DC Office of the State Superintendent of Education
Office of Compliance and Review
Student Hearing Office

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Confidential

STUDENT[1], by and through Parent	**HEARING OFFICER'S DETERMINATION**
Petitioners,	Date: May 27, 2009
v.	
District of Columbia Public Schools	
Respondent.	**Hearing Officer: Wanda I. Resto, Esquire**

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

I. PROCEDURAL BACKGROUND

On April 7, 2009, parent's counsel filed a Due Process Hearing Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to identify, locate and evaluate the Student for special education needs in a timely manner. The Petitioner requests that the Respondent be deemed to have denied the Student a FAPE and ordered to provide the Student a compensatory education award.

The DCPS' Response to Parent's Administrative Due Process Complaint Notice was filed on April 17, 2009. The Respondent asserted it could not confirm that a multidisciplinary team ("MDT") meeting was held on January 9, 2009 because the Student currently attends a Public Charter School who is its own local education agency. The Respondent asserted that the Student had behavior incidents throughout September and October 2006 while attending and in response it put in place behavioral instructional strategies such as a change in classroom teacher, small group instruction and counseling services. It further asserted that the school has a center for positive change where regular education students can receive small group instruction, individual instruction and counseling service. The Respondent asserted that on November 3, 2006, the Student's teacher referred the Student to a student support team ("SST"). A SST meeting was held on December 1, 2006, and the team determined that the Student would be referred to the Multi-Disciplinary team ("MDT") because a disability was suspected. The Respondent admits that on December 20, 2006, the parent made a written request for initial evaluations of the Student. However, the consent to evaluate that was included with the request for evaluation failed to identify the Student or to provide contact information for the parent and failed to indicate if the parent was consenting to initial evaluations. The Respondent further asserted that on December 23, 2006, the Respondent sent Petitioner's Counsel a letter of invitation proposing three dates for the purpose of holding a student evaluation plan meeting. The Respondent alleged that it did not receive a response until January 23, 2007 and the letter indicated that the parent was only available for a meeting after February 2007. It's the position of the Respondent that a Student Evaluation Plan ("SEP") meeting was held on February 9, 2007, where the parent and educational advocate participated. At that meeting, the MDT determined that the Respondent would perform the following evaluations: a psychological, an educational and speech and language to be completed by April 8, 2007. The Respondent claimed that the 120 days timeline for completion of evaluations began to toll on February 9, 2007 when it received informed consent from the parent. The Respondent admitted a MDT meeting was convened on June 6, 2007, where neither the parent nor the educational advocate participated, although the date and time had been confirmed. During that MDT meeting, it was determined that the Student was not eligible to receive special education services. The team reviewed a social history assessment, a comprehensive psychological and a speech and language evaluation. The Student was found to be in the average range on the measure of both his cognitive skills, and academic skills and also in the average range of functioning in the measures of his communication skills. The Respondent argued that the process to determine initial eligibility was completed within 120 days from when the informed consent was obtained by the parent. The Respondent also admitted that on November 28, 2007, a settlement agreement was executed it agreed to allow the parent to obtain an independent psychological evaluation. The independent evaluation was completed on January 11, 2008, and it recommend the Student receive 45 minutes of individual counseling per week. No recommendation was made for special education services. A MDT meeting was held on

February 11, 2008, and the team determined the Student should receive current academic testing to rule out attention deficit hyperactivity disorder ("ADHD") or determine the need for a disability classification of other health impaired ("OHI"). The Respondent additionally admitted that on February 14, 2008, an educational evaluation was performed on the Student and it found that the Student's academic achievement was in the average range in written expression, math calculation skills, broad math, broad written language and broad reading.

The Respondent denied that on July 18, 2008, the MDT refused to find the Student eligible for special education, the Respondent asserted that the team which included the parent and educational advocate determined that the Student met the criteria for an emotional disturbance, and the team agreed to reconvene to create the IEP after the parties reviewed their calendars to secure meeting dates. It's the contention of the Respondent that it sent a letter of invitation to the parent and April 18 or 19th 2008 was confirmed, however the parent failed to attend. It was then discovered that the parent had withdrawn the Student from . The Respondent alleged that within 120 days the MDT made a determination of eligibility for special education and that on July 18, 2008, it was determined that the Student was eligible for special education services as a child with emotional disturbance. The Respondent denied that the Student is entitled to compensatory education and asserted there is no educational harm to the Student; nor has he been denied a FAPE.

