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District of Columbia

Office of the State Superintendent of Education

Office of Review and Compliance

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</p> <p>“DCPS”</p> <p>Respondent.</p> <p>Case</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: August 13, 2010</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Zachary Nahass 1220 L Street NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Harsharen Bhuller, Esq. Assistant Attorney General District of Columbia DC Public Schools 1200 First Street, NE 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* (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.

BACKGROUND:

Student or “the student” is age seven and attends a DC Public Charter School, hereinafter “School B”. The student began attending School B at the start of the 2009-10 School Year (“SY”). Prior to attending School B, the student attended a DC Public Elementary School, hereinafter “School A”. Petitioner alleges in the complaint that DCPS failed to timely determine the student’s eligibility for specialized instruction and related services and failed to timely develop and appropriate IEP. The complaint originally alleged the same claims against both School A and School B (which is its own local educational agency (“LEA”)).

DCPS, in its response admitted the student attended School A during SY 2008–09. DCPS denied receiving a request from the parent to evaluate this student for special education. DCPS admitted the staff at School A and the parent had meetings to address the student’s behavior and alleges DCPS participated in those meetings to remediate the student’s behavioral concerns and by the end of SY 2008–09 both the parent and DCPS admitted the student was making both behavioral and academic progress. DCPS denied the student was suspended on several occasions during his attendance at School A and DCPS asserted it has the proper policies and procedures in place to comply with IDEA’s “child find” provisions.

A resolution meeting was held May 25, 2010, between Petitioner and DCPS and the matter was not resolved. School B did not participate in the resolution session and was at that point not represented by counsel. The Hearing Officer gave School B time to obtain counsel and it did so.

Counsel for School B obtained consent from the other parties for a continuance, which was granted by the Hearing Officer to allow time for a resolution session to be held between Petitioner and School B.² That resolution session was held in July 2010.

On July 14, 2010, the student was found eligible and an individualized educational program (“IEP”) was developed. Petitioner and School B achieved resolution and settlement and Petitioner’s counsel notified the Hearing Officer and DCPS counsel at the pre-hearing conference on July 27, 2010, that based on the settlement Petitioner intended to withdraw the complaint as to School B but maintain the complaint as to DCPS and seek a finding of denial of

² Petitioner agreed to the continuance and the motion was granted. The date for a final decision in the matter was extended by thirty-five (35) calendar days by an interim order dated July 8, 2010. As a result of the continuance granted, the timeline for a Hearing Officer Determination and Order (“HOD”) as to the complaint Petitioner maintains against DCPS was extended to August 13, 2010.

FAPE and compensatory education as a remedy. Petitioner's counsel submitted a withdrawal notice as to School B on July 28, 2010.

Pursuant to the settlement agreement reached between Petitioner and School B, Petitioner acknowledged School B had agreed to provide the student compensatory education for what Petitioner's counsel claimed was due the student for missed services from January 1, 2010, to July 14, 2010, when the student's IEP was developed.

The pre-hearing conference conducted between Petitioner and DCPS on July 27, 2010, resulted in a pre-hearing order issued on July 30, 2010. A Due Process Hearing was convened August 13, 2010, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003, in Hearing Room 1. The hearing was held pursuant to the due process complaint submitted by counsel for the parent and student filed on May 7, 2010, alleging the issue(s) outlined below against DCPS and School B.

Petitioner alleges the student is due from DCPS 180 hours of tutoring, 20 hours of speech and language services and 40 hours of occupational therapy services. The Hearing Officer did not require Petitioner to disclose the terms of the settlement agreement between Petitioner and School B prior to the hearing.

ISSUE(S): ³

The issues adjudicated are: (1) Whether DCPS denied the student a FAPE by failing to timely evaluate the student and determine his eligibility for special education and related services during SY 2008-09? and (2) if a denial of FAPE is found what compensatory education, if any, is the student due?

Petitioner alleges the student was attending School A during SY 2008-09 and the parent requested of the student's classroom teacher that the student be evaluated for special education. Petitioner alleges based on the date of the alleged parental request the student should have been evaluated and determined eligible by January 1, 2009.

Petitioner's counsel requested⁴ that he not be made to disclose the amount of compensatory education School B agreed to provide and/or fund under the settlement agreement and requested that amount be deducted from any amount the Hearing Officer might award for the denial(s) of FAPE by DCPS should the Hearing Officer at the conclusion of the hearing find DCPS to have denied the student a FAPE by not timely evaluating him and finding him eligible.

³ 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.

⁴ Petitioner's counsel stated his concern that the amount was negotiated from a settlement position and he wished to avoid the Hearing Officer looking at the amount as evidence of reasonability of the amount of compensatory education the student was due.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 & 12 and DCPS Exhibits 1-3) which were admitted into the record.

