

RECEIVED

SEP 09 2010

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

STUDENT,¹the
Petitioner,

Date Issued September 9, 2010

Hearing Officer: Wanda I. Resto Torres

v

Case No:

District of Columbia Public Schools,

Hearing Date: August 2 -27, 2010 Room: 4a

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND

The Student is an _____ year old male in the _____ grade, with a disability category of Other Health Impaired (OHI) as a result of his Attention Deficit Hyperactivity Disorder. On May 3, 2010, the Respondent finalized an individualized education program (IEP) which provides the Student 7 hour of specialized instruction in a general education setting and 7 hours of specialized instruction outside of the general education setting. On July 1, 2010, the Petitioner filed a due process complaint (Complaint) against the District of Columbia Public Schools (Respondent), pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), alleging the Respondent denied the Student a free appropriate public education (FAPE).² The Petitioner claimed the Respondent failed to develop an appropriate IEP; because it does not provide him sufficient level of services to meet his unique needs, and does not include appropriate measurable transition or vocational goals. The Petitioner alleged the majority of the IEP goals do not specify if it is for a 2nd or a 12th grade level and the baselines do not provide any information regarding where the Student is in meeting the specific goals. The Petitioner also claimed there was no explanation of how he who is functioning at a 2nd grade level in written language will be able to master 11th grade work.

As relief, the Petitioner requested, *inter alia*, an order that the Respondent convene a IEP/multidisciplinary team (MDT) meeting to increase his specialized instruction hours to a full time program and that it fund a private full time special education program in a school chosen by the him. The Petitioner also requested to be granted a compensatory education award.

On July 2, 2010, the undersigned Hearing Officer was assigned the case. On July 27, 2010, a telephonic pre-hearing conference was held in the above matter. The Petitioner reiterated the issues as plead. Also on July 27, 2010, the DCPS file a Response to the Complaint and claimed a settlement

¹ Personal identification information is provided in Appendix A.

² 20 U.S.C. §1415(c)(2)(B)(i)(I)

agreement was executed between the parties on January 20, 2010. As a result of that agreement, the Petitioner cannot claim a denial of FAPE under IDEIA that precedes facts or circumstances occurring before January 20, 2010. The Respondent further argued the Petitioner claimed the IEP in the previous complaint lacked appropriate measurable transitional or vocational goals. The Respondent alleged the Petitioner's claim is barred as it was decided and contractually agreed upon by the parties as settled. The Petitioner countered that the allegations are for actions after January 20, 2010 and for inappropriateness of the transitional plan and goals that subsequently were added to the IEP in April 2010.

The Respondent asserted that the Petitioner seeks compensatory education in the July 1, 2010 complaint; however, he had agreed in writing on May 26, 2010 with the DCPS' compensatory education plan. The Respondent argued that any allegation of compensatory education would have to be limited to the time between May 26, 2010 and July 1, 2010. Further, the Respondent argued that the Student was not attending school after school commenced on or about June 23, 2010 and thus could not have suffered any educable harm. The Respondent claimed the Student is scheduled to receive a high school diploma and attend a career exploration class at the DCPS. The Respondent argued the Student's IEP is calculated to provide him a FAPE and has appropriate goals for his success. The Respondent further argued the Student has current psychological and vocational assessments, which were part of determining his IEP. Lastly, the Respondent alleged the Student has not been denied FAPE, and is not entitled to any relief.

On July 30, 2010, an Order required the Petitioner to provide evidence that the IEP challenged in the January 6, 2010, Complaint did not contain transition and vocational goals, and it is proper for the Hearing Officer to determine if the current IEP contains measurable transitional and vocational goals. A July 30, 2010 Order required the Petitioner to provide evidence by August 2, 2010, that the January 6, 2010 Complaint did not contain transition plan goals and to provide the specific timeframe for which the request for compensatory education is sought. On August 5, 2010, the Petitioner filed copies of the October 6, 2009 IEP showing no transition or vocational goals, and the April 21, 2010 IEP including those goals. The Petitioner alleged that the transitional goals subsequently added to the transition plan in his IEP were not designed to meet his unique need; actions that occurred during April 2010. The Petitioner also clarified that the compensatory education award requested is for services missed during the period of April 22, 2010 through the last day of school on June 22, 2010.³

