District of Columbia

Office of the State Superintendent of Education

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OSSE
STUDENT HEARING OFFICE
2010 DEC 27 AM 9:40

Confidential

STUDENT[1], by and through her Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. US District Court for the District of Columbia Civil Action # Remand to Hearing Officer	HEARING OFFICER'S DETERMINATION Hearing Date: November 10, 2010 Representatives: Counsel for Petitioners: Samuel Adawusi, Esq. 4811 Amberfield Way Upper Marlboro, MD 20772 Counsel for DC PCS: Laura George, Esq. 1200 First Street, NW Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

[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* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30, and the Memorandum Opinion and Order issued by the U.S. District Court for the District of Columbia September 29, 2010.

BACKGROUND:

This case originated as a due process complaint filed September 11, 2006, and amended on September 29, 2006. A due process hearing convened on November 29, 2006, and resulted in a Hearing Officer's Decision ("HOD") issued on December 17, 2006. On March 22, 2007, petitioners filed a complaint in the U.S. District Court for the District of Columbia appealing the December 17, 2006, HOD. This case is on remand from the District Court pursuant to Memorandum of Opinion and Order issued September 29, 2010. On remand, a due process hearing was convened November 10, 2010, at the OSSE Student Hearing Office 810 First Street, NE, Hearing Room 2006.

The Courts Memorandum of Opinion and Order directed the Hearing Officer to:

(1) Make further factual findings and determinations regarding whether the student received during her time at School C two hours per week of social emotional counseling as required by her individualized educational program ("IEP");

(2) Make further factual findings and determinations as to whether School D was an appropriate placement under the IDEA and, if so, to order that DCPS reimburse Petitioner for the student's private school tuition at School D during the 2006-2007 school year: and

(3) Determine an appropriate compensatory education so that it is "reasonably calculated to provide the educational benefits" that the student should have received at School C.[2]

Prior to the hearing on remand a prehearing conference was convened November 4, 2010, resulting in a prehearing order ("PHO") issued November 5, 2010. During the pre-hearing conference this Hearing Officer directed Petitioner to include with disclosures a proposed compensatory education plan and the name of any witness who would testify about such a plan. However, there was no written compensatory plan presented with the disclosures or at the hearing. Petitioner's counsel claimed at the hearing that there was insufficient time to prepare such a plan and requested that information in the record and the testimony by the parent and student be used as the basis for a compensatory education determination.[3]

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[2] This Hearing Officer interpreted the Court's remand directive as requiring a compensatory education determination consistent with the standards of Reid v District of Columbia, 365 401 F3d 516 (D.C. Cir. 2005).

[3] Petitioner's counsel did not seek to continue the hearing to allow additional time to prepare a written compensatory education plan.

At the outset of the hearing the parties stipulated to the appropriateness of School D for the student for the 2006-2007 school year. Thus, one issue the U.S. District Court directed the Hearing Officer to decide was resolved with the stipulation and is thus not an issue adjudicated by the Hearing Officer listed below. The stipulation is included in the Findings of Fact and the Order below.

For the first time at the outset of the hearing Petitioner's counsel asserted the student was due compensatory education for missed extended school year ("ESY") services that allegedly should have been provided the student at the conclusion of the 2005-2006 school year. [4]

ISSUES ADJUDICATED:

(1) Whether during her time at School C the student received two hours per week of social emotional counseling as required by her IEP?

(2) Whether Petitioner/Parent is due reimbursement for the student's private school tuition at School D during the 2006-2007 school year? [5]

(3) Determine an appropriate compensatory education so that it is "reasonably calculated to provide the educational benefits" that the student should have received at School C.

(4) Whether the alleged missed ESY services should be included in the compensatory education determination the Court directed the Hearing Officer to make?

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the testimony of the witnesses, the documents submitted in the parties' disclosures (Petitioner's Exhibits 1- 20 and DCPS Exhibits1-11) that were admitted into the record and are listed in Appendix A. In addition, the Hearing Officer considered the arguments made in the parties' briefs filed with this Hearing Officer November 19, 2010.

