

**District of Columbia
Office of the State Superintendent of Education**

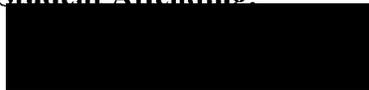
**Office of Review and Compliance
Student Hearing Office**

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STATE SUPERINTENDENT'S OFFICE

Confidential

STUDENT, through the legal guardian¹)	Complaint Filed: October 23, 2009
)	
Petitioner,)	Prehearing Order: November 24, 2009
)	
v.)	Hearing Date: December 7, 2009
)	
THE DISTRICT OF COLUMBIA)	Docket Nos. 2009-1442
PUBLIC SCHOOLS)	
)	
Respondent.)	
)	
Student Attending:)	
)	

HEARING OFFICER'S DECISION

Counsel for Petitioner: Roberta Gambale, Esquire
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Counsel for DCPS: Daniel McCall, Esquire
Office of the General Counsel, DCPS
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¹ Personal identification information is provided in Appendix A.

Jurisdiction

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 (“IDEIA”), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia (“District” or “D.C.”) Municipal Regulations (“DCMR”); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

Background

Petitioner is a seventeen year-old student attending [REDACTED] School [REDACTED]. On October 23, 2009, Petitioner filed a Due Process Complaint Notice (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) had failed to provide transportation on a consistent basis. In a Prehearing Order on October 26, 2009, the Hearing Officer determined the issue to be adjudicated as follows:

- DCPS’ failure to provide transportation

Petitioner alleges that DCPS has not consistently provided Petitioner transportation during the 2009-2010 school year. DCPS concedes the failure to provide transportation consistently and stipulates its willingness to reimburse the parent for expenses incurred providing Petitioner’s transportation to Pathways. DCPS asserts that there has been no educational harm as a result of its failure to provide transportation; the transportation failures have primarily affected English class in which Petitioner is receiving good grades.

Neither party requested a modification of the Prehearing Order. The due process hearing was convened on December 7, 2009. The parties’ Five-Day Disclosures were admitted into evidence at the inception of the hearing except for Petitioner’s Exhibit number 6.²

Record

Due Process Complaint Notice dated October 23, 2009
District of Columbia Public School’s Response, Notice of Insufficiency, and Motion to Dismiss Petitioner’s Due Process Complaint Notice dated November 2, 2009
Due Process Complaint Disposition dated November 9, 2009
Response to DCPS’ Motion to Dismiss dated November 9, 2009
Prehearing Order dated November 24, 2009

² Upon DCPS’ objection to the exhibit, the Hearing Officer deferred ruling on the admissibility of Petitioner’s Exhibit (“P.Exh.”) No. 6. Petitioner’s counsel did not offer the document into evidence later in the hearing; therefore, it was not admitted into evidence.

Petitioner's Five-Day Disclosure dated November 24, 2009 (Exhibit Nos. 1-5, 7-8)

DCPS' Five-Day Disclosure dated November 30, 2009 (Exhibit Nos. 1-3)

Attendance Sheet for hearing conducted on December 7, 2009

Witnesses for Petitioner

Petitioner's Mother

██████████ Compensatory Education Provider
██████████ Special Education Teacher, Pathways School

Witnesses for DCPS

None

Findings of Fact

1. Petitioner is a seventeen year-old student who has attended ██████████ since the beginning of the 2007-2008 school year.³

2. At ██████████, Petitioner receives 30 hours of specialized instruction per week, 90 minutes per week of behavioral support services, and one hour per week of speech-language services.⁴

3. Petitioner receives bus transportation to and from ██████████ from DCPS.⁵ Between the beginning of the 2009-2010 school year and October 2, 2009, Petitioner missed over twenty-five hours of school due to the absence or tardiness of DCPS bus transportation.⁶ Most of the lost time was in Petitioner's first period English class, but he also missed at least seven days of math, his second period class.⁷

4. As a result of having missed all or part of at least twelve English classes, Petitioner was unable to complete a significant writing assignment. He also suffered deficiencies in Writing/Composition, Grammar, and Literature Analysis/Comprehension. Petitioner would require approximately four hours of tutoring to make up for the deficiencies he suffered in grammar, and twelve hours to make up for the deficiencies in Literature Analysis/Comprehension.⁸

³ Testimony of Petitioner's mother.

⁴ Petitioner's Exhibit ("P.Exh.") No. 5 at 6-7.

