DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE

STUDENT,[1]	)	
	)	
Petitioner,	)	**Case No.**
v.	)	
	)	**Bruce Ryan, Hearing Officer**
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
	)	**Issued: July 1, 2011**
Respondent.	)	
	)	

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HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed March 23, 2011, on behalf of a -year old student (the "Student") who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Complaint alleges that DCPS has denied the Student a free appropriate public education ("FAPE") by "failing to provide appropriate compensatory education services" for the period of the 2008-09 and 2009-10 school years, pursuant to a September 20, 2010 written settlement agreement ("SA").

DCPS filed its Response on March 29, 2011, which denied the allegations. DCPS asserted that it had agreed to provide the Student with 90 hours of an intensive reading program at Linda Mood Bell ("LMB") as compensatory education to remedy the harm alleged in Petitioner's August 2010 complaint, which was settled by the 09/20/2010 SA. DCPS also asserts that "compensatory education is not a cognizable issue under the IDEA; it is a form of equitable relief." *Response,* p. 2.

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

A resolution session was held, which did not resolve the Complaint, and the statutory 30-day resolution period ended as of April 22, 2011. Prehearing conferences ("PHCs") were then held on May 10 and 25, 2011. The due process hearing was scheduled for June 20, 2011.[2]

Following the PHCs, DCPS filed a motion styled as a Motion to Dismiss, which also attached documents including the 09/20/2010 SA and prior complaint. DCPS argued that it had implemented the SA, and thus that Petitioner "cannot prove facts in support of the allegations pled in her Complaint which would entitle her to any relief." *Motion to Dismiss,* p. 3. Petitioner filed an opposition to the motion on June 6, 2011, attaching a number of additional documentary exhibits. The Hearing Officer deferred ruling on the motion until the hearing convened, so that the parties could clarify their positions and evidence could be received as to any disputed facts. *See Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures (SOP),* Section 401(C) (7).

The parties filed five-day disclosures as required on June 13, 2011; and the Due Process Hearing was held on June 20, 2011. Petitioners elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence:

Petitioners' Exhibits: P-1 through P-21.

Respondent's Exhibits: R-1 through R-5.

In addition, the following Witnesses testified on behalf of each party:

Petitioners' Witnesses: (1) Parent-Petitioner; and (2) of the Linda Mood Bell Program.

Respondent's Witness: Ms. Ashley Lozano, Compliance Case Manager ("CCM").

[2] The hearing was originally scheduled for June 3, 2011, but Petitioner encountered a problem with the availability of one of her witnesses. Also, DCPS filed its motion to dismiss later than originally anticipated, to which Petitioner could not respond until June 6 due to conflicts with court deadlines in another case. The earliest date that all parties and witnesses were available was June 20, 2011. Accordingly, Petitioner filed a consent motion for continuance of the HOD timeline to July 1, 2011, to accommodate the agreed hearing dates, and the motion was granted.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*. The statutory HOD deadline is July 1, 2011.

III. ISSUE AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioners resulted in the following single issue being presented for determination at hearing:

> **Failure to Provide Appropriate Compensatory Education Services** — Did DCPS deny the Student a FAPE by failing to provide "appropriate compensatory education services" for the period of the 2008-09 and 2009-10 school years, pursuant to a September 20, 2010 settlement agreement?
>
> Specifically, the Complaint alleges that DCPS held an IEP meeting on 12/06/2010, at which DCPS determined a compensatory education program that "is too limited to be effective and would not meet [Student's] needs." Petitioner claims that such program "does not constitute an appropriate compensatory education program for SY 2008-2009 and SY 2009-2010 under *Reid*, its progeny or applicable case law." *Addendum to Hearing Request* (March 23, 2011), at 2. [3]

Petitioner requests that DCPS be ordered to immediately fund the LMB program for the Student as recommended by personnel at the LMB program, with transportation.