The Hearing Officer held a pre-hearing conference call with Counsel for both parties on April 23, 2009. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. The parties stipulated that a MDT on February 11, 2008, determined the Student was not eligible for special education and that he was determined eligible on July 18, 2008. The parties further stipulated that the Student was withdrawn from sometime in August 2008, and enrolled at a Public Charter School. The Respondent reasserted it defenses. Both Counsels provided a synopsis of their witnesses' testimony.

An April 27, 2009 Order required that at the May 22, 2009 hearing the Petitioner demonstrate how the Respondent failed to identify and evaluate the Student in a timely manner, and what if any harm was cause to the Student or parent. Additionally, the Petitioner was required to present evidence for purposes of establishing whether compensatory education is warranted, and if so, what type and amount of compensatory education is most appropriate The Petitioner was also required to prove that the Student's eligibility was untimely and (1) that as a result of Respondent' violation of the IDEIA, the Petitioner suffered an educational deficiency, (2) that but for the violation, Petitioner would have progressed to a certain academic level, and (3) that there exists a type and amount of compensatory education services that could bring the Petitioner to the level Petitioner would have been but for the Respondent's violation. The Petitioner has an obligation to establish the need and reasonableness of the amount of compensatory education requested and how the hours will be integrated into the Student's current educational program.

The Respondent was required to demonstrate that it acted appropriately, in a timely manner in making the eligibility determination and that the Student has received a FAPE. The Petitioner requested that the hearing date be scheduled pass the original date because a witness was not available. The Respondent did not oppose the change in date. Furthermore, the Petitioner waived her right to a decision within 45 days of filing of the Complaint. Consequently

the Hearing Officer granted the request and the hearing was scheduled for May 22, 2009 at 9:30 AM.

At the hearing held on May 22, 2009. The Petitioner presented a disclosure letter dated May 14, 2009 to which thirty-five documents were attached, labeled P-1 through 35 and which listed ten witnesses. Three witnesses testified –the Mother, and two Education Advocates. The Respondent presented a disclosure letter dated May 14, 2009 identifying sixteen witnesses and to which twenty documents were attached, labeled DCPS 1 through 20. The documents were admitted without objections. Two witnesses testified – the Special Education Coordinator and the Special Education Specialist. Petitioner's documents identified as numbers 1 through 24, 26 and 28 were admitted without objections, documents 32 through 35 were removed by the Petitioner and Petitioner's document 25, 27, 29, 30 and 31 were excluded because they lacked relevance to the current Complaint.

The hearing was conducted in accordance with the rights established under the Individuals with Disabilities Education Act of 2004 ("IDEIA"), 20 U.S.C. § 1400 et seq. and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

II. ISSUE(S)

1. Did the Respondent fail to identify, locate and evaluate the Student for special education needs in a timely manner?

2. Is the Student entitled to a compensatory education award?

III. FINDINGS OF FACT

1. The parent and the Student are residents of the District of Columbia. The Student is a student with disabilities under the Individuals with Disabilities Education Improvement Act ("IDEA"). The Student's most recent IEP is dated January 9, 2009 and provides 17.5 hours of specialized instruction, and 45 minutes of counseling services weekly.
2. The Student's disability classification is Other Health Impaired. The parties stipulated at the hearing the following facts:

    a. A Student Support Team meeting was held on December 1, 2006;

    b. A Student Education Plan meeting was held on February 9, 2007, where the parent and educational advocate participated. At that meeting, the MDT determined that the Respondent would perform the following evaluations: a psychological, an educational and speech and language to be completed by April 8, 2007;

    c. The parties agreed to the facts as alleged by Petitioner and indicated in the Response for the period of February 11, 2008-through June 16, 2008.

3. On December 20, 2006, the parent made a written request for initial evaluations of the Student. The parties agreed to a meeting after February 2007.

