

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

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

[STUDENT],¹
through the Parent/Guardian,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 9/12/11

Hearing Officer: Seymour DuBow

DCSE
STUDENT HEARING OFFICE
2011 SEP 12 PM 4:05

HEARING OFFICER DETERMINATION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

This case was remanded to the Student Hearing Office by the United States District Court for the District of Columbia in Civil Action No. 09-2130 on March 23, 2011 to craft a appropriate compensatory education remedy and order appropriate tests, including an FBA, for the student. This hearing officer was appointed on the remand issue. On April 12, 2011, the first pre-hearing conference was held in the above matter and the prehearing Order issued on April 19, 2011 required DCPS to conduct a comprehensive psychological evaluation, a speech and language evaluation, an occupational therapy evaluation and a Functional Behavior Assessment for purposes of gathering current information on the student to determine the issue of compensatory education. On June 7, 2011, counsel for respondent DCPS sent copies of the completed evaluations to this hearing officer and counsel for petitioner. On that date, counsel for

¹ Personal identification information is provided in Appendix A.

DCPS and counsel for petitioner agreed to a July 19, 2011 date for the due process hearing to present evidence on compensatory education. A second prehearing conference was set for July 11, 2011, but did not take place because counsel for petitioner informed this hearing officer that she no longer represented the petitioner and her firm had closed the case. After further discussions, counsel for petitioner in the above court case and counsel for respondent agreed to a July 21, 2011 prehearing conference. At the prehearing conference on July 21, 2011 it was discussed that counsel for petitioner was unable to make contact with the parent and her firm had closed the case. It was further discussed that once the school year started she may be able to make contact with the parent and determine the parent's wishes and possible participation in a hearing. A hearing date of 10 a.m. on August 29, 2011 was therefore set at which time counsels would be available for questions from the hearing officer on the documents previously submitted into the record in the earlier due process hearing in 2009 and the above cited court action and the current evaluations completed by DCPS on the issue of compensatory education. Counsel for respondent DCPS stated she would present no witnesses and counsel for petitioner in the court action said she would make herself available for questions, but would not present any witnesses. A prehearing Order was issued on July 22, 2011.

Roberta Gambale,
counsel for the petitioner in the previous due process hearing of August 5, 2009 and the appeal to the U.S. District Court and Laura George, counsel for DCPS participated in the hearing. No witnesses were called. Pursuant to the pre-hearing Order of July 22, 2011 this hearing officer asked questions to counsel on crafting an appropriate compensatory education remedy ordered by the Court on remand to this hearing officer. Ms.Gambale stated she has sent certified letters

to the parent informing her of this proceeding as well as several telephone calls and never received a response from the parent. Both counsel provided this hearing officer with requested documents. Ms. Gambale provided documents from the August 5, 2009 due process hearing labeled -1- -27. Counsel for respondent Ms. George provided the recent evaluations ordered by this hearing officer that are labeled R-1- the DCPS psychological evaluation dated June 1, 2011, R-2-the DCPS Speech and Language Re-evaluation dated May 26, 2011, R-3-the DCPS Occupational Therapy Assessment dated May 16, 2011, R-4-the DCPS Functional Behavior Assessment, R-5-the student's current April 14, 2011 IEP, R-6- last school year's IEP dated February 26, 2010, R-7- the March 25, 2011 student report card and R-8- the IEP Progress Report for the 2010-2011 School Year, and R-9 the comprehensive independent psychological evaluation of October 18, 2009 that was provided by Ms. George. Ms Gambale provided the Woodcock-Johnson Tests of Achievement-Third Edition test scores done by DCPS's evaluator Ms. Jackson in her June 1, 2011 comprehensive psychological report that is attached to R-1 and labeled as R-1A and a comparison chart prepared by Ms. Gambale of 2006 and 2011 Woodcock-Johnson Tests of Achievement scores that is labeled DL-28.

JURISDICTION

This hearing process was initiated and conducted, and this decision written, pursuant to the Order of United States District Judge Gladys Kessler in Civil Action No. 09-2130 on March 23, 2011 and the hearing was convened on August 29, 2011 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