IV. FINDINGS OF FACT

1. Petitioner is a year old student who has been determined to be eligible for special education and related services under the IDEA as a child with a disability. *See R-1.*
2. Petitioner has attended her neighborhood DCPS high school (the "High School") for the past several years, including the 2010-11 school year. *P-9; Parent Test.*

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[3] At the PHC, both parties were requested to present what they believe are the applicable legal authorities as to the Hearing Officer's authority to decide this issue.

3. On or about August 30, 2010, a due process complaint was filed on behalf of Petitioner, *see P-8,* which was then settled by a written settlement agreement ("SA") dated September 20, 2010. *P-1.*
4. As part of the 09/20/2010 SA, the parties agreed that DCPS would complete various evaluations, and then would convene an IEP meeting to (a) review the evaluations, (b) review and revise the IEP, if necessary, and (c) "develop a compensatory education plan for the 2008-2009 school year and the 2009-2010 school year." *P-1,* ¶ 4.
5. In discussions following the 09/20/2010 SA, Petitioner requested that DCPS fund an evaluation at the Linda Mood Bell ("LMB") program to determine if the program would be appropriate to meet the Student's compensatory education needs. On November 10, 2010, DCPS agreed in writing to fund an LMB evaluation. *P-3.*
6. On or about November 11, 2010, the Student was evaluated by LMB personnel, who then made specific recommendations as to the services they believed were appropriate to meet the Student's needs and remedy her deficits. *P-5.* Daily instruction – 6 hours a day, 5 days a week – was recommended for an "initial period" of 16-24 weeks of instruction (a total of 480-720 hours). *P5-4.*
7. On or about November 12, 2010, DCPS convened an IEP team meeting for the Student. The team decided to postpone the development of a compensatory education plan until the LMB evaluation was available. *P-4.*
8. On or about December 6, 2010, DCPS convened another IEP team meeting for the Student. *P-6.* Petitioner requested that DCPS fund the full amount of the LMB recommendation (480-720 hours of LMB programming). *P6-2.* DCPS proposed 90 hours of LMB programming as a compensatory education plan for the two years at issue. *Id.* Petitioner disagreed with the proposal and declined to accept it. *Id.* The DCPS representative asked for a counter-proposal, but Petitioner's counsel replied that she wanted "whatever the recommendations in the LMB assessment state." *Id.* The team discussed alternative forms of compensatory education (*i.e.*, independent tutoring and an intensive summer camp), but Petitioner believed that the LMB program was the appropriate remedy. *P6-2 – P6-3.* The DCPS representative then stated that she would authorize funding for 90 hours of intensive instruction in the LMB program, regardless of

whether Petitioner wanted to accept it, because the Student would benefit. *P6-3. See also R-2* (Compensatory Education Authorization Letter, dated 12/06/2010).

9. On or about February 8, 2011, DCPS convened another IEP team meeting for the Student, and compensatory education services again were discussed. At the meeting, Petitioner's counsel stated that 90 hours of LMB instruction were "not enough to make up for the two years" of missed services. *P7-1.* The SEC stated that the Student "would benefit from that program" and agreed with 90 hours of LMB. *P7-2.* The meeting notes indicate that, following a discussion of the issue, it was "the consensus of the team that [Student] would benefit from 90 hours of LMB offered by DCPS." *Id.* Petitioner's counsel stated "that is not going to be enough." *Id.*

V. DISCUSSION AND CONCLUSIONS OF LAW

The burden of proof in a special education due process hearing is on the party seeking relief. *See Schaffer* v. *Weast,* 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. DCMR 5-E3030.3. In this case, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof.

"The IDEA does not specifically address enforcement by hearing officers of settlement agreements reached by the parties." *Letter to Shaw,* 50 IDELR 78 (OSEP 2007). However, it is generally recognized that a complaint alleging a failure to implement an IDEA settlement agreement is within the jurisdiction and authority of a hearing officer if it amounts to a dispute over the provision of FAPE. [4] In such action, District of Columbia law governs the interpretation and enforcement of the IDEA settlement agreement. *See Hester v. District of Columbia,* _ F.3d _ (D.C. Cir. 2007). Settlement agreements are treated as contracts between the LEA and the parents/petitioners. *See, e.g., Makins v. District of Columbia,* 277 F.3d 544, 548 (D.C.