4. A May 2007 DCPS psychological evaluation-indicates that the Student has clinically significant characteristics in most areas associated with attention deficit hyperactivity disorder ("ADHD"). It states the Student's emotional issues "seem to continue to negatively impact his school performance." It recommended that the Student be evaluated to determine if he has ADHD and meets the criteria for Other Health Impaired ("OHI"). It also suggested that the team consider whether the Student may also meet the criteria for emotional disturbance given his continued and increasing behavior issues and clinical significance on the rating scales of social problems.[2]

5. A February 2008 Education Evaluation – found the Student's academic skills and the ability to apply the skills, along with fluency within the average range.[3]

6. Since the Fall of 2007 the mother received telephone calls about the Student's problematic behavior at school. Approximately once a month she would get calls from the principal or a counselor because of the Student's disruptive and dangerous behavior. The Petitioner believes the MDT used the clinical evaluations that existed in the file in February 2008 and that the educational evaluation did not add anything to the Student's July 2008 eligibility determination. The Student did not receive specialized instruction and counseling for approximately four months and the Petitioner believes his academic progress has been limited. The Student's behavior continued deteriorating and during April of 2008 the Student was taken from school to a crisis center at Children's Hospital because the principal had the Student remove from school. During the summer of 2008 the parent withdrew the Student from DCPS and enrolled him in a public charter school.[4]

7. A January 2008 independent psychological evaluation indicates the parent and teachers had reported that the Student presents symptoms of a student with ADHD. It recommended that the Student receive an educational evaluation to determine his academic strengths and weaknesses. It also indicated that the Student should be screened by a Psychiatrist to determine whether medication is appropriate for inattentiveness, hyperactivity and disruptive behaviors. The report's diagnostic impression indicate - Axis I - Attention Deficit Hyperactivity Disorder, combined type; Anxiety Disorder NOS; Axis II-No diagnosis; Axis III- High fever seizures at 18 months old; Axis IV-Psychosocial stressors: primary support group problems, absent father figure, one violent death of brother, environmental problems, intentional problems, and Pierre relational problems and Axis V-Global function 55 –severe symptoms. [5]

8. On February 11, 2008, a MDT reviewed the psychological evaluations, the Student's record and determined that the Student was not eligible for special education services because of his academic performance. The Student was achieving average or above in his academics, his behavior was not impacting his achievement and there was no medically diagnosis of ADHD. The teacher was at the meeting the team heard her review of the

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[2] P15-Comprehensive psychological evaluation the date on the reports is May 20, 2004-however, due to the age of the Student cited in the report and the mention of evaluations that occurred in 2007, the Hearing Officer accepted the date of the report of the evaluation as May 20, 2007.

[3] P -22 February 14, 2008- Education Evaluation

[4] Testimony of the mother.

[5] P20 -January 11, 2008 -Psychological evaluation-

District of Columbia's academic achievement tests scores. It is not clear what changed from February to July when the Student was determined eligible in July. [6]

9. The February 2008, eligibility determination was based on the data presented. The EA disagreed because there was a psychological evaluation which suggested the Student might be ADHD should be determined eligible based on emotional disturbance criteria. The Student was not determined eligible because the protocol in the District of Columbia required that the diagnosis be a medical determination. The Respondent instructed the Petitioner to get the diagnosis from her pediatrician. The MDT thought that the determination of other health impaired for special education purposes could only be done through a medical diagnosis.[7]

10. At the July 28, 2008 MDT/IEP meeting the psychological, educational assessment, report card, the District of Columbia Baseline Assessment of Student (DC BAS) and the District of Columbia Comprehensive Assessment System ("DC CAS") scores were reviewed and the Student was determined eligible. At the meeting it was discussed that the Student performed on grade level but the team focused on the teacher's comment which stated the Student was not available for learning because of his behavior.[8] The parent agreed after discussion that the appropriate placement for the Student is a cluster program within DCPS. The team was to reconvene to create an initial IEP for the Student after the Education Advocate and the team members agreed on a date.[9]

