

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

on behalf of,

(DOB Student
 STARS

Petitioner,

Case No.
Bruce Ryan, Hearing Officer

v.

Hearing: April 21, 2009
Decided: May 8, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

OSSE
STUDENT HEARING OFFICE
2009 MAY 11 AM 8:01

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was brought on behalf of a year old student (the "Student") who resides in the District of Columbia and currently attends School. The complaint is brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations. Petitioner is represented by Carolyn Houck, Esq., and Respondent District of Columbia Public Schools ("DCPS") is represented by Daniel McCall, Esq., Assistant Attorney General for the District of Columbia.

The procedural background of this case is lengthy and somewhat complicated. In this latest chapter, Petitioner first filed a complaint on February 10, 2009, alleging that "DCPS has failed to develop an adequate and appropriate compensatory education plan for its failure to provide an appropriate education at School during school year 2006/07 and at School during school year 2007/08." (Due Process Complaint, filed Feb. 10, 2009.) The denials of a free appropriate public education ("FAPE") for those two school years were found in prior HODs dated June 25, 2007 and October 25, 2008. *Id*; see *Prehearing Conference Order*, dated March 18, 2009.

In response to the original complaint, DCPS filed a pleading styled as a "Response, Notice of Insufficiency, and Motion to Dismiss" on February 26, 2009. The pleading did not specify the nature of any alleged insufficiency, but asserted that the claims raised in the complaint were barred by the doctrine of claim preclusion/*res judicata*. DCPS further asserted in response that the student "has received the highest form of compensatory education available, *i.e.*, a private education at public expense (placement at School)," and thus "no additional services are necessary...." DCPS' Response, filed Feb. 26, 2009, at p. 3.

After the case was reassigned to this Hearing Officer on February 27, 2009, Prehearing Conferences (“PHCs”) were held on March 4 and 12, 2009. In addition, Petitioner filed a Letter Motion for Continuance on March 12 requesting, with agreement of DCPS counsel, that the Due Process Hearing be continued to April 21, due to the unavailability of Petitioner’s expert witness. Because it appeared to the Hearing Officer that the parties may disagree as to certain facts relating to DCPS’ motion to dismiss on the ground of claim preclusion/*res judicata*, and in light of Petitioner’s intention to amend the complaint, the Hearing Officer deferred ruling on the motion pursuant to *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures (“SOP”)* Section 401(C)(7). Petitioner was permitted to amend her complaint.

Petitioner’s amended complaint, filed March 19, 2009, alleges two claims: (1) that DCPS violated the October 25, 2008 HOD, by (a) failing to convene an MDT meeting in a timely manner, and (b) failing to carry out compliance with the earlier June 2007 HOD (specifically the compensatory education section), which the 10/25/08 HOD had ordered; and (2) that DCPS has failed to develop an adequate compensatory education plan for the 2006/07 and 2007/08 school years, which were previously adjudicated in the 6/25/07 and 10/25/08 HODs, respectively. *See* Amended Hearing Request, filed March 19, 2009.

In response to the amended complaint, DCPS then filed a combined pleading consisting of 80 pages including attachments, styled “First Amended Response, Notice of Insufficiency and Motion to Dismiss Petitioner’s Due Process Complaint Notice.” DCPS did not specify how it believed the amended due process complaint failed to meet the requirements of 34 C.F.R. 300.508(b), and the Hearing Officer determined that on the face of the complaint, it met the requirements of Section 300.508(b). *See Order*, dated April 3, 2009. The Hearing Officer again deferred ruling on DCPS’ renewed motion to dismiss until the hearing convened to allow the parties to provide evidence relating to any disputed facts, pursuant to *SOP* Section 401(C)(7).

The Due Process Hearing convened on April 21, 2009. At the hearing, 20 documentary exhibits submitted by Petitioner (identified as “1” through “20”) were admitted into evidence. DCPS submitted two large documentary exhibits (identified as “DCPS-1” and “DCPS-2”), which consisted of previous submissions in connection with its motions;¹ an email exchange between DCPS and Petitioner’s counsel regarding compensatory education (identified as “DCPS-3”); and a one-page document labeled “Compensatory Education Plan,” dated June 5, 2008 (identified as “DCPS-4”). These DCPS exhibits also were admitted into evidence. Petitioner presented four witnesses – Petitioner (parent); the Student; Ms. Brandy Cox (Board-certified Behavior Analyst); and _____ DCPS presented one witness – Mr. Kirby Riley, Compliance Specialist with DCPS.

Following the hearing, both Petitioner and DCPS submitted written closing arguments and/or post-hearing briefs, as directed by the Hearing Officer. On May 1, 2009, the 10th day after the hearing, Petitioner’s counsel served an objection to DCPS’ post-hearing brief, stating that Petitioner opposed the introduction of new evidence by DCPS in the form of meeting notes of an April 3, 2009 MDT meeting that had not been submitted at the hearing. Petitioner’s counsel

¹ While Petitioner did not object to the form of these exhibits, the Hearing Officer strongly discourages such reuse of motion exhibits and/or incorporation of multiple documents within a single hearing exhibit, due the confusion it may cause at hearing. In this case, it resulted in exhibits being referred to at hearing as, e.g., “Motion Exhibit #_ of DCPS Hearing Exhibit 1,” etc.

indicated her intention to prepare an additional brief addressing this issue. As a result, the Hearing Officer granted a further motion for continuance, which extended the time for issuance of the HOD until May 8, 2009, pursuant to *SOP* Section 402 (A)(1).