FINDINGS OF FACT ⁵:

1. The student is _____ years old and resides in the District of Columbia with his parent(s), (hereinafter "Petitioner" or "Parent"). At the start of the 2008-09 School Year ("SY") the student attended School A, a DCPS public elementary school. The student was in the kindergarten. (Parent's testimony)
2. The student began a Head Start program in 2006 and attended a year or two then he was enrolled at School A at the start of SY 2008-09 at age five. During Head Start the student had some acting out behavior because he found the work difficult. (Parent's testimony)
3. In October 2008 the parent took the student for what turned out to be a seven day psychiatric evaluation at Children's Hospital as a result of the student's acting out in school, i.e. fighting, cursing and setting fires at school and at home. Following the psychiatric evaluation the student was referred for outpatient behavioral health services at Scruples Corporation. (Parent's testimony, Petitioner's Exhibits 6 & 7)
4. School A staff frequently called the parent the due to the student's behavior and the student was, at least on one occasion suspended. The parent was informed about the student's behavior by the school's guidance counselor, his classroom teacher and on one occasion the principal. By November 2008 as a result of the student's display of disruptive behaviors (jumping on tables, using profanity, fighting, trying to walk out the school building and setting a fire) the student's classroom teacher called the parent to the school to discuss the student's behavior. The parent asked if the student could be tested. The teacher stated the school would initiate some form of intervention but with regard to testing she would get back to the parent because there was a process that needed to followed. (Parent's testimony)
5. The teacher did not get back to the parent about the requested testing. On November 24, 2008, the school convened a Student Support Team ("SST") meeting to discuss behavior interventions. The parent attended along with several School A staff including the school psychologist, the classroom teacher and the school social worker. The team identified the concerns with the student that included: staying in his seat, loud talking and completing assignments. The team generated strategies to address the concerns. (Parent's testimony, DCPS Exhibit 2)

⁵ 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 may only one party's exhibit.

6. At the SST meeting the parent asked again about the student being tested and the school staff stated that there was not so much concern about his academic ability as his behavior and they “sort of shrugged off the idea of testing.” The parent told the school staff she had gotten the student a therapist at the Scruples Corporation. (Parent’s testimony)
7. The parent began giving the student medication as a result of the therapy session when she was informed the student had Attention Deficit Hyperactivity Disorder (“ADHD”). After the student was seen at Scruples Corporation the teacher stated to the parent that the student was calmer. During this time the teacher showed the parent that the student was writing from right to left but stated to the parent that this was age appropriate behavior. (Parent’s testimony, DCPS Exhibit 2)
8. On February 13, 2009, the SST reconvened to discuss the student’s progress with SST interventions. The team noted the student began medication in February 2009 and noted that the “behavior chart and reinforcement were unsuccessful due to the student’s inability to focus.” (DCPS Exhibit 2)
9. In March 2009 the student’s classroom teacher said to the parent the student was likely to be retained but that he could be given a test that might prevent him from being retained. There was no action or comment from the School A staff about testing the student. (Parent’s testimony)
10. The SST team met again on April 9, 2009, and the team noted again that the strategies of intervention were unsuccessful. (DCPS Exhibit 2)
11. Finally, the SST team met on May 21, 2009. The team noted the student’s behavior had improved but the strategies implemented had been partially successful. School A staff never initiated testing and/or evaluations for the student. (Parent’s testimony, Exhibit 2)
12. The student’s behavioral difficulties lessened but his academic performance did not seem to change much based on the teacher comments in his report cards during SY 2008-09. The teacher continued to write in the comments that the student was not performing up to par. The rating on his report card seemed to belie the comments made in the teacher comments. (DCPS Exhibit 3)
13. By the end of the school year the teacher stated to the parent that she believed the student should be in a classroom with fewer students. As result of this recommendation the parent transferred the student to School B for the following school year. (Parent’s testimony)
14. Upon the student’s enrollment at School B Petitioner reported her concerns to the staff regarding the student’s academic and behavior deficits. (Parent’s testimony)
15. At School B the student’s behavior was better than at School A. His academics, however, were not as good; he was not on grade level. School B initiated evaluations to determine the student’s eligibility for specialized instruction and related services on January 19, 2010. (Petitioner’s Exhibit 7)