FINDINGS OF FACT

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

1. An independent psycho educational evaluation report dated October 10, 2006 recommended based on the results of the assessment that the student should be classified as a learning disabled student. (Ex. 23 at p.6)
2. The student was found eligible for special education services as a student with a specific learning disability on May 18, 2009. (Ex. 19 & 20)
3. The Court in remanding this case found: "Meanwhile, [redacted] lacked access to the special education curriculum from 2006 until the MDT developed an IEP in May 2009, well after the 120-day statutory time period for carrying out Child Find obligations. *See. Id.* at 252-53. Surely one cannot seriously argue that deprivation of special education services for a period of three years has not harmed a child.... [redacted] was located and identified as a potential special education candidate in October 2006, triggering DCPS' Child Find obligations at that time. Thus, Plaintiffs have shown by a preponderance of the evidence that the Hearing Officer's decision was erroneous and that DCPS denied [redacted] a FAPE by delaying determination of [redacted] special education eligibility." At p.16 of Memorandum Opinion
4. The student's current IEP of April 14, 2011 states that the student's primary disability is a specific learning disability. The current IEP provides for eight hours per week of specialized instruction in the general education setting, thirty minutes a week of

behavioral support services outside of general education and fifteen minutes per month of speech-language pathology. The IEP call for classroom and statewide assessment accommodations of reading of test questions in math, science and composition, repetition of directions, providing calculators, preferential seating, small group testing and location with minimal distractions, flexible scheduling and extended time on subtests. (R-5)

5. The student's IEP of February 26, 2010 called for ten hours per week of specialized instruction in math, reading and written expression outside of general education and thirty minutes a week of counseling outside of general education. The IEP provided the same accommodations for the classroom and statewide assessments as stated in the current IEP. (R-6)
6. The student's Report Card for the 2010-2011 School Year through the third advisory showed the student receiving Fs for each advisory in English, C- for the first two advisories and a C for the third advisory in Algebra MS taught by the special education teacher. He received grades of D+ for the first two advisories and a C- the third advisory in Science. He received grades of a D the first advisory and Fs the second and third advisory in Spanish Humanities. He received grades of C the first two advisories and a D the third advisory in U.S. History. (R-7)
7. Pursuant to the Pre-hearing Order of April 19, 2011 a comprehensive psychological evaluation was conducted by DCPS school psychologist _____ with the student on April 28, May 2, May 5, May 23 and June 1, 2011. The written report was dated June 1, 2011. (R-1) The report noted that a comprehensive psychological dated May 12 2009 found: "Academically, he appeared to achieve at approximately the

upper second to third grade range in reading with spelling skills in the upper fourth grade range.” (R-1 at p.2) the DCPS evaluator, administered the Wechsler Intelligence Scale for Children Fourth Edition (WISC IV) on May 2, 2011 and the student’s Full Scale IQ score is 85. “He scored higher than approximately 16 out of 100 children his age. His general thinking and reasoning skills, as assessed by the WISC IV, are in the Low Average range.” (R-1 at p.6) The student was also administered the Woodcock-Johnson Tests of Achievement-Third Edition. The evaluator found that on Broad Reading, which includes reading decoding, reading speed, and the ability to comprehend connected discourse while reading, the student’s standard score range is 81-86 with a percentile rank range of 10-18 which is within the low average range. The evaluator found: “His overall reading ability is mildly delayed. [Student] will likely continue to require intensive instructional support and targeted interventions in reading.” (R-1 at p. 6) On Broad Math which includes mathematics reasoning and problem solving, number facility, and automaticity, the student’s standard score range from 70-77 with a percentile rank of 2 to 6. The student’s standard score is very low compared to grade peers in math calculation skills. The evaluator found: “[Student’s] overall mathematics ability is also mildly delayed. Intensive instructional support in math, including targeted interventions, will likely continue to be needed for [student].” (R-1 at p.6) On writing fluency the student’s standard score range was 66 to 77 which is in the low range for his grade. The evaluator found: “His writing fluency is mildly delayed; speeded writing will require him to have accommodations such as extended time for written projects and tasks.” (R-1 at p.7)The evaluator reported that the student’s special education

inclusion teacher conducted the Behavior Assessment System for Children-Second Edition (BASC-2). The evaluator reported that the student's "BASC-2 profile indicates significant problems with Learning Problems, Hyperactivity and Attention Problems." (R-1 at p.9) The report states the student is experiencing problems with the following behaviors: leaving seat, not waiting for turn, having poor self-control and being overly active and the attention problems of not listening well, staying focused and paying attention. The evaluator concluded that the student's "general cognitive ability, as estimated by the WISC-IV, is in the Low Average range. [Student's] general verbal comprehension abilities were in the Average range (VCI=91), and general perceptual reasoning abilities were in the Low Average range (PRI=88). Based upon the results of the Woodcock Johnson Tests of Achievement-Third Edition, Form B, [student's] achievement, as measured by a brief set of tests, is in the low average range for his grade. [Student's] fluency with academic tasks is within the low range. When compared to others at his grade level, [student's] standard scores are low average in broad reading and brief reading. His broad mathematics and brief mathematics scores are in the low range. The student received a standard score of 84 with a percentile rank of 14 in Broad Reading and a standard score of 73 with a percentile rank of 4 in Broad Math. (R-1A) His standard score is very low (compared to grade peers) in math calculation skills. Additionally, the BASC-2 supports significant learning difficulties and concern that his behavior should be monitored." (R-1 at p.11) The evaluator recommended that a mentor could be assigned to provide support for student in the school environment. Instructional recommendations and interventions included providing reading instruction within the late fourth grade to