On August 26-27, 2010, closed hearings were held,⁴ representing the Petitioner was Pamela Halpern; and the Respondent was represented by Tanya Chor. The Petitioner presented a disclosure letter dated August 12, 2010, to which twenty-seven documents were attached, labeled P-1 through 27 and which listed five witnesses; three witnesses testified; the Petitioner, the Mother, and the Education Advocate. The Respondent presented a disclosure letter dated August 13, 2010, identifying ten witnesses and to which twenty-five documents were attached, labeled DCPS 1 through 25; four witnesses testified; the Special Education Coordinator, Program Manager-Office of State Superintendent of Education, the DCPS Psychologist, and the Program Coordinator for Transition Services-DCPS. The parties stipulated to the admission of documents identified as Petitioner's 1-10, P-12, 14, 17, 18, and 21-26; Respondent's 2-4, 7, 8, 10, 11, 13, 16-18, 20, 22, and 24.⁵

³ P 8, October 6, 2009, IEP, and P 9, April 21, 2010, IEP.

⁴ The Hearing was originally scheduled for August 19, 2010; a last minute non-availability of the Petitioner required the hearing to be rescheduled.

⁵ The Respondent withdrew documents 19 and 21. Petitioner's document 27 a copy of an E-mail message was excluded for failing to include the full message.

The hearing was conducted in accordance with the rights established under the IDEIA, local laws, the implementing federal/local regulations, and the SOP.⁶

ISSUES

The issues to be determined are as follows:

1. Did the Respondent fail to provide the Student an IEP appropriate to address his unique educational needs?
2. Has the Respondent provided an appropriate educational placement for the Student?
3. Does the Student require a full time out of the general education special education placement?
4. Has the Student been denied a FAPE?
5. Is the Student entitled to a compensatory education award, and if yes in what amount?

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

- a. On August 26, 2010, the parties stipulated there was an IEP/MDT meeting held on April 22, 2010, a draft IEP was sent to the Petitioner on April 23, 2010, the Petitioner responded to the IEP draft on April 26, 2010. On May 3, 2010, the Respondent sent a finalized IEP to the Petitioner. On May 13, 2010, the Student, through counsel, sent a letter to the Respondent, requesting changes in the IEP. The parties also stipulated the last day of class for the 2009-2010 school year was on June 22, 2010.
- b. The Student's prior IEP prescribed 15 hours of specialized instruction outside the general education setting. The current IEP provides him 7 hour of specialized instruction in a general education setting and 7 hours of specialized instruction outside of the general education setting. The amount of specialized instruction hours reflects the number of hours the school can provide a student on track for graduation with a high school diploma.⁷
- c. The Student was administered a Woodcock Johnson III, Tests of Cognitive Abilities; his general intellectual ability (GAI) = 51, his cognitive scores are extremely low. The Student's verbal ability standard score is also extremely low and it is estimated that he will find age-appropriate verbal tasks difficult.⁸ The Student's current IEP goal in mathematics specifies he will master the grade level standards for probability and statistics. However, this goal does not indentify if it is for a 2nd or an 11th grade level and the baseline does not provide any information regarding where the Student is in meeting the specific goal. The Petitioner has a grade equivalent of 2.1 to 3.4 in reading skills, yet the goal indicates that he will master the goals in the standards for English IV.⁹ In written language the Student has a grade equivalent of 2.8 in written language and the goal indicates that he will master the written expression standards goals as listed in English IV. There was no explanation of how the

⁶ IDEIA and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; 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).

⁷ Testimony of the Education Advocate, Special Education Coordinator, P#8, October 6, 2009 IEP, P#9, April 21, 2010, IEP and P#11, April 21, 2010, MDT meeting notes.