FINDINGS OF FACT:[6]

1. The student is and currently attends the Community College of the District of Columbia ("CCDC"). In June 2010, the student graduated from School A, a

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[4] At the conclusion of the hearing the Hearing Officer directed each party to submit a post hearing brief on the issue whether the relief sought should include services the student might have missed during the ESY period at the end of the 2005-2006 school year. The parties submitted the post hearing briefs on November 19, 2010. Thus, the issue of whether the student is entitled under this remand to compensation for ESY services is an issue adjudicated by this Hearing Officer in addition to those the U.S. District Court directed be decided.

[5] As noted in the Findings of Fact and the Conclusions of Law Petitioner acknowledged the parent did not pay tuition to School D for any year the student attended and DCPS presented convincing evidence that DCPS paid the student's tuition at School D for the 2006-2007 school year and for all subsequent school years she attended School D.

District of Columbia public high school where she attended from the start of the 2009-2010 school year until her graduation. (Student's testimony)

2. During most of her middle and high school career the student was eligible as a child with a disability in need of special education and related services under IDEA. (Petitioner's Exhibit 4, Student's testimony)

3. At that time of her eligibility determination the student was in the seventh grade attending School B, a District of Columbia Public Charter School. (Petitioner's Exhibit 4)

4. On December 8, 2005, when the student was in the eighth grade, School B convened an IEP meeting and developed an IEP for the student that prescribed the following weekly services: 25.5 hours of specialized instruction and 2 hours of social emotional counseling. Pursuant to the IEP the student was to spend 100% of her time "not in a regular education setting." The Least Restrictive Environment ("LRE") section of the IEP stated "[the student] requires a full-time therapeutic setting that is also academically challenging." The IEP also prescribed ESY services. The student's previous IEP had not prescribed a full time special education setting. (Petitioner's Exhibit 4-1, 4-7)

5. Because School B could not provide the student a full time special education setting, DCPS proposed a placement for the student at a DCPS public middle school, hereinafter called School C. Various participants of the IEP team including the parent expressed concern with the student's placement in the program at School C. The parent and other IEP team members did not believe School C was an appropriate placement for the student. (Petitioner's Exhibit 11-3)

6. The parent through counsel filed an administrative due process complaint against School B and DCPS in February 2006, challenging both the adequacy of the services the student received at School B and the proposed placement at School C. (Petitioner's Exhibit 11-3)

7. In March 2006, the parent dismissed the claims in the due process complaint against School B. On May 8, 2006, a Hearing Officer's Decision ("HOD") was issued concluding that School C "can meet [the student's] behavior and social emotional needs and implement her IEP." The Hearing Officer ordered the student be immediately placed at School C. (Petitioner's Exhibit 11-3, 11-4)

8. The parent attempted to enroll the student at School C on May 9, 2006, in compliance with the May 8, 2006, HOD. The school staff told the parent she could not enroll the student. After conferring with her attorney the parent brought the student back to School C on May 15, 2006, and the school allowed the student to enroll. The student missed an

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[6] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may perhaps only cite one party's exhibit.

additional four days of school as a result of not being allowed to enroll in School C on May 9, 2006. (Parent's testimony)

9. The student completed the remainder of the 2005-2006 school year at School C. While at School C the student was placed in a cluster program where she had a full-time aide. However, while at School C the student did not spend 100% of her time outside of a general education program. (Petitioner's Exhibit 11-4)

10. The student attended School C from May 15, 2006, to June 14, 2006, a total of 22 school days or five weeks. (DCPS Exhibit 11)

11. During the five weeks the student attended School C she was regularly given worksheets that were below her grade level. The student never left her classroom for any specialized instruction in a resource classroom. The student never received any counseling services while she attended School C. (Student's testimony)