middle sixth grade range and with math instruction presented within the early fourth grade to middle fifth grade range that “will likely produce the greatest gains for [student].” (R-1 at p.16)

8. A comprehensive psychological evaluation was conducted on the student in a report dated May 12, 2009. 25) A WISC-IV assessment of cognitive abilities determined that the student falls in the below average range, based on his WISC-IV Full Scale IQ score of 84, with a Verbal Comprehension Index score of 89 (Low Average), and a Perceptual Reasoning Index score of 94 (Average). -25 at p.2) The Wechsler Individual Achievement Test-Second Edition (WIAT-II) was administered and the student had a standard score of 82 and a percentile rank of 12 in reading and a standard score of 86 and percentile rank of 18 in mathematics. 25 at p.3) The document was missing pages six to eleven which was noted in the following October 18, 2009 psychological evaluation.
9. An independent comprehensive psychological evaluation was conducted on the student on September 15 and 21, 2009 and the report written on October 18, 2009 by Dr. Nancy Heiser and Dr. Maria Zimmitti. (R-9) Using the WISC-IV, the evaluator found that the student’s full scale IQ was 80 which is in the low average range. The student’s academic achievement levels in reading, math, and written language were evaluated using the Woodcock Johnson-III, the GORT-4, and the TOWRE. On the WJ-III, the student’s reading fluency standard score was 83 which is at the 14th percentile with a grade equivalent of 3.6 which is low average and a letter-word identification standard score of 92 which is at the 29th percentile with a grade equivalent of 4.4 which is average and a word attack standard score of 95 which is at

the 36th percentile with a grade equivalent of 4.4 which is average. On the GORT-4 the student's reading comprehension skills were at the 3rd grade level and below average and his oral reading quotient was a standard score of 73 at the 4th percentile which is in the poor range. On the WJ-III the student's math fluency was a standard score of 88, which is the 21st percentile and a grade equivalent of 4.9 which is low average. The student's written language was a standard score of 88 which is the 22nd percentile and a grade equivalent of 4.4 which is low average. (R-9 at p.16) The evaluator diagnosed the student with a Reading Disorder. She recommended individual tutoring by a learning disability specialist for 3-5 hours per week to make gains and further recommended Extended School Year services so that he does not lose skills over the summer. (R-9 at p. 12-13)

10. A comprehensive psycho educational evaluation was conducted on the student in a report dated October 19, 2006. The student's cognitive ability using the WISC-IV assessment was a full scale IQ of 84. The Woodcock-Johnson III Tests of Achievement were conducted on the student and he had a standard score of 88 with a percentile rank of 20 in Basic Reading Skills and a standard score of 96 with a percentile rank of 40 in Broad Math Cluster. -23 at pgs. 9-10)
11. A DCPS Occupational Therapy Assessment was conducted on the student on May 16, 2011 and the evaluator concluded "[Student's] motor, visual perception, and sensory motor skills are functional and adequate in is school environments whereas these skills does not impact his performance to meet academic-based goals and objectives." (R-3 at p.10)

12. A speech and language re-evaluation was conducted by DCPS with the student on May 26, 2011. The evaluator found that “On the Clinical Evaluation of Language Fundamental (CELF-4) [student] obtained a Core Language score of 81. His expressive language standard score was 77, and his receptive language score was 96. His expressive language score indicates that his expressive skills are in the moderately low range of functioning. On the measure of receptive vocabulary [student] displayed a mild delay. On his expressive vocabulary [student] displayed a moderate delay... [Student] has strengths in the following areas: voice, articulation, fluency, formulation of sentences, and the understanding of spoken information. [Student] has difficulty with the following recalling and reproducing sentences of varying length and syntactic complexity, understanding relationships between words that share a variety of functional and conceptual relationships, expressive vocabulary and receptive vocabulary development. [Student’s] difficulties in the areas recalling facts/details, vocabulary development, understanding relationships between words that share a variety of functional and conceptual relationships have a negative impact on [student’s] ability to access the curriculum.” (R-2 at p.7) The evaluator recommended several recommendations to be used at school including giving the student extra time to process and respond, adapting assignments for length and complexity and enhancing assignments with visual and contextual support. (R-2)
13. The student is currently attending the _____ grade at _____ School.
(Stipulation of counsel)