⁸ P#11, April 21, 2010, MDT meeting notes, and P#13, February 24, 2010, Comprehensive Psychological Evaluation.

⁹ Testimony of the Education Advocate.

Student who is functioning at a 2nd grade level in written language will be able to master 11th grade work. The Student's post-secondary transition activities and services on his IEP fail to include the amount of time with special education teacher, there is no baseline and the goal for the Student requires that he investigate apartment living with 80% accuracy. The Student is eighteen years of age with no employable skills. The Student requires a placement that will take into account his unique needs and prepare him with both vocational training and independent living skills¹⁰

- d. The Student was in a class of approximately 20 students with one teacher. He did not understand most of the material taught, rarely participated in class activities because the classes were crowded or the work was too hard for him. The Student many times went to school and did not enter his classes, he went to the classroom of the football coach who allowed him (a football player) to stay with him and not go to classes. The Student has not received job skills training and is not learning as he would like. According to the Student he goes to school for the lunch and the football team. He would like to attend a school like the _____ school because it is smaller, is not crowded, and he will get one-on-one assistance in Reading and in Math. The Student wishes to learn and is not interested in receiving one-on-one assistance the entire school day; he wants help in Reading, Math and Science.¹¹
- e. The Mother spoke to the Student's teachers of who indicate he does not do his homework and the Student tells her that he does not understand the work. At an April 21, 2010 meeting with the Respondent, the Student's failure to go into classes was discussed and an attendance progress report was to be put in place for the Student. However, it was not consistently provided and the follow-up was left to the Student. After that meeting the Mother expected an inclusion teacher to assist the Student in class and counseling to begin, but neither happened. The Student is not being provided any work related practice; he cannot complete a job application and his transition plan only requires him to gather information. The Student is entitled to 75 hours of tutoring in Reading and Math, he has attended twice; it is the Student's responsibility to coordinate the tutoring sessions. The Mother thinks the Student requires a full time specialized instruction program with no general education students and in small groups because the inclusion program is not being effective for him. The Mother visited with the Petitioner the _____ School a full-time specialized instruction private school; it provides classes in groups of 5-6 students with two teachers, it has a work study program which takes the students into the community to see on the job activities.¹²
- f. Although, not mentioned in the Student's IEP the school has a partnership program "Bridges with Marriot" which provides assistance with interviewing skills, opportunities to job shadow in different work areas and the Student could participate in the program. The Student probably failed his classes because he had approximately 55 absences during the 2009-2010 school year. The Student is interested in barbering and his IEP should include the opportunity to see and participate in real world experiences, it does not, and it may be because the person who drafted the IEP did not know of all the existing programs available to serve the Student. The fail to include the amount of minutes with a special education teacher on the Student's transition plan maybe a clerical error.¹³
- g. The Student was to receive 7 hours of specialized instruction in the general education setting and 7 hours out in order to allow him the maximum time in general education to achieve high school diploma credits and to be able to graduate at the same time as his peers. The school has job shadowing available for those students whose schedules allow the time out. The school can provide the support

¹⁰ P#9, April 21, 2010, IEP Transition plan, P #22, April 26, 2010, E-mail, and Testimony of the Education Advocate.

¹¹ Testimony of the Petitioner.

¹² Testimony of the Mother.

¹³ Testimony of the Program Coordinator for Transition Services, DCPS.

the Student needs by recommending community based organizations and research of jobs as indicated on his IEP. The Student is capable of doing work in the general education and with support he can be successful. According to the SEC the English IV in the Student's academic goal section of the IEP is the last English required to get a high school diploma; there is no explanation on how the Student will be able to do grade work; because it depends on the Student. The SEC was not aware that the Student was allowed to stay in the classroom with his football coach instead of going to classes. The Student's teachers say that when he attends class he can do the work in an inclusion setting.¹⁴