16. The student has now been determined to be in need of special education whereas the staff at School A told the parent that he did not need to be tested for special education services. (Parent's testimony)
17. On March 10, 2010, School B produced a psycho-educational evaluation, which demonstrated the student's cognitive abilities to be in the average range. The evaluation also found the student was functioning below grade level⁶ in all areas of Reading, Math and Written Language, and diagnosed the student with reading disorder, mathematics disorder, and disorder of written expression. The evaluation also found the student's visual-motor integration and visual-perceptual skills were in the very low range. The evaluation recommended, *inter alia*, that the student receive: instruction in a multisensory manner, including visual support materials, and concrete manipulative materials to supplement verbal and written instructions, that the student receive modified assignments and extra time to complete tasks, the student be provided with learning aides, such as an electronic dictionary, text reader, and spell check software, that the student should be provided with taped books as well as being read to and have the use of a reading computer program in order to develop effective reading skills, the student receive remedial instruction in math reading and writing skills, as well as individual tutoring, and that assignments be reduced to small, manageable units to enhance his comprehension of the content material. (Petitioner's Exhibit 7)
18. On March 26, 2010, School B convened a multidisciplinary team ("MDT") meeting, at which the team reviewed the March 10, 2010, psycho-educational evaluation. The team determined that the student qualifies for specialized instruction in the areas of reading, math, and written expression, the team agreed that speech and language and occupational therapy ("OT") evaluations of the student were warranted, and School B committed to completing the ordered evaluations before the end of April 2010. (Petitioner's Exhibit 3)
19. On May 25, 2010, an OT evaluation was conducted which recommended the student receive direct OT services of 1 hour per week. (Petitioner's Exhibit 8)
20. On July 14, 2010, an individualized educational program ("IEP") was developed for the student. The student's disability classification was determined be Specific Learning Disability ("SLD"). The IEP developed that day prescribes the student receive the following weekly services: 15 hours of specialized instruction, 30 minutes of speech and language services and 1 hour of occupational therapy. The IEP prescribes academic goals in the areas of Reading, Math and Written Expression. The student is targeted to start the second grade at School B for SY 2010-11. (Parent's testimony, Petitioner's Exhibit 5)
21. The parent's educational advocate who assisted her and accompanied her at the student's MDT/IEP meetings at School B is a certified special education teacher who is employed by the law firm that represents the parent. The educational advocate was asked by Petitioner's counsel to prepare a compensatory education plan, based on her familiarity

⁶ The Woodcock Johnson III assessment determined the student was, at the time of assessment, operating approximately at the kindergarten level (one grade level behind) in all academic areas assessed.

with the student and his educational history and evaluations. At the hearing she offered her opinion on the services that would compensate the student for services allegedly missed from January 2009 when Petitioner alleges the student should have been evaluated and determined eligible by DCPS to the date the student's IEP was developed at School B (July 14, 2010). The advocate proposed the student be provided 180 of independent tutoring to compensate the student for approximately 570 hours of specialized instruction the student would have received the services that are now in his IEP had he been determined eligible and began receiving in January 2009. She also recommended the student receive 20 hours of speech and language and 40 hours of OT services as compensatory education. The student should be able to avail himself of at 2 hours of tutoring per week. At this pace it is hoped that the student would be on grade level by the time he has reached the grade. 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.⁷ *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: Whether DCPS denied the student a FAPE by failing to timely evaluate the student and determine him eligible during school year ("SY") 2008-09? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

The IDEA requires the State to have in place policies and procedures to ensure that all children with disabilities who are in need of special education and related services are identified, located and evaluated. 34 C.F.R. § 300.311(a)(1). The obligation to identify, locate and evaluate these children is the responsibility of the LEA under District of Columbia law. 5 DCMR § 3002.1(d). Each local education agency shall ensure that the child is assessed in all areas of suspected disability. 20 U.S.C. § 1414(b)(3)(B). And, if a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child. 34 C.F.R. § 300.306(i)(2).

⁷ 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.

In this case, the student exhibited academic and behavior deficiencies, which should have caused DCPS to suspect that student required accommodations in excess of what he could receive in the general education classroom. The Petitioner and DCPS discussed the necessity of evaluating the student on several occasions. Yet, DCPS never conducted any evaluations to determine the student's eligibility for specialized instruction and related services.

Although it is apparent that DCPS took action to address the student's behavioral concerns by initiating the SST process in November 2008 and the student's behavioral difficulties lessened, his academic performance did not seem to change much based on the teacher comments in his report cards. The teacher continued to write in the comments that the student was not performing up to par. In addition the student's academic evaluations once finally conducted belie the comments made in the teacher comments.

There was credible and un-rebutted testimony by the parent that she asked that the student be evaluated by School A as early as November 2008 and the student's in school behavior had become problematic as early as October 2008, which led the parent to take the student for a seven-day psychiatric evaluation at Children's Hospital.

Following this evaluation the parent took the student for outpatient treatment and informed the school staff in the November 24, 2008, meeting that the student was in therapy. The parent credibly testified that she again requested the student be tested or evaluated. Her concerns about testing were deterred and the SST team developed strategies to address the student's behavior and dismissed the parent's concern the student be evaluated.