⁵ *Id.* at 8; testimony of Petitioner's mother.

⁶ P.Exh. No. 7; testimony of Petitioner's mother.

⁷ P.Exh. No. 7.

⁸ Testimony of Ms. ██████████

Conclusions of Law

DCPS concedes that it has failed to provide Petitioner the timely and consistent bus transportation to which he is entitled as related services. Therefore, the only issue before the Hearing Officer is whether and to what extent Petitioner is entitled to compensatory education services. "Compensatory 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 give period of time to provide a FAPE to a student... Courts and hearing officers may award "educational services . . . to be provided prospectively to compensate for a past deficient program."⁹

In *Reid v. District of Columbia*, the D. C. Circuit held that in determining awards of compensatory education services, Hearing Officers could not simply award services on an hour-for- hour basis, or by use of a standard formula.

We reject... appellants'... mechanical hour-per-hour calculation and instead adopt a qualitative standard: compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.¹⁰

Thus, Petitioner has the burden of showing that (1) as a result of DCPS' failure to provide transportation, he suffered an educational deficiency, (2) but for the violation, he would have either maintained his current level of academic performance or progressed to a higher level, and (3) that there exists a type and amount of compensatory education services that would bring him to the level he would have been but for DCPS' violation.

Hearing Officers may not award compensatory education services based solely on the amount of services a local education agency ("LEA") failed to provide.

[W]e part company with the Reids regarding how such awards are calculated. They urge us to adopt a presumption that each hour without FAPE entitles the student to one hour of compensatory instruction, a standard apparently embraced by several courts... In our view, this cookie-cutter approach runs counter to both the "broad discretion" afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce.

More specifically, as the Fourth Circuit has explained, "compensatory 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 give period of time to provide a FAPE to a student... Overlooking this equitable focus, the Reids' hour-for-hour formula in effect treats compensatory education as a form of damages – a charge on school districts equal to expenditures they should have made

⁹ *Reid v. District of Columbia*, 401 F.3d 516, 522-24 (D.C. Cir. 2005).

¹⁰ *Id.* at 18.

previously. Yet “the essence of equity jurisdiction” is “to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it...” In keeping with that principle of case-specific flexibility, we agree with the Ninth Circuit that “there is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of IDEA...”¹¹

Thus, Petitioner has the burden of establishing the type and amount of compensatory services that will compensate the student for the services that were denied. Absent such a showing, any award by the Hearing Officer would be arbitrary.

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... 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.¹²

In this case, Petitioner offered testimony from a Ms. [REDACTED] a compensatory education service provider, and from Ms. [REDACTED] Petitioner's English teacher. Ms. [REDACTED] testified that Petitioner would require tutoring at least three days a week for up to a year to make up for the losses Petitioner suffered. However, Ms. [REDACTED] did not specify the deficiencies Petitioner suffered as a result of DCPS' violations. In fact, Ms. [REDACTED] testimony seemed to address Petitioner's historical educational deficiencies and the fact that he does not perform at grade level. She offered no explanation why deficiencies suffered as a result of a loss of 25 hours of classroom time would require a year of thrice weekly, intensive tutoring services.

Ms. [REDACTED] on the other hand, offered a credible assessment both as to the deficiencies Petitioner suffered as a result of the lost time, and the measures that should be taken to address the deficiencies Petitioner suffered as a result of the lost services. Ms. [REDACTED] credibility was enhanced by her admission that, as to Writing/Composition, it would be “hard to throw out a number” as to the number of hours of tutoring Petitioner would require to compensate for the deficiency that she perceives him to have suffered.

The Hearing Officer concludes that Petitioner has met his burden under *Reid* to prove he suffered an educational deficiency, that but for the violation, he would have progressed to a higher level, and that there exists a type and amount of compensatory education services that would bring him to the level he would have been but for DCPS' violation.

¹¹ *Id.*, 401 F.3d at 523-24, citations omitted.

¹² *Id.*, 401 F.3d at 524.

ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented during the hearing, and the representations of the parties' counsel at the hearing, this 14th day of December 2009, it is hereby

ORDERED, that Petitioner is authorized to obtain twenty-five hours of independent tutoring services in accordance with 5 D.C.M.R. Section 3027.5.

IT IS FURTHER ORDERED, that this Order is effective immediately.

Notice of Right to Appeal Hearing Officer's Decision and Order

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision 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 of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

_____/s/_____
Terry Michael Banks
Hearing Officer

Date: December 14, 2009