- h. The Student's teacher reported the Student has a tendency to arrive late to classes, to not attend, and to send text messages while in class. The school can address the Student's attendance problem by putting in place the daily progress report and possibly a behavior intervention plan. At a meeting it was discussed that if the Student received 15 hours of specialized instruction he could not get a high school diploma at the same time as his peers.¹⁵
- i. After reviewing the Student's educational records, psychological evaluation and truancy report; the DCPS Psychologist deems the Student's disability category of attention deficit hyperactivity disorder (ADHD) is not clear because of the many absences from classes which impact his learning environment. The Student's Intelligence Quotient (IQ) has remained constant over time; this factor along with his age demonstrates that the Student has reached a plateau in his level of cognitive functioning. There is little for the Student to gain cognitively even if provided additional specialized instruction. If the Student was stable and participating in all his classes his production would improve; but not his academic achievement. The Student has many absences and was not motivated to receive academic instruction; therefore to provide him more hours for missed services will not demonstrate gains. To address the Student's truancy DCPS could offer support to the parent or the Student to get him to come to class. The Student's current specialized instruction hours in the April 2010 does not offer the least restrictive environment and is not appropriate for the Student. The Student requires 15 hours a week of specialized instruction in an inclusion setting so he can receive educational benefit. The Student needs the extra hours to allow him to excel because he has shown no substantial gains since elementary school. Reducing the specialized instruction hours may allow him to finish sooner high school; but it would just be a "pass through". The Student needs academic remediation; however to provide him a full time specialized instruction is premature because that cannot be determined until he starts attending classes and participating in the IEP. The Student requires intervention strategies that include meeting with counselors, information to be broken down into segments, assignments to be more manageable, and all the strategies included in the Student's IEP. The IEP goals are not realistic; it requires the Student with third grade level performance to do grade level work and it is not likely to be successful. The Student's success depends on many factors including his attendance to class. The Student may have missed two months of services of 7 hours of specialized instruction in the inclusion setting and 7 hours out of general education yet he only attended 10 days of classes during the period claims; making his request for compensatory education services excessive.¹⁶
- j. At an April 2010 meeting for the Student a compensatory education plan was discussed and in May 2010 the parties agreed the Student will be provided 75 hours of tutoring in reading, and 75 hours in Math, and two online high school credit courses. In the case of the Student he is behind his peers academically; but because of his disability he will not progress any further. The Petitioner's current proposed compensatory education plan and requests more hours of services than the days the Student

¹⁴ Testimony of the

¹⁵ P11, April 21, 2010, Meeting Notes.

¹⁶ Testimony of the DCPS psychologist.

attended classes; because period to consider is from May 26, 2019 through June 22, 2010 the last day of class. A calculation of hour per hour of services as suggested by the Petitioner would be 19 days with 15 hours of specialized instruction, would equal 3 hours per day of specialized instruction in an out of the general education setting for a total of 57 hours; however an hour for hour calculation which is not appropriate. It is estimated that 30 hours of tutoring usually provide the equivalent of one year in academic progress. The Respondent's proposed 5 hours of specialized instruction in the area of reading and math because the Student only had 19 days of classes and is already entitled to 150 hours of tutoring.¹⁷

- k. The Student received a compensatory education award of 150 hours for the time period of September 2009 to April 21, 2010. Currently it is being requested for the period between April 21, 2010 and June 22, 2010. The Petitioner's proposed compensatory education award was calculated based on 43 days of school, when the Student should have received 15 hours of specialized instruction outside of the general education, equaling a total of 120 hours specialized instruction, and requests an additional 60 hours to increase his knowledge with the on-line courses. The amount of recommended compensatory education hours should be 20 in Reading, 20 in Math, and 20 in Written Expression for a total of 60 hours.¹⁸
- l. The Student was accepted into the _____ School in Annandale, Virginia which offers individual and group services integrated sessions in the classroom to students with emotional disturbance, specific learning and intellectual disabilities, and other health impairment. The Student will be in a class of 9 students with 1 teacher and a teacher assistant. The school has Career Education, Behavioral Specialists, Reading Specialist, and other related services staff. The vocational training staff help the students gain career experience, and there is a Kitchen in the school along with community based experiences and job shadowing. The tuition is approximately _____ per year plus the cost of the related services. The school can only provide a full-time specialized instruction with no individualized attention.¹⁹

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The IDEIA and the District of Columbia laws require the Respondent 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.²⁰ The applicable regulations 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)."²¹

Burden of Proof

¹⁷ P16, April 21, 2010, Petitioner's compensatory education plan, and R24, May 26, 2010, Respondent's proposed compensatory education plan and the testimony of the OSE Program Coordinator.