Even if it was reasonable for the School A to attempt the SST process before formal evaluations, by the time the SST team met again in February 2009 it determined the strategies attempted were unsuccessful. School A still did not initiate evaluations at that point. Had DCPS initiated evaluations at that point presumably the evaluations would have been completed by the end of SY 2008-09. Because the student evaluations when conducted determined that he had a learning disability, presumably this disability would have been detected by the end of SY 2008-09 and the student would have been found eligible by that date and would have begun receiving specialized instruction and related services by the time ESY 2009 was available. (The student's IEP when it was finally developed included ESY services). So, the student would have presumably been provided 6 weeks of ESY services and a full year of special education and related services in SY 2009-10.

The Hearing Officer concludes based upon the student's behavioral and academic difficulties and his failure to derive any benefit from the strategies School A implemented in the SST process, and based on the parent's repeated requests that the student be evaluated, DCPS should have by February 2009, initiated evaluation of the student for special education services.

Had evaluations been timely initiated the student would have been presumably found eligible (based on his ultimate eligibility finding) by the end of the SY 2008-09 academic year. As a result, the student did not have the benefit of the opportunity for ESY services in the summer of

2009 and did not have the benefit of special education and related services for the entire year of SY 2009-10. The Hearing Officer thus concludes the student was denied a FAPE by DCPS's failure to timely evaluate him and find him eligible. Thus, this is the basis for the missed services for which the Hearing Officer determines the student should be compensated.

Issue: (2) If a denial of FAPE is found what compensatory education if any is the student due?

Conclusion: The Hearing Officer concludes based on the evidence presented that Petitioner is due a compensatory education award in the amount of services awarded in the Order below.

In *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the Court stated, "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.

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 of proving that he is entitled to compensatory education."

Petitioner seeks 180 hours of individualized tutoring, 20 hours of independent speech and language services and 40 hours of occupational therapy services as compensatory education. Although the plan Petitioner proposed sighted the student's educational assessments and noted the student's lack of educational progress without the benefit of the special education and related services in the year between when he might have been identified by DCPS and when his IEP was finally drafted in July 2010, and the plan has a somewhat logical basis for the amount of services requested, the Hearing Officer is not convinced that the plan as proposed is appropriate.⁸

However, the Hearing Officer has a different conclusion as to the amount of compensatory education that is appropriate. The student would have presumably attained one year of academic growth in a calendar year had he been provided the specialized instruction that he should have been given. The question becomes how much individualized private tutoring would have the effect of a year of academic progress for this student. This is speculative. Nonetheless, the Hearing Officer will attempt to arrive a number of hours of specialized instruction and related services that would achieve this. Based upon the testimony that the student could reasonably avail himself of 2 hours of independent tutoring per week and it is hoped he would be on grade

⁸ The Advocate suggested that the student missed a total of 570 hours of specialized instruction and assuming the student was in a special education classroom of approximately 4 students he would have received the equivalent of one quarter of individualized instruction thus 140 hours plus the advocate requested an additional 40 hours of tutoring to address the students specific academic deficits. The student has not received any related services and the amount of related services were suggested as the amount needed to put the student in the place he would have been had services been provided timely.

level by grade five and he is currently entering the second grade, the Hearing Officer concludes it is reasonable for the student to be awarded 96 hours of specialized instruction⁹, 10 hours of independent speech and language services and 20 hours of independent occupational therapy services¹⁰ as compensatory education designed to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place.

ORDER:

1. DCPS shall fund for this student ninety-six (96) hours of independent tutoring, ten (10) hours of independent speech language services and twenty (20) hours of independent occupational therapy services at the DCPS approved rates as compensatory education due the student for the denial of FAPE found in this Hearing Officer's Determination for DCPS' failure to timely evaluate, find eligible and provide special education and related services to the student and the harm caused to the student thereby.
2. The amount of compensatory education that has been provided to Petitioner in the settlement agreement between School B and Petitioner shall be deducted from the above award of compensatory education the Hearing Officer has awarded.
3. Petitioner's counsel shall by August 16, 2010, present to DCPS counsel a copy of the settlement agreement between Petitioner and School B for DCPS to determine the amount that shall be deducted from the amount the compensatory education awarded above. Both counsel shall, by August 18, 2010, provide to this Hearing Officer notification by email that the above provision of this Order has been fulfilled.
4. As to the claims alleged in the complaint against School B (the public charter school the student currently attends), based upon Petitioner's notice of withdrawal, the complaint as to School B is hereby dismissed.

⁹ The reasonable use of this award is based on 2 hours per week for three academic years until the student reaches the fifth grade when he should, based on the testimony, be operating on grade level and no longer be in need of specialized instruction.

¹⁰ The independent related services proposed have been reduced by the approximate reduction in the requested tutoring services as it seems reasonable to the Hearing Officer that the student's progress in the related services areas will be commensurate with the student's progress in academic areas.

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).

A handwritten signature in cursive script, appearing to read "Coles B. Ruff".

Coles B. Ruff, Esq.
Hearing Officer

Date: August 13, 2010