12. The student did not receive any ESY services during the summer of 2006. The parent was not aware the student was supposed to receive ESY services. No meeting was ever convened after the December 8, 2005, IEP meeting and prior to summer 2006 to remove ESY services from the student's IEP. No one from DCPS contacted the student or the parent about attending ESY services when the school year ended in June 2006. (Parent's testimony)

13. ESY services during the 2005-2006 school year lasted six weeks. (Stipulation)

14. The student got her first summer job during the summer of 2006. She worked at a DCPS high school and was paid for her work. (Student's testimony, Parent's testimony)

15. DCPS did not convene an IEP team meeting at the end of the 2005-2006 school year to determine an appropriate placement for the student for the 2006-2007 school year. On August 1, 2006, the parent sent DCPS a letter stating that the student had not received an educational placement for the 2006-2007 school year and DCPS had ten days in which to place her or the parent would exercise her right to unilateral placement. When DCPS did not respond within the required time the parent unilaterally placed the student at the start of the 2006-2007 school year at School D, a private full time special education school. (Petitioner's Exhibit 11-4)

16. The parent never appealed the HOD issued May 8, 2006. On September 11, 2006, the parent filed another due process complaint that was amended on September 29, 2006, alleging, inter alia, that DCPS failed to issue a notice of placement for the student for the 2006-2007 school year. (DCPS Exhibits 1-3, 1-4, 2-3, 2-4)

17. Petitioner did not state a claim for ESY services for summer 2006 in her September 11, 2006, complaint or the September 29, 2006, amended complaint. (DCPS Exhibits 1-3, 1-4, 2-3,2-4)

18. On December 7, 2006, a HOD was issued dismissing the September 29, 2006, complaint. (Petitioner's Exhibit 2)

19. In March 2007 Petitioner appealed the December 7, 2006, HOD in the U.S. District Court for the District of Columbia. The Court determined that DCPS had failed to implement the student's IEP at School C as she "did not receive her entire education in an out of general education setting which was a substantial requirement of her IEP." The Court concluded DCPS failed to implement the student's IEP. The Court remanded the case for the Hearing Officer[7] to carry out the directives of the District Court's decision. (Petitioner's Exhibit 11-18, 11-24)

20. After enrolling at School D at the start of the 2006-2007 school year for ninth grade, the student remained at School D through ninth grade, tenth grade and half of her eleventh grade year. The parent never made a payment to School D for the student's tuition in the three years the student attended School D. DCPS paid the tuition for the student's tuition at School D for each of these school years. (Parent's testimony, DCPS Exhibit 7)

21. School D was an appropriate placement (IEP and location of services) for the student for the 2006-2007 school. (Stipulation)

22. On August 27, 2008, the student was exited from the special education program at School D. The student was considered by School D to have mastered her academic and clinical goals and objectives and that "a DC Charter School placement should be explored." (Parent's testimony, DCPS Exhibits 8 & 9)

23. The parent did not agree with the student being exited from special education services. As a result she filed another due process complaint on September 11, 2008. The complaint was eventually settled. Pursuant to the settlement agreement the student was exited from special education and the student was provided compensatory education services in the form of 68 hours of tutoring and 34 hours of counseling.[8] (DCPS Exhibit 10)

24. The student left School D and began attending School E, a DCPS public high school, for two advisories at the end of the 2008-09 school year. The student then attended School A, her neighborhood public high school at the start of the 2009-2010 school year until her graduation in June 2010. The student believes she was provided below grade level work during much of the time at Schools C and D. (Student's testimony, DCPS Exhibit 5)

25. After graduating from high school in June 2010 the student enrolled at CCDC. She is hoping to become a registered nurse. She is struggling with her academic courses at CCDC and feels unprepared. She is having difficulty in English because of the heavy level of writing that is required is the course. The parent believes had the student

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[7] The Hearing Officer who adjudicated the case and issued the HOD is no longer a hearing officer for OSSE and the case was assigned to the current hearing officer to follow the directives of the remand.

