC public school, and not a full time special education placement. Prior to attending School C the student attended School D a DC public charter school for which the DC Office of the State Superintendent of Education ("OSSE") is the LEA. (Parent's testimony)

3. On October 21, 2008, while the student was attending School B Petitioner filed a due process complaint. A due process hearing was held on that complaint on November 24, 2008. At the time the student had not yet been found eligible under IDEA. The resulting Hearing Officer's Determination ("HOD") issued December 4, 2008, identified the issues to be adjudicated as follows: (1) "Whether the student was denied a free and appropriate public education ("FAPE") as a result of DCPS's failure to identify the student as a child with special needs under Child Find, (2) Whether the student was denied a FAPE as a result of DCPS's failure to develop an appropriate individualized educational program ("IEP") and (3) Whether the student was denied a FAPE as a result of DCPS's failure to comprehensively evaluate him notwithstanding his poor academic performance." (DCPS Exhibit 1)

4. In the December 4, 2008, HOD the Hearing Officer found the student had received failing grades in the every academic subject while attending School C (SY 2007-08) and had excessive absences and tended to miss specific classes. The Hearing Officer also found the student's grades had significantly improved during SY 2008-09 while attending School B. The Hearing Officer concluded the student had been denied a FAPE as a result of "DCPS'[s] failure to identify the student over the past two years while he suffered severe academic stagnation." The HOD ordered DCPS to fund independent evaluations and determined the student's eligibility for special education. (DCPS Exhibit 1: pgs. 4-5)

5. The December 4, 2008, HOD did not address the issue of compensatory education for the denial of a FAPE that was found as the student has not yet been found eligible. [4]

6. On December 15, 2008, an independent vocational evaluation was conducted of the student. On January 8, 2009, an independent comprehensive psychological evaluation was completed. That evaluation determined the student to have borderline cognitive abilities with a Full Scale IQ of 72 and academic abilities at approximately the 3rd grade level in reading and approximately the 5th grade level in math. The evaluator diagnosed the student with Adjustment Disorder and Learning Disorder, NOS. (DCPS Exhibits 5&6)

7. On February 10, 2009, an eligibility meeting was convened at School B. The multidisciplinary team ("MDT") found the student eligible with disability classifications of learning disability ("LD") and emotional disturbance ("ED"). The student's IEP prescribed the following weekly services: 31 hours of specialized instruction and 1 hour

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[4] This Hearing Officer takes administrative notice of the fact that unless and until a student has been found eligible there was no right to compensatory education.

of psychological services. The MDT agreed the student should be in a full time special education placement and acknowledged the student had been accepted to School A. (DCPS Exhibit 3)

8. On March 4, 2009, Petitioner filed a due process complaint against School B which resulted in a settlement agreement executed March 26, 2009. There was no provision in the agreement for School B to provide the student within any compensatory education for any alleged denial of services by School B. School B agreed to attend any meeting with Petitioner and DCPS regarding any compensatory education the student might be due for SY 2007-08 while the student attended a DC Public School (School C). (Petitioner's Exhibit 4)

9. OSSE issued a notice of placement placing the student at School A. The student began attending School A in the second semester of SY 2008-09. (Parent's testimony)

10. Petitioner's counsel sent correspondence to OSSE attempting to obtain compensatory education for the student for the time the student attended School C and School D. When there was no award of compensatory education by OSSE Petitioner filed the current due process complaint seeking compensatory education. (Petitioner's Exhibits 1 & 10)

11. Based on the student's previous socio-emotional deficits, chronic absenteeism, and poor academic performance, exhibited while a student at School C, School C should have been on notice that the student should have been identified a perhaps a student with a qualifying disability. (Parent's testimony, DCPS Exhibit 1)

12. Petitioner proposed the following compensatory education plan at the July 6, 2009, due process hearing:

> "Time period in which Petitioner alleged service Delay/Disruption occurred: 3.5 years
>
> Description of Compensatory Education due to: Settlement Agreement & Previous Denial of a FAPE
>
> Describe the produces and services to be awarded: 600 hours of compensatory education, as well as a laptop and educational software, to be provided and funded by LEA for services needed and not provided by DCPS & Charter School.
>
> Provider: Special Education Educator
>
> Goal: Currently the student is reading at the 3rd grade level, earning an extremely low score on the WJ-III. Roderick is functioning 4.8 grades behind in mathematics according to his psycho-educational, specifically the WJ-III. In spelling, Roderick is 7.2 grades below his grade level according to the same report in Petitioner's Exhibit 3. Roderick, according to his most recent vocational evaluation, would like to attend college and become a physical education teacher. However, with his present academic ability completing high school, much less college will present a significant challenge. Therefore, the 600 hours of tutoring in the broad academic subject areas, inclusive of counseling, to deal with bereavement issues and malaise as supported by the reports introduced into evidence by Petitioner, would help propel Roderick forward socio-emotionally and academically, so that there will be less of a chasm between his current grade level and where he actually performing."