[4] *See Letter to Shaw, supra; see also* 34 C.F.R. 300.507 (a); *Blackman-Jones* Consent Decree, Section II, A., pp. 10-11 (including within the "Jones class" any children who have been denied a FAPE because DCPS "failed to fully and timely implement agreements concerning a child's identification, evaluation, educational placement, or provisions of FAPE that DCPS has negotiated with child's parent or education advocate.")

Cir. 2002); *Cain v. Arts & Technology Academy Public Charter School,* 46 IDELR 163 (2006). In general, the "written language embodying the terms of an agreement will govern the rights and liabilities of the parties." *Howard Univ. v. Best,* 484 A.2d 958, 967 (D.C. 1984).

In this case, the 09/20/2010 SA embodies the parties' agreement that DCPS would: (a) conduct six different evaluations of the Student; [5] and (b) convene an MDT meeting to review the evaluations, review and revise the IEP as necessary, and "***develop a compensatory education plan*** for the 2008-2009 school year and the 2009-2010 school year." *P-1* (emphasis added).

The instant Complaint does not allege that DCPS failed to carry out any aspect of this agreement; it merely disagrees with the ***results*** of such process because it claims that the plan does not provide "appropriate compensatory education services." *P9-7.* Petitioner alleges that "90 hours of Linda Mood Bell does not constitute an appropriate compensatory education program for SY 2008-2009 and SY 2009-2010 under *Reid,* its progeny or applicable caselaw." *P9-6.* This argument was confirmed at the PHC. *See Prehearing Order ¶ 7.*

The main problem with this argument is that Petitioner chose to settle, rather than litigate, her prior claims of denials of FAPE that allegedly give rise to her right to compensatory education relief.[6] The current Complaint merely repeats verbatim the same allegations of denial of FAPE that were previously contained in the August 2010 complaint. *Compare P-8 with P-9.* By entering into the 09/20/2010 SA, the Parent agreed to exchange the right to have her prayer for compensatory education litigated in a due process hearing for the right to have an IEP team "develop a compensatory education plan" at an IEP team meeting with no certain outcome. To underscore this point, the SA expressly provides that it is "in full satisfaction and settlement of all claims contained in the pending Complaint, including those claims under IDEA and §504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement." *P-4,* p. 2. Thus, the prior claims were settled and released by the

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[5] The evaluations consisted of an Educational Evaluation, an Orientation and Mobility Evaluation, an Assistive Technology Evaluation, a Speech and Language Evaluation, and a Vision Assessment. *DCPS-1,* ¶ 4 b.

[6] It is well established that compensatory education is an equitable remedy for the denial of FAPE; it is not a claim or dispute over the provision of FAPE itself. *See, e.g., Board of Educ. of Fayette County v. L.M.,* 478 F.3d 307, 316 (6th Cir. 2007).

09/20/2010 SA and cannot be re-litigated in a new due process complaint. *See, e.g., Bristol Township School District v. S.W.,* 55 IDELR 72 (E.D. Pa. 2010).

Petitioner's counsel attempted to reinterpret the Complaint in response to DCPS' motion to dismiss by arguing, for the first time, that "a compensatory education plan was never developed for [Student]" at all, but rather was "unilaterally decreed by a representative of DCPS" in the absence of team agreement. *Opposition to Motion to Dismiss,* pp. 3-4 (emphasis in original). This appeared to be a belated effort to recast Petitioner's claim as a violation of the 09/20/2010 SA. However, even if this revised claim were entertained, Petitioner failed to prove it by a preponderance of the evidence at hearing. Petitioner's own exhibits establish that the 90 hours of LMB services offered by DCPS reflected "the consensus of the team." *P-7* (02/08/2011 MDT meeting notes), p. 2. The argument that the "IEP team never agreed on a compensatory education plan" simply because the parent disagreed and thus the parties were "at an impasse," *Opposition,* pp. 3-5 (emphasis in original), misapprehends the parent's role under the IDEA. [7] Moreover, nothing in the 09/20/2010 SA required DCPS to award any particular amount or type of compensatory education services to Petitioner. The agreement only obligated DCPS to convene an IEP team to "develop a compensatory education plan" for the period in question. Petitioner could have insisted on more specific provisions in the SA, but apparently did not.