[8] The compensatory education awarded was not related to the student's time at School C.

consistently been provided grade level work during her time at School D and the DCPS schools she subsequently attended she would now be better prepared academically. The parent hopes that compensatory education will be awarded to include tutoring and a computer. The student is not always able to always use the computers at CCDC because of her schedule demands. (Parent's testimony)

26. The student currently taking the following courses at CCDC: Developmental Math, Ethics, English and Foundations of Education. The student finds it difficult to complete required term papers in her courses as she does not know how to complete a term paper and was not provided that training while at School E or School A. (Student's testimony)

27. As compensatory education the student is hoping to be provided a tutor to assist her in developing her abilities to complete term papers and improve her writing. Additionally, she would like a computer to assist her in getting these assignments completed. The student's primary reason for requesting a computer is because she does not have one of her own and finds it difficult and inconvenient to use the computers at her community college. (Student's testimony)

CONCLUSIONS OF LAW:

Issue (1): Whether the student received during her time at School B two hours per week of social emotional counseling as required by her IEP?

The student's IEP, that was to be implemented while she was at School C, prescribed 2 hours of counseling per week. The student credibly testified that she did not receive any counseling services while she attended School C from May 15, 2006, to June 14, 2006. DCPS presented no evidence to the contrary. The parent also credibly testified she attempted to enroll the student at School C one week prior to May 15, 2010, and was not allowed to do so by School C staff. This Hearing Officer concludes that as a result of the student not being allowed to enroll on May 9, 2006, the student missed an additional four school days or one week prior to her start at school C on May 15, 2006. This Hearing Officer concludes, therefore, the student was in inappropriate program and missed services at School C for six weeks and thus missed a total of 12 hours of counseling services during that period.

Issue (2): Whether Petitioner is due reimbursement for the student's private school tuition at School D during the 2006-2007 school year?

The parties stipulated that School D was an appropriate placement for the student for the 2006-2007 school year. There was credible testimony from the parent that she never paid tuition to School D and evidence presented by DCPS that proved DCPS paid the tuition to School D directly. Thus, the Hearing Officer concludes Petitioner is due no tuition reimbursement for the student's attendance at School D for the 2006-2007 school year.

Issue (3) Determine an appropriate compensatory education so that it is "reasonably calculated to provide the educational benefits" that the student should have received at School C.

The evidence of this case (coupled with the conclusion by this Hearing Officer that the student's missed services at School C should be measured from May 9, 2006) demonstrates the student missed twelve hours of counseling services while at School C and spent six weeks in an inappropriate educational program. 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." 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. Reid v District of Columbia, 365 401 F3d 516, 526 (D.C. Cir. 2005).

Determining an appropriate compensatory education is often difficult and speculative. This difficulty was made no easier in this case by the absence of sufficient evidence presented by Petitioner's counsel. Petitioner has provided little if any guidance to this Hearing Officer in fashioning an appropriate compensatory education award.

First, Petitioner did not comply with the requirement in the PHO to submit a written proposed compensatory education plan with the disclosures for the hearing. The proposed plan was for the express purpose of putting both DCPS and this Hearing Officer on notice as to the level of services Petitioner would be claiming the student missed and the amount and form of compensatory education Petitioner deemed appropriate to put the student in the place she would have been had she been provided the missed services. This would have allowed for adequate preparation in evaluating the validity and appropriateness of the proposed plan. In addition, Petitioner waited until the hearing to make a demand for missed ESY services. The Court's order on remand makes no mention of missed ESY services.

Second, Petitioner's counsel asserted at the hearing that student should receive one hour of tutoring for each hour of services missed.[9] Petitioner's counsel asserted during the hearing the student was denied six weeks of service while at School C, measured from the date the parent attempted to enroll the student at School C on May 9, 2006, until the end of the official school year on June 14, 2006.