DISCUSSION/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 Court in this case decided: "This Court has determined that [redacted] was denied a FAPE due to DCPS' failure to comply with Child Find obligations and conduct necessary evaluations. Therefore, the Court will remand the case to a Hearing Officer to craft an appropriate compensatory education remedy. See *Henry*, ---F. Supp. 2d---, 2010 WL 4568841, at *3." At p.27 The Court found that:

Meanwhile, [redacted] lacked access to the special education curriculum from 2006 until the MDT developed an IEP in May 2009, well after the 120-day statutory time period for carrying out Child Find obligations. See *Id.* at 252-53. Surely one cannot seriously argue that deprivation of special education services for a period of three years has not harmed a child.... [redacted] was located and identified as a potential special education candidate in October 2006, triggering DCPS' Child Find obligations at that time. Thus, Plaintiffs have shown by a preponderance of the evidence that the Hearing Officer's decision was erroneous and that DCPS denied [redacted] a FAPE by delaying determination of special education eligibility." At p.16

The hearing officer can determine the amount of compensatory education that a student requires if the record provides him with sufficient "insight about the precise types of education services [the student] needs to progress." *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 130 (D.D.C. 2008) Findings to assist the hearing officer to tailor the compensatory education award to the student's unique needs should include the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services requested and the student's current educational abilities. *Branham v. District of Columbia*, 427 F. 3d 7 (D.C. Cir. 2005) "[T]he 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." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) This standard "carries a qualitative rather than quantitative focus," and must be applied with "flexibility rather than rigidity." *Id.*

The Court in this case has found, as cited above, there was a three year delay by DCPS in finding the student eligible for special education services that resulted in educational harm to the student. The student's primary disability is a specific learning disability. The June 1, 2011 DCPS comprehensive psychological evaluation, ordered by this hearing officer to determine the student's current functioning, found that on the WISC-IV the student's full scale IQ is 85 which places him in the low average range. This full-scale IQ score is consistent with the 2006 and 2009 psychological evaluations where the student had full-scale IQ scores of 80 to 84. (See Findings of Fact #8, #9 & #10) The June 1, 2011 evaluator administered to the student the Woodcock-Johnson Tests of Achievement-Third Edition, and found the student scored in the low average range for his grade in reading and mathematics. The evaluator's instructional recommendations and interventions included providing reading instruction within the late fourth grade to middle sixth grade range and with math instruction presented within the early fourth grade to middle fifth grade range to produce the greatest gains for the student. Based on this evaluation, the student is performing three to four years below grade level in reading and mathematics.

The student's report card in _____ grade at _____ School showed through three advisories up to March 25, 2011 that the student was failing each advisory in English. The failing grades in English further support the DCPS evaluator's recommendations for intensive

instructional interventions in reading for the student. During the 2010-2011 School Year the student's IEP of February 26, 2010 called for ten hours of specialized instruction per week outside of general education. The student's current IEP of April 14, 2011 provides for eight hours a week of specialized instruction to be provided in the general education setting. The student is currently attending the ninth grade at _____ School. The student will have great difficulty accessing the high school curriculum until his reading and math deficits caused by his learning disability and exacerbated by the three year delay in determining eligibility are addressed.

The record does not include any current expert opinions on how much services the school district should have supplied in the first place. In the absence of that expert testimony, this hearing officer in determining the amount of the award has looked at the following facts in the record: A comparison of the 2006, May and October 2009 and 2011 psychological evaluations shows the student stayed at the same full scale IQ level of 80- 84-85 in the low average range for cognitive ability. On achievement levels, the 2006 psycho-educational evaluation found using the Woodcock-Johnson III Tests of Achievement on the student that he had a standard score of 88 with a percentile rank of 20 in Basic Reading Skills, in the May 2009 evaluation using the WIAT-II the student had a standard score of 82 with a percentile ranking of 12 in reading, in the October 2009 evaluation the student had on the WJ-III a standard score of 83 in reading fluency with a percentile ranking of 14 and a grade equivalent of 3.6 which is low average and in 2011 the student had on the WJ-III a standard score of 84 with a percentile rank of 14 on Broad Reading. In the October 2009 evaluation the student was achieving at approximately the upper third grade range in reading fluency and in the 2011 evaluation he is currently at the late-fourth grade to middle sixth grade level in reading. In the 2006 evaluation using the WJ-III, the