¹⁸ Testimony of the Education Advocate.

¹⁹ Testimony of the Private school representative.

²⁰ 20 U.S.C. § 1400(d)(1)(A). and 5 D.C.M.R. § 3000.1 (2007)

²¹ 34 C.F.R. § 300.17

The burden of proof is the responsibility of the party seeking relief, in this case the Student. 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.²²

FAPE Determination

In assessing whether a FAPE has been provided, a court must determine whether (1) the school complied with the IDEIA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the Student to receive educational benefits.²³ The Respondent has not met its legal obligation under the IDEIA, and below is why.

Individualized Education Program

The Petitioner alleged the current IEP is not appropriate because the majority of the goals are not specific to his needs, have no baseline, the hours of specialized instruction are insufficient, and the transition plan does not take into account his abilities, functioning level or prepare him for independent living.

The IDEIA requires that local and state education agencies, make certain that the Student's IEP contain 1) a statement of the student's measurable annual goals, 2) a description of how the student's progress toward meeting the annual goals will be measured, and 3) any statement of the special education needs and related services and supplementary aids for a student to advance properly toward attaining the annual goals.²⁴

Additionally, the Student is _____ years of age; his IEP must include a transitional services plan. Consistent with the IDEIA regulations²⁵ that plan must include:

- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
- (2) The transition services (including courses of study) needed to assist the child in reaching those goals.

The IDEIA and its regulation are clear about what constitute transition services. It states, (a) transition services means a coordinated set of activities for a child with a disability that: Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; Is based on the individual child's needs, taking into account the child's strengths,

²² 5 D.C.M.R. § 3030.3.

²³ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982); and *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 16 (D.D.C. 2008).

²⁴ 20 U.S.C 1412 (a)(1) et.al, 1414(d)(3), (4)(B), and (7) and 1414(e).

²⁵ 34 C.F.R. §300.320(b)

preferences, and interests; and includes--²⁶

- (i) Instruction;
- (ii) Related services;
- (iii) Community experiences;
- (iv) The development of employment and other post-school adult living objectives; and
- (v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.²⁷

The Student's IEP does not include specific individualized strategies for the Student who is years of age. The transition plans fails to include approaches that will assist him in the acquisition of daily living or post school activities. The IEP is inappropriate because the Student is significantly below grade level and requires individualized instruction in all academic area. Meanwhile, the Respondent reduced specialized instruction hours

The DCPS did not meet its statutory obligations. The goals on the Student's IEP failed to provide baseline, specific attainable benchmarks, and does not explain how a third grade functioning student will achieve grade work. The evidence was the Student requires specialized instruction in all academic areas for not less than 15 hours of specialized instruction. The Student's transition plans must include the development of employment and other post-school adult living objectives, acquisition of daily living skills designed for his particular needs and abilities; and fails to include the amount of minutes with a special education teacher.²⁸

The Petitioner proved that his current IEP which is the foundation of his educational program is defective because the specialized service hours were reduced and it appears to fit the program the school has for achieving a high school diploma; yet it does not address the Student's academic functioning. The Petitioner proved that the Student's IEP was not calculated to provide an educational benefit.²⁹

Educational placement

The Petitioner claimed he requires an educational program that places emphasis on his vocational and full time specialized instruction needs, and that the DCPS educational placement offered on April 23, 2010, does not address his specific needs.

The IDEIA obligates the Respondent to make placement decisions for children with disabilities on an individual basis, based on the unique needs of each child, 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. Additionally, the local public education agency shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP.³⁰

Each public agency must ensure to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the

²⁶ 34 C.F.R §300.43

²⁷ 20 U.S.C. 1401(34); and 5 D.C.M.R. § 3001.