Third, Petitioner's counsel in the post hearing brief asserted a second measure of compensatory education. Petitioner's counsel asserted the student should receive compensatory education in the amount of two times the missed hours of services for a total of 660 hours of independent tutoring services.[10]

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[9] At hearing Petitioner's counsel outlined the requested compensatory education, apparently not including the alleged missed weeks of ESY. Petitioner's counsel asserted that in the six weeks of denial the student was to receive 27.5 hours of specialized instruction and related services at School C – equal to 165 total hours she was denied. According to Petitioner's counsel 165 hours times $65 per hour (DCPS' approved rate for independent tutoring) equals a total award worth $10,725. Petitioner's counsel stated the student would prefer to use that dollar amount for tutoring and a portion of that amount for a laptop computer with the software needed for remedial classes at an approximate cost of $2000.

[10] Petitioner urged the Hearing Officer in the post hearing brief to determine that for every hour of special education and related services denied the student she be awarded two (2) hours of independent tutoring services as compensation. Based on the December 8, 2005, IEP of 27.5 hours per week, Petitioner's counsel asserted for the

Petitioner failed to present evidence that demonstrated a nexus between the compensatory education requested and the educational benefits the student would have accrued had she not missed the services. To the contrary, the requested compensatory education of 165 hours of tutoring at the hearing and 660 hours requested in the post hearing brief (one hour for every hour missed and two hours for every hour missed respectively) are both the types of cookie cutter approach to compensatory education that Reid prohibits.

Determining appropriate compensatory education in this case is further complicated by the facts that transpired in the four years since the student was at School C. Subsequent to attending School C the student attended a private full time special education placement for three school years with LEA funding. She was exited from special education in 2008 and received compensatory education in the form of tutoring following that exit. She then attended two different DCPS high schools and ultimately earned a high school diploma in June 2010. After high school graduation the student enrolled in the local community college. The student's efforts in completing high school and entering college are commendable. She acknowledges, however, she is now struggling academically in her college courses and recognizes she is unprepared for the academic rigors of college.

The only evidence that offered in this case as to what would compensate the student for the loss was the student's testimony, bolstered by that of the parent, that the student is struggling in her current college level courses and believes tutoring would assist her.[11] However, the student could not say that her missed services at School C alone attributed her current academic difficulties as opposed to overall the middle school and high school education she obtained. This evidence presented by Petitioner does not meet the standards set forth in Reid.

This Hearing Officer must reject both calculations of compensatory education offered by Petitioner's counsel because this "cookie- cutter" approach "runs counter to both the 'broad' discretion afforded by [the] IDEA's remedial provision and the substantive [free and appropriate public education] standard that provision is meant to enforce." Reid, 401 F.3d at 523.

As the U.S. District Court for the District of Columbia pointed out in another recently remanded case if the plaintiff on remand failed to meet this obligation of presenting evidence that would allow the Hearing Officer [or the Court] to properly craft a compensatory award that comports with the IDEA and the standard created by Reid and its progeny, or if the Hearing Officer finds that [the student's] subsequent placement at a school mitigated the detrimental effects resulting from the denial of a free and appropriate public education, then the Hearing Officer is free to determine that no compensatory services can be awarded or that the award proposed by the

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alleged six weeks she attended School C and the six weeks she should have received ESY services (165 hours for each six week period) amounted to a total of 330 hours of services the student missed. (330 hours X 2 = 660 hours of compensatory services). Thus, Petitioner requested a total amount of compensatory education of Six Hundred and Sixty (660) hours. "Wherefore, the Petitioners pray the hearing officer to order that the award be used to fund 1) private independent tutorials for student; 2) buy a laptop with various academic courses' software; and 3) pay part of her tuition at D.C. Community College, so that she can perform well and make better progress "towards self-sufficiency."

