

<p>STUDENT¹, by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date of Hearing: July 23, 2009</p> <p>Date of Complaint: June 1, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Domiento Hill, Esq. 1220 L Street, NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Daniel Kim, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> Coles B. Ruff, Esq.</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* (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 23, 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 June 1, 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- 20 and DCPS disclosure) which were admitted into the record.

ISSUE(S):²

Did DCPS deny the student a free and appropriate public education by failing to develop an appropriate compensatory education plan as a part of the student's Individualized Educational Program?

FINDINGS OF FACT³:

1. The student is _____ years old, currently attends School A and resides in the District of Columbia with her parents. The student is classified as emotionally disturbed ("ED") and mentally retarded ("MR"). The student currently attends the School A, a private full time special education school where she was placed and funded by DCPS for the 2008-09 school year pursuant to a previous Hearing Officer Determination (HOD) issued May 23, 2008. (April 27, 2009, HOD).

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer will cite only one party's Exhibit.

2. In October 2008, Petitioner filed a due process complaint. A hearing on the complaint was held November 6, 2008, which resulted in a HOD dated November 9, 2008. The HOD directed DCPS to fund an independent speech/language evaluation and an independent assistive technology evaluation and convene a MDT meeting within ten (10) school days of the receipt of the independent evaluations. The HOD also directed the multidisciplinary team ("MDT") "determine the type and amount of compensatory education to be provide the student a result of the denial of FAPE by LEA."⁴ (April 27, 2009, HOD).
3. On December 10, 2008, the parents, by and through counsel forwarded to DCPS an invoice in the amount of _____ the monies the parent allegedly paid towards the student's Tae Kwon Do class which allegedly was to be a part of the compensatory education plan DCPS agreed to reimburse. (April 27, 2009, HOD)
4. A MDT meeting occurred March 27, 2009. At the meeting the MDT reviewed the assistive technology evaluation and discussed a compensatory education plan proposed by the student's educational advocate. The advocate was to present DCPS with details of the plan and another discussion was to take place April 1, 2009. (April 27, 2009, HOD)
5. DCPS did not reconvene the student's MDT meeting timely and did not reimburse the parent for the cost of the student's Tae Kwon Do class, and did not implement any aspect of the student's compensatory education program. As a result thereof, a due process complaint notice was filed. (April 27, 2009, HOD)
6. An administrative due process hearing on the complaint took place on April 8th and April 17th, 2009. As a result of that hearing, the Hearing Officer presiding over the matter, on April 27, 2009, issued a HOD which ordered DCPS to, among other things, reconvene the student's MDT meeting within fifteen (15) days of the issuance of the Order, convene a multidisciplinary team (MDT) meeting to review and revise the student's IEP to include the services and goals and objectives the MDT determines are appropriate based on the student's most recent speech and language evaluation and assistive technology evaluation. The HOD also went on to note that the parents, in the event there is not agreement meet regarding the student's entitlement to compensatory education services, could file a due process complaint notice solely on this issue. (April 27, 2009, HOD)
7. The student's MDT meeting was reconvened on or about May 21, 2009. At the meeting, the MDT, after a review of the student's evaluations, revised and updated the student's IEP to reflect the appropriate goals and objectives and agreed that the student would require, as a part of her educational program, vocational training in the form of cosmetology and DCPS would fund the program once the student is accepted.
8. With respect to compensatory education, DCPS informed the parents that the student would be provided, by the close of business May 27, 2009, a laptop computer, and the

⁴ The Hearing Officer acknowledged the Reid standard but nonetheless delegated this duty to the MDT because no evidence was presented at the hearing as to compensatory education.

following educational software/additional assistive technology devices: a text reader, graphic organizer, word prediction software, and talking word processor software. DCPS also agreed to upload the student's educational software on the computers at the student's school by said date and time. DCPS provided all agreed upon hardware and software as of the July 23, 2009, due process hearing. (Stipulation)

9. The parent proposed that the student receive 30 hours⁵ of individualized tutorial services in reading, writing, and math; as well as the reimbursement/funding of _____ for the student's Tae Kwan Do class. DCPS did not agree to fund the hours of tutorial services because they agreed to fund the student's cosmetology program if accepted and refused to fund the Tae Kwan Do class because DCPS stated that they could not remember having agreed to fund said program. Thus, no resolution with regards to the student's remaining compensatory education services was met. (Stipulation)

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.⁶ 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.

Did DCPS deny the student a free and appropriate public education by failing to develop an appropriate compensatory education plan as a part of the student's Individualized Educational Program? Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

The Individuals with Disabilities Education Improvement Act ("IDEIA") of 2004 requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

⁵ At the meeting the parent proposed 100 hours of tutoring but at the hearing Petitioner had reduced the number request for relief to 30 hours.

⁶ 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.

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..."

20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1. The FAPE requirement is satisfied when the State provides personalized instruction that is reasonably calculated to permit the child to benefit educationally. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

34 C.F.R. § 300.323(c) states that each public agency must ensure that, "a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(a) provides that a child's IEP must be in effect at the beginning of each school year.

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.* The compensatory education requested was reasonable in light of DCPS' continued failure to provide FAPE to this student.

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

At the MDT Meeting of May 21, 2009, the parent, through her educational advocates, presented to DCPS, a compensatory education plan that Petitioner believed was reasonably calculated to provide the student with educational benefit to address the student's alleged loss while she was awaiting an appropriate IEP and placement to which she was entitled from DCPS. DCPS' failure to provide the student with the needed compensatory education in the form of an appropriate compensatory education plan, as a

part of her IEP, has resulted in a continuing denial of FAPE. The Hearing Officer did not credit the parent's testimony that DCPS agreed to funding of the Tae Kwon Do class, but the representation that the student does not have the abilities to yet pass the exam to allow her to enroll in the cosmetology course demonstrates the student's need for tutoring to assist in her being able to meet the qualification for entrance in the program(s) DCPS has already agreed to fund. Consequently, the Hearing Officer orders that DCPS provide 30 hours of tutoring to assist the student in obtaining the remedial assistance needed.

ORDER:

DCPS shall as of the date of this Order fund thirty (30) hours of individualized tutoring for the student.

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: August 2, 2009