²⁸ Testimony of the Program Coordinator for Transition Services, DCPS.

²⁹ 20 U.S.C. 1401(34); and 5 D.C.M.R. § 3001.

³⁰ 34 CFR §300.116(a)(1), and 5 D.C.M.R. § 3013.1(e).

nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.³¹

The law requires the Respondent as the local public education agency to ensure that a continuum of alternative placements *is available* to meet the needs of children with disabilities for special education and related services [emphasis added]. This continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services such as resource room or itinerant instruction, to be provided in conjunction with regular class placement.³² The IDEIA obligates the group that makes the placement decision to do so in conformity with the least restrictive environment provisions (LRE).³³

The Complaint alleged the Petitioner's educational placement is inappropriate because he requires a full time specialized instruction program in a special education setting as opposed to the general education or inclusion setting. The Student however when asked by the Hearing Officer testified that he wants individualized services and not a full-time special education program.

The Respondent has a statutory obligation to implement the hours of specialized instruction through an appropriate placement and in this case it chose to provide the Student in an inclusion setting with a reduction of hours outside the general education group. Inclusion is undefined in the IDEIA itself or by the United States Department of Education (ED). However, it is generally understood as the placement of a child with a disability with his or her chronological age peers in a regular education class.

"In implementing IDEA's LRE provisions, the regular classroom in the school the student would attend if not disabled is the first placement option considered for each disabled student before a more restrictive placement is considered. If the IEP of a student with a disability can be implemented satisfactorily with the provision of supplementary aids and services in the regular classroom in the school the student would attend if not disabled, that placement is the LRE placement for that student. However, if the student's IEP cannot be implemented satisfactorily in that environment, even with the provision of supplementary aids and services, the regular classroom in the school the student would attend if not disabled is not the LRE placement for that student."³⁴

At the DCPS the Student was not receiving specialized instruction in Math, he did not attend classes; he spent most time in school at the classroom of the football coach and there was no strategy in his IEP to address the problem. The evidence including the testimony of the Respondent's expert witness was that the Student requires additional specialized instruction and job training services; there was insufficient evidence to show that he requires a full-time specialized instruction program. There merely was a statement in an evaluation stating that the Student "may benefit from a full-time program". Furthermore, it is necessary for the Student who is currently entitled to 150 hours of tutoring in Reading and Math, and who has not coordinated the tutoring sessions on a regular bases, to begin participating in the services and programming to allow proper assessment of what progress if any the IEP is providing him.

This Hearing Officer determines it was demonstrated the Student requires that his specialized instruction hours be increased to 15 hours; the distribution of which will be decided by the IEP/MDT after

³¹ 34 CFR §300.114(a)(2).

³² 34 CFR §300.115.

³³ 34 CFR §§300.114-300.118.

³⁴ See: OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994),

a discussion that includes what is needed for the Student to also achieve a high school diploma and if that can be met in the inclusion setting. After the modifications are made to the IEP the IEP/MDT will also discuss the appropriateness of the current DCPS educational placement.

Petitioner's choice for placement at the _____ School is a full time special education private school outside of the District of Columbia, with no opportunity for him to interact with disabled peers. The request is contrary to the IDEA and its implementing regulations³⁵ consistent with implementing the Act's strong preference for educating children with disabilities in regular classes with appropriate aids and supports. The choice also appears in conflict with what the adult student in this case truly wants, per his testimony.

Additionally, the District of Columbia Code imposes a strict order of priority for special-education placement: "(1) DCPS schools or District of Columbia public charter schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia."³⁶ the private school chosen by the Petitioner is in the state of Virginia, and there was no explanation on why the Petitioner should be allowed to override the order of priority.