student had a standard score of 96 with a percentile rank of 40 in Broad Math Cluster, in the May 2009 evaluation for math using the WIAT-II the student had a standard score of 86 and a percentile ranking of 18, in the October 2009 evaluation on the WJ-III he had a standard score of 91 with a percentile rank of 28 and a grade equivalent of 4.8 in Broad Math, but on the 2011 WJ-III the student had fallen to a standard score of 73 with a percentile ranking of 4 in Broad Math. The student is currently at the early fourth grade to mid fifth grade level in math. (See Findings of Fact #7-#10) In crafting the compensatory education award, this hearing officer also looked to the recommendations of the psychologists in the October 2009 comprehensive psychological evaluation and the June 2011 comprehensive psychological evaluation and the recommendations of the speech pathologist in the May 2011 speech and language re-evaluation.

Based on the record before me, this hearing officer finds that since the IEP was in place in May, 2009 providing ten hours a week of specialized instruction the student made in reading two to two and half grade levels of improvement up to June, 2011. Taking that progress of two to two and half grade levels in reading in two years into account, this hearing officer calculates the award shall include two hours a week of after school one on one tutoring by a special education teacher for an entire school year in reading and math, which Ms. Gambale stated at the August 29, 2011 hearing was what she requested in the 2009 due process hearing in her compensatory education plan (-20 & -21) and what the student could handle. One-on-one tutoring needs to be provided after school by a qualified DCPS special education teacher working in coordination with the student's current teachers. Both counsel agreed at the August 29th, 2011 hearing, that the tutoring services should be provided by DCPS qualified personnel because of the lack of response from the parent to certified letters and phone calls by Ms. Gambale and the need to provide the compensatory education services now.

In addition to the after school tutoring, the student will also need the 2011 psychological evaluator's recommended intensive instructional interventions in reading and math one class period a day during the school day. The student is also awarded ESY services for the summer of 2012 to continue to provide specialized instruction to meet his deficits and ensure he does not regress over the summer months. (See Findings of Fact #9) The ESY services must include intensive instructional interventions in reading, written expression and mathematics.

The June 1, 2011 comprehensive psychological evaluation also included a BASC-2 profile that indicates significant problems with Learning Problems, Hyperactivity and Attention Problems and a concern that his behavior should be monitored. The evaluator recommended that a mentor could be assigned to provide support for student in the school environment. The student should have available to him a mentor during the school day who can provide support for the student in coping with academic and transition issues.

The speech and language re-evaluation of May 26, 2011 found the student had moderately low range of functioning in expressive skills and a mild delay in receptive vocabulary and a moderate delay in expressive vocabulary. Based on that assessment, this hearing officer finds that a compensatory education award should also include provision of speech and language therapy for 30 minutes a week outside of general education above the 15 minutes a month of speech and language services currently in the student's IEP.

All the above services will provide in totality what the student should have been provided in the first place, *Reid*, 401 F. 3d at 524 and "yield tangible results." *D.W. v. District of Columbia*, 561 F. Supp. 2d 56, 61 (D.D.C. 2008) This compensatory education award is crafted to provide the *Reid* standard's qualitative flexible focus.

ORDER

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

The compensatory education award for the student is that DCPS shall provide to the student one on one tutoring in reading, written expression and mathematics after school for two hours a week by a qualified DCPS special education teacher for the 2011-2012 School Year. DCPS shall also provide one on one tutoring in reading and math for one full class period a day during the school day by a DCPS special education teacher for the 2011-2012 School Year. The special education teacher shall initially provide reading instruction within the late fourth grade to middle sixth grade range and math instruction within the early fourth grade to middle fifth grade range. The special education teacher shall coordinate with the student's regular teachers on adapting class materials to the student's current reading level. The above tutoring services are to begin five school days after issuance of this Hearing Officer's Determination. DCPS shall provide ESY services for the student for the 2012 summer that includes intensive instructional interventions in reading, written expression and mathematics. DCPS shall provide a qualified DCPS mentor for the student for one hour a week during the school day for the 2011-2012 School Year to begin ten school days after issuance of this Hearing Officer's Determination. A DCPS speech and language pathologist shall provide thirty minutes a week of speech and language therapy services outside of general education for the 2011-2012 school year to begin ten school days after issuance of this Hearing Officer's determination in addition to the fifteen minutes a month of speech and language services currently required in the student's IEP.

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: 9/12/11

Seymour DuBow /s/
Hearing Officer