Petitioner's counsel appeared to tweak this argument further at hearing by suggesting that, subsequent to the 09/20/2010 SA, DCPS agreed to develop an LMB-based plan, but then it authorized services that were too limited to constitute a viable plan of this type. There are two problems with this iteration of the claim. First, Petitioner failed to put forward sufficient evidence to establish these facts. In deciding to authorize an LMB evaluation, DCPS did not agree to be bound by whatever LMB personnel might recommend for the Student; [8] and

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[7] *See* 20 U.S.C.§§1414 (c) (IEP team must "determine ... educational needs of the child" based in part upon "input from the child's parents"), 1415 (b) (1) (requiring "[a]n opportunity for the parents of a child with a disability ... to participate in meetings with respect to the identification, evaluation, and educational placement of the child").

[8] *See P-3; CCM Test.; Coppersmith Test.* At most, it appears that the parties concurred that the IEP team should receive and review the recommendations from the LMB assessment before developing a compensatory education plan pursuant to the 09/20/2010 SA. *See P4-2.* Neither the IEP team nor DCPS was locked into those recommendations before even hearing them, as Petitioner appears to suggest.

Petitioner did not demonstrate through LMB testimony or otherwise that a smaller amount of LMB services would be of no benefit to the Student. [9]

Second, and more fundamentally, this argument would require hearing officers to judge the reasonableness of an IEP team's decisions on compensatory education in virtually every settlement agreement involving that issue. This result would be functionally indistinguishable from allowing a petitioner to re-litigate the underlying FAPE claims, since a reasonable amount and type of compensatory education cannot be fashioned without assessing the specific harm suffered from a specific denial of FAPE over a specific period of time. Indeed, Petitioner's counsel invites that very analysis by arguing that the Hearing Officer must ensure that the IEP team's award satisfies the same *Reid* standards applicable to courts and hearing officers – *i.e.*, that "[i]n every case ... 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,* 401 F.3d 516, 524 (D.C. Cir. 2005). Allowing Petitioner to effectively negate the 09/20/2010 SA in this manner "would work a significant deterrence contrary to the federal policy of encouraging settlement agreements," especially in the context of the IDEA. *D.R v. East Brunswick Board of Education,* 109 F.3d 896, at *5 (3d Cir. 1997), *citing McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994).

[9] The CCM testified that DCPS' 90-hour intensive reading proposal was designed to focus on the Student's "practical, functional reading skills," given her cognitive abilities, academic testing, and vocational evaluation results. *CCM Test.* This testimony was not refuted. Moreover, the LMB witness who testified at hearing was unaware of the Student's age or cognitive abilities – even though the programs being recommended focused on developing "the sensory-cognitive functions" of symbol imagery and concept imagery, and were designed to "increase her language processing and literacy skills to a level commensurate with her potential." *P5-4.* Nor had the LMB witness reviewed any of the Student's evaluation reports or records, or conducted any observations of the Student in an educational setting. *See Coppersmith Test.* (cross examination).

VI. ORDER

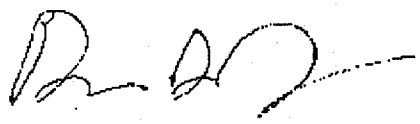
Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Petitioner's requests for relief in her Due Process Complaint filed March 23, 2011 are hereby **DENIED;**

2. The Complaint is **DISMISSED, With Prejudice;** and

3. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.



Dated: July 1, 2011

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415 (i) (2).