11. The July 2008 School Psychologist's note indicates that previous psychological testing evidenced social and behavior problems and the likelihood of ADHD symptoms were evident in the Student. It indicates that on January 4, 2008 the Student was diagnosed with ADHD, combined type and anxiety disorder, NOS. [10]

12. The Student's eligibility determination form reflects that the Student has severe deficits in social competence or appropriate behavior, which cause an inability to build or maintain satisfactory interpersonal relationships with adults and peers, and there is a tendency to develop physical symptoms or fears associated with personal or school problems. The deficits in social skills and behavior were not willful or intentional actions. The evaluations and the report card indicate that there is an adverse effect on the educational performance of the Student. [11]

13. The education advocate ("EA") participated in a MDT meeting in July 2008 where the two clinical evaluations and the February 14, 2008 educational evaluation were reviewed. The Student was determined eligible. The parties agreed to reconvene to develop an IEP for the Student. The EA learn that the Student had been withdrawn from the school the second week of August. The EA believes that because there was not a therapeutic setting, behavior intervention plan, and other strategies put in place to manage the Student's

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[6] Testimony of the special education coordinator.

[7] Testimony of the education advocate

[8] Testimony of the special education specialist.

[9] P24- July 18, 2008 -multidisciplinary team meeting notes

[10] P 24-Id.

[11] P 24-Id.

behavior during February-June the Student did not progress. The witness suggested that the Student should receive tutoring for services missed during the period of February through June 2008. It is the position of the EA that Student should be provide tutoring in reading, written expression, and math. He calculated that the Student has missed approximately 280 hours of services. He reviewed the Student's report cards, educational records, spoken to another educational advocate, the parent and has determined that 125 hours of tutoring services would be appropriate as a compensatory education award. The calculation was made based on an IEP that provides for full time services, not the 17.5 hours currently on the IEP. [12]

14. Throughout the months of February, March, April, August, September and October of 2007 there are approximately 16 incidents reports relating to the Student's problematic behavior.[13]

IV. CONCLUSIONS OF LAW

FAPE Determination

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The applicable IDEIA regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.

The Respondent did not its legal obligation under the IDEIA. Here is why.

Identification and provision of special education services.

The Petitioner alleged there was sufficient information in February 11, 2008 to determine the Student eligible.

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate

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[12] Testimony of the education advocate.

[13] P16-Student incident reports.

IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living.

Additionally the IDEIA at 20 U.S.C. 1412(a)(3), and its regulations at § 300.111, require that DCPS have in effect policies and procedures to ensure that, among other things, all children with disabilities residing in the District of Columbia, including children with disabilities who are homeless children or are wards of the state, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated.

Pursuant to D.C. Code § 38-2501, initial evaluations are to be completed "within 120 days from the date that the student was referred for an evaluation." In conformity with Scott v. District of Columbia, CA No.: 03-1672 (DAR) (D.D.C. 2006) DCPS is required to identify and evaluate students in need of special education services and related services, whether or not the parents have made a request.
The IDEIA regulations at 34 C.F.R. §300.301(a)(b) provides in pertinent part:

(a) General. Each public agency must conduct a full and individual ***initial*** evaluation, in accordance with §§300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part.

(b) Request for ***initial*** evaluation. Consistent with the consent requirements in §300.300, ***either a parent of a child or a public agency may initiate a request for an initial evaluation*** (emphasis supplied) to determine if the child is a child with a disability.

According to 34 C.F.R §300.301(c)(1)(i) the initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation; ***or*** if the State establishes a timeframe within which the evaluation must be conducted. The 60 day timeframe established by IDEIA in completing initial evaluations, only applies if the State fails to establish a timeframe within which an initial evaluation must be conducted.

In the District of Columbia, the District of Columbia Code, Chapter 25, §38-2501, entitled "Special Education and Assessment", established a 120 day timeframe within which initial evaluations and assessments must be completed for students who may have a disability and may require special education services; applicable to student in public or non-public schools.