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] 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.

In accordance with the Individuals with Disabilities Education Act, DCPS as the local education agency while the student was at School C, was responsible for identifying and evaluating student suspected of having qualifying disabilities. This obligation includes identifying, locating and evaluating children in all areas of suspected disabilities 34 CFR §300.125 . . . and determining an appropriate placement 34 CFR §300.552, et. seq.

The IDEA requires the LEA to "ha[ve] in effect a policy that assures all handicapped **children** the right to a free appropriate public **education**." 20 U.S.C. § 1412(1). DCPS must provide eligible handicapped **children** with "[a]ccess to specialized instruction and **related services** which are individually designed to provide **educational** benefit to the handicapped **child**." Hendrik Hudson Dist. Bd. of **Educ**. v. Rowley, 458 U.S. 176, 201, 102 S.Ct. 3034, 3048, 73 L.Ed.2d 690 (1982). With input from a **child's** parents, DCPS must develop an individualized **education** program (IEP) designed to address the **child's special educational** needs in an appropriate school placement. 20 U.S.C.A. § 1414(a)(5); see id.§ 1401(a)(18).

In *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the Court stated that "courts and hearing officers may award 'educational services . . . to be provided prospectively to compensate for a past deficient program.'" *Id.* citing *G. ex. Rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003). Compensatory education is an equitable remedy crafted to remedy educational deficit created by "an educational agency's failure over a given period of time to provide FAPE to a student'" *Id.* "Appropriate compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." *Id.*

Moreover, in *Mary McLeod Bethune Day Academy Public Charter School v. Bland*, Civil Action No. 07-1223, the U.S. District Court for the District of Columbia found that, "if a parent presents

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[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.

evidence that her child has been denied FAPE, she has met her burden of proving that he is entitled to compensatory education."

The previous Hearing Officer in the December 4, 2008, HOD concluded the student should have been identified as a child who may have a disability and be in need of special education. Although the Hearing Officer in the December 4, 2008, HOD heard expert opinion that the student had a learning disability the Hearing Officer did not conclude that the student was eligible but instead ordered independent evaluations. Because the student had not been yet found eligible and could not be unless and until evaluations were conducted the claim for compensatory education was not ripe.

It is clear from the evidence the student is due some form of compensatory services for the time he was not identified for special education services during SY 2007-08. During that school year the student failed all of his classes and was severe absenteeism. Had the student been identified during that school year he would have been entitled to a full time special education placement. School C was not a full time special education placement and the student received no special education services that school year as he was not yet identified. There was insufficient evidence, however, the student was denied a FAPE prior to SY 2007-08 and the December 4, 2008, HOD does not specifically give findings of fact for the denial of FAPE prior to that school year.

The Petitioner is not precluded from seeking relief on matters that were not decided in a previous HOD, thus this Hearing Officer did not and will grant DCPS's motion to dismiss this complaint. However, the Hearing Officer is not convinced the plan proposed by Petitioner at this due process hearing is "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." The plan was developed by Petitioner's counsel.[6] There is no evidence specifically as to what progress the student could have or would have made in the time he attended School C. There was no evidence as to the efficacy of the services being provided the student has his new full time special education placement and the level and rate of progress the student is making there.

Because the proposed compensatory education award is overly speculative and not based in any recent data as to the student's current level of performance and rate of progress, the Hearing Officer will not at this juncture grant the requested relief. Instead the Hearing Officer is ordering that a MDT review the student's progress and that an assessment be made as to the student's current level of performance and rate of academic and related services progress at the new placement and make a recommendation to the Hearing Officer as to the appropriate compensatory education for the student.

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[6] Although Petitioner presented a witness to support the compensatory education plan proposed the Hearing Officer did not credit the testimony because it was not based on an assessment of what services the student missed and what would likely place the student in the position he would have been in but for the loss. In addition the witness had no personal knowledge of the student beyond reviewing records.

ORDER:

1. DCPS shall, within thirty (30) calendar days of the issuance of this Order, conduct an assessment of the student's current levels of performance and progress both academically and in the areas of the related service(s) provided and convene a MDT to prepare a recommendation to a Hearing Officer as to a compensatory education plan that is "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place" for the services the student was not provided during the time the he attended School C during SY 2007-08.

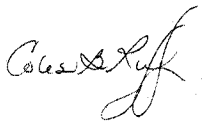
2. If no agreement is reached by the parties as to compensatory education DCPS and/or Petitioner may file a due process complaint for a review of the MDT recommendation and a determination of the compensatory education the student is due.

3. The MDT meeting shall be scheduled through counsel for the student and parent.

4. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

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. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: July 16, 2009