[11] In addition to independent tutoring Petitioner requested she be provided a computer.

plaintiff should be modified. (Phillips v. District of Columbia D.D.C. (September 13, 2010)) Pursuant to Reid and its progeny including the case cited above, this Hearing Officer would be justified in awarding no compensatory education services at all based on the lack of evidence presented.

However, in light of the fact that the plaintiff has demonstrated a denial of services, this Hearing Officer is not prepared to shut the door on her claim for relief. Case law allows for equity to prevail and for the fundamental purposes of IDEA to be met: for a child to be provided a free and appropriate public education. It is a fundamental principle that compensatory education is an equitable remedy, and this Hearing Officer concludes equity would be disserved if this Petitioner were to given nothing for the twelve hours of counseling she was not provided and the six weeks she was in an appropriate placement at School C in 2006. Thus, since the student has indicated the difficulty she currently has is in writing term papers and mastering her current level of college courses, the Hearing Officer will grant as equitable and reasonable relief a total of 30 hours of individualized tutoring to the student.

Issue (4): Whether the alleged missed ESY services should be included in the compensatory education determination the Court directed the Hearing Officer to make?

As defined by 34 C.F. R. § 300.106(b) ESY means special education and related services that are provided to a child with a disability i) Beyond the normal school year of the public agency; ii) In accordance with the child's IEP; and iii) At no cost to the parents of the child; and 2) meet the standards of the SEA." Based on the student's December 8, 2005, IEP, the IEP team determined that ESY services were a necessary component of her IEP.

Pursuant to 34 C.F. R. § 300.106(a)(3), the SEA is prohibited from either limiting, or unilaterally limiting – (i) extended school year services to particular categories of disability; or (ii) the type, amount, or duration of those services.

The student's IEP that was to be implemented at School C clearly prescribed ESY services. The student credibly testified the she received no ESY services during the summer of 2006. There was also credible testimony from the parent there was no IEP meeting during the time the student attended School C to amend her IEP and/or determine that the student was ineligible for ESY services in the summer of 2006.

However, Petitioner's counsel for the first time at the November 10, 2010, hearing asserted the student should be awarded compensatory education for ESY services she should have received during summer 2006. As DCPS counsel apply pointed out in her post-hearing brief the claim for ESY services was not raised in Petitioner's September 11, 2006, complaint or the September 29, 2006, amended complaint, and was apparently not raised in the November 29, 2006, hearing as it was not addressed in the December 7, 2010, HOD that was appealed. Petitioner did not raise ESY services in either prehearing conference for the hearing on remand and ESY services was not mentioned in the District Court's opinion or order.

The District Court in its remand directed this Hearing Officer to make further factual findings and determinations regarding whether the student received during her time at School C two hours

per week of social emotional counseling as required by her IEP; (2) make further factual findings and determinations as to whether School D was an appropriate placement under the IDEA and, if so, to order that DCPS reimburse Petitioner for the student's private school tuition at School D during the 2006-2007 school year, and (3) determine an appropriate compensatory education so that it is "reasonably calculated to provide the educational benefits" that the student should have received at School C.

This Hearing Officer concludes that the remand order is specific and did not direct the Hearing Officer to consider whether the student missed additional services not mentioned in the Court's Memorandum and Order. Accordingly, this Hearing Officer concludes the alleged missed ESY services should not be included in the compensatory education determination the Court directed the Hearing Officer to make and this Hearing Officer has thus excluded ESY services from the compensatory education determination above.

ORDER:

1. DCPS shall provide the student 30 hours of independent tutoring (at the DCPS approved rate) as compensatory education for the twelve hours of missed social emotional counseling and for the student having not been in an inappropriate placement at School C from May 9, 2006, to June 14, 2006.

2. School D is determined to have been an appropriate placement for the student for the 2006-2007 school year.

3. The parent is due no reimbursement for the student's tuition at School D for the 2006-2007 school year as the tuition was paid directly to School D by DCPS.

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. § 1415(i)(2).

Coles B. Ruff, Esq.
Hearing Officer
Date: December 24, 2010