Compensatory education award

The Respondent has denied the Student a FAPE. The Respondent's violations entitle the Petitioner to a compensatory education award determination to be made by the Hearing Officer. When there is a denial of FAPE a compensatory award should be granted.³⁷

The law requires the Petitioner to demonstrate the Student's specific educational deficits resulting from a loss of FAPE and the specific compensatory measures needed to best correct those deficits, if any.

"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 (2005) the D.C. Circuit held, with respect to compensatory education, that, "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." The Court rejected arbitrary approaches to the award of compensatory education.

At the hearing for purposes of establishing whether compensatory education is warranted, and if so, what type and amount of compensatory education is most appropriate. The Petitioner has an obligation *inter alia* to argue the reasonableness of the amount of compensatory education requested and how the hours would be integrated into the Student's current educational program.

³⁵ 20 U.S.C. 1412(a)(5), and 34 CFR §§c 300.114 through 300.118,

³⁶ D.C. Code § 38-2561.02(c) (2007).

³⁷ *Mary McLeod Bethune Day Academy Public Charter School v. Bland Civil* Action No. 07-1223 (D.D.C. February 20, 2008)

The evidence to establish a compensatory education award consisted of the testimony of the education advocate who reviewed the Student's report cards, educational records, spoke to the Student and testified that the relevant period for the alleged missed services was from April 21, 2010 through June 22, 2010, the last day of school. At the Hearing she recommended the amount of compensatory education hours should be 20 hours in Reading, 20 hours in Math, and 20 hours in Written Expression for a total of 60 hours. However, the Petitioner presented a plan based on 120 hours of specialized instruction for approximately 8 weeks.³⁸ However, the witness failed to sufficiently support – under the standards of Reid, what the compensatory plan would consist of, and what program, if any, would be used to get the Student to where he should be. Furthermore, there was insufficient evidence to demonstrate where academically the Student is as compared to where he should be. Additionally, providing the Petitioner with more individualized attention when he is not assessing the tutoring services currently provided and when he did not address the large number of absences he has from classes, how he will modify his conduct to allow him to start achieving educational progress, would not be fruitful.

The Reid decision demands substantial evidence of a link between the compensatory education sought and the expected educational benefit. The Petitioner had to offer an informed and reasonable exercise of discretion regarding what services the Student needs to elevate him to the position he would have occupied absent the school district's failures." The Petitioner failed to provide the Hearing Officer with the fact specific requirements establish in the Reid.

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).

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby:

ORDERED, the Respondent will schedule a MDT/IEP meeting by October 1, 2010, for the purpose:

- a. Prepare with the Petitioner and the parent's input an IEP that includes a transition plan and goals to address the discrepancy between the Student's capacity and academic programming;
- b. Include in the IEP one hour a month of assistance in reading and preparing job applications and other work skills linked to Petitioner's abilities and interest;
- c. Increase the Student's specialized instruction hours to 15 hours; the distribution of which will be decided by the MDT after a discussion that includes what is needed for the Student to also achieve a high school diploma and if that can be met in the inclusion setting;
- d. Provide the Student a Behavior Intervention Plan with a strategy to address truancy and identify the responsible DCPS personnel who will follow-up regularly with the Student.
- e. Make a placement determination for the 2010-2011 school year;
- f. The advantages and disadvantages with respect to each school must be discussed and put in writing, including any schools proposed by the Petitioner. The Respondent shall provide the Petitioner an explanation for the placement it proposes, and the reasons for the proposal shall be included in the Meeting Notes. The Respondent shall have five school days to issue a prior notice of placement to a DCPS school, and 20 school days to issue a prior notice of placement to a non public or private school,

³⁸ P15, Compensatory education plan July 31,2010.

- g. The Respondent will document all discussion pertaining to the development of the revised IEP for the Student;
- h. The Respondent will also document all efforts made to obtain the participation of the Guardian and Student in the IEP/MDT meeting; **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. The Respondent shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives, **it is further;**

This order resolves all matters presented in the Petitioner's July 1, 2010, due process hearing complaint; and the Hearing Officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: September 9, 2010



Wanda I. Resto Torres- Hearing Officer