The uncontested evidence is that the Student was referred to the MDT in December, 2006 and the Student should have been evaluated by mid April 2007. In the present case the Student was located and evaluated the Student. What was untimely was the Respondent's special education services eligibility determination and the failure to created an IEP and starting the implementation. The Respondent and MDT had available in February 2008 two existing psychological evaluations of the Student suggesting a diagnosis of ED or OHI and the Student's behavior and assessment implied there were concerns of ADHD. The Respondent could not articulate what changes occurred beyond a different set of team members in the July meeting versus the February meeting. The Hearing Officer determines the Respondent should have identified the Student as a Student in need of special education services in February 2008.

The core of the IDEIA is not intended to make the Student in need of services wait until the timelines have expired before services are provided. School districts may not ignore disabled

students' needs, nor may they await parental demands before providing special instruction. Instead, school systems must ensure that "all children with disabilities residing in the State ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." *Reid v. District of Columbia, 365 U.S. App. D.C. 234, 401 F.3d 516,* 519 (D.C. Cir. 2005) (internal citations omitted) (emphasis omitted); *Branham v. District of Columbia, 427 F.3d 7,* (D.C. Cir. 2005).

Compensatory education

The Respondent has denied the Student a FAPE. The Respondent's violation entitles the Petitioner to a compensatory education award determination to be made by the Hearing Officer. When there is a denial of FAPE a compensatory award should be granted. [14]

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

"Under the theory of "compensatory education," courts and hearing officers may award educational services . . . to be provided prospectively to compensate for a past deficient program." See, G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003). More specifically, as the Fourth Circuit has explained, "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." G. ex rel. RG, 343 F.3d at 309.

In Reid v. District of Columbia, 401 F.3d 516 (2005) the D.C. Circuit held, with respect to compensatory education, that, "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place."

Whichever path the court chooses, the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits. It rejected arbitrary approaches to the award of compensatory education.

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

The Reid decision demands substantial evidence of a link between the compensatory education sought and the expected educational benefit. The student "is not entitled, however, to an amount of such instruction predetermined by a cookie-cutter formula, but rather to an

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

informed and reasonable exercise of discretion regarding what services he needs to elevate him to the position he would have occupied absent the school district's failures."

The evidence consisted of the testimony of the educational advocates who testified that because there was not a therapeutic setting, behavior intervention plan, and other strategies put in place to manage the Student's behavior during February-June 2008 the Student did not progress. The witness suggested that the Student should receive tutoring in reading, written expression, and math for services missed during the period of four months. He calculated that the Student has missed approximately 280 hours of services. The EA reviewed the Student's report cards, educational records, spoke to another educational advocate, the parent and has determined that 125 hours of tutoring services would be appropriate as a compensatory education award. However, the witness' testimony failed to sufficiently support – under the standards of Reid, the calculation of the number of hours of compensatory education, what the compensatory plan would consist of, and what program, if any, would be used to get the Student to where he should be. The calculation of hours was erroneously made based on 27.5 hours or specialized instruction on the IEP and not on the 17.5 hours currently in the IEP. Furthermore there was insufficient evidence to demonstrate where academically the Student is as compared to where he should be.

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

A Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides her/him with "insight about the precise types of education services [the student] needs to progress." Branham v. D.C., 427 F.3d 7, 12 (D.C. Cir. 2005).

V. SUMMARY OF DECISION

The Petitioner proved the Student should have been found eligible in February 2008. However the Petitioner was not able to provide evidence to meet the qualitative standard imposed by the Reid case for a compensatory education award to be granted. Accordingly, the Petitioner has failed to meet the burden imposed and the request for compensatory education fails on the merits.

Upon consideration of Petitioner's request for a due process hearing, the parties' Five Day Disclosure Notices, the evidence presented at the hearing, and the applicable laws and regulations. The Hearing Officer determines that while the Petitioner proved there was a denial of FAPE the Petitioner failed to meet the Reid's standard for a compensatory educational award to be granted and issues the following:

VI. ORDER

ORDERED, the Complaint is **Dismissed.**

IT *IS FURTHER ORDERED*, this Order resolves all issues raised in the Petitioner's April 7, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)

/s/ WIRestorres **Date: May 27, 2009**
Wanda Iris Resto - Hearing Officer