Petitioner thereafter filed a "Response to DCPS' Closing Argument and Objection to Submission of New Evidence Presented Following Close of the Record." Having reviewed Petitioner's response and objection, and the Hearing Officer's own notes of the hearing, the Hearing Officer will sustain Petitioner's objection and exclude the April 3, 2009 meeting notes from the record of this case. Petitioner correctly points out that these notes were not offered or admitted into evidence at the hearing. Moreover, at the hearing, the Hearing Officer gave DCPS the opportunity to produce a copy of the notes, but neither DCPS counsel nor his LEA party representative (the person who authored the notes) could produce them.² While the *SOP* permits HODs to be based on "additional written documents requested by the Hearing Officer prior to closing arguments," *SOP* Section 1003, DCPS counsel has not indicated that the Hearing Officer made any such specific ruling in this case. Nor has DCPS counsel offered any other justification or explanation for now presenting the notes, which were merely attached without comment to its written closing argument.

As the April 3, 2009 MDT meeting notes were authored by DCPS' testifying witness and are not subject to cross examination by Petitioner, the Hearing Officer concludes that it would be inappropriate to consider them at this time. In any event, the meeting notes appear to be largely redundant of the testimony already provided at the hearing concerning the substance of the meeting, and thus likely would not affect the outcome of this HOD.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and *SOP* Section 1003.

II. ISSUE(S) AND REQUESTED RELIEF

As discussed at the PHCs and the outset of the Due Process Hearing, a review of the pleadings filed by both parties (including amended complaint and motions to dismiss) has resulted in the following issues and requested relief being presented for determination:

- a. ***Whether DCPS violated an October 25, 2008 HOD by (1) failing to convene an MDT meeting within 15 school days of receiving independent evaluations, and (2) failing to comply with the provisions of a prior June 25, 2007 HOD incorporated therein, regarding compensatory education.***
- b. ***Whether Petitioner is entitled to an award of compensatory education services for DCPS' denials of FAPE during the 2006-07 and 2007-08 school years, which were previously adjudicated in the 6/25/07 and 10/25/08 HODs, respectively, and, if so, in what type and amount.***
- c. ***Whether the claims and/or relief raised by Petitioner are barred by the doctrine of res judicata/claim preclusion.***

² The Hearing Officer observes that the copy of the meeting notes attached to DCPS' closing argument contains a "DC Special Education" facsimile date of 4/6/09 across the top of the document. This was two weeks *before* the hearing was convened.

III. FINDINGS OF FACT

1. The Student is a -year old resident of the District of Columbia whose date of birth is . He currently attends School , pursuant to a DCPS notice of placement issued October 1, 2008. See Parent Testimony; DCPS Testimony.

2. The Student previously attended School during the 2006/07 school year, and attended School during the 2007/08 school year. The Student was determined to be eligible for special education and related services as a child with a disability during each of these years. -3; -9; Parent Testimony; SEC Testimony.

3. On June 25, 2007, an HOD was issued finding that the educational placement for the Student at during the 2006/07 school year was inappropriate and a denial of FAPE. See -3, p. 8. The HOD ordered DCPS to convene an MDT/IEP team meeting to review evaluations, review and revise the IEP, and discuss and determine placement 30 days before commencement of the 2007/08 school year. *Id.* The HOD also ordered that at such MDT/IEP meeting, "the form, amount and delivery of compensatory education, if any, will be discussed and determined." *Id. at p. 9.*

4. On October 25, 2008, a further HOD was issued concluding that DCPS failed to provide a FAPE by failing to comply with the June 25, 2007 HOD. The HOD concluded that DCPS violated the 6/25/07 HOD because (a) it did not convene an MDT meeting until December 18, 2007, and (b) at the 12/18/07 meeting, the MDT did not discuss compensatory education.

9, p.4. The 10/25/08 HOD found that without holding a placement meeting as directed by the 6/25/07 HOD, DCPS made a decision to send the Student to for the 2007/08 school year, and that the Student's IEP was not implemented at . *Id.*, at p. 3.

5. Among other things, the 10/25/08 HOD found that the Student "was mistreated and verbally abused by both students and staff," and that the Student "did not progress academically" at . Thus, the Student remained inappropriately placed during the 2007/08 school year. *Id.*³

6. Subsequently, "during the time that the requested [10/15/08] hearing was being scheduled, DCPS issued notice of placement to Frost, the school of parent's and student's choice." .8 (DCPS Amended Response, dated Oct. 8, 2008, Case No.

7. The October 25, 2008 HOD also concluded that DCPS failed to provide a FAPE by failing to evaluate the Student in all areas of suspected disabilities, including failing to conduct triennial evaluations. 9, p. 4. The HOD ordered DCPS to fund independent evaluations for psycho-educational , neuropsychological, occupational therapy (OT), speech/language, and functional behavioral assessment (FBA). *Id.*, p. 5. In addition, the HOD again ordered DCPS to convene an MDT/IEP meeting to review the evaluations, review and revise the IEP as appropriate, and "otherwise comply with the provisions ordered in the June 25, 2007, HOD." *Id.*

³ The 10/25/08 HOD further recognized that the *Blackman/Jones* Consent Decree establishes a rebuttable presumption of harm in cases (like this one) where HODs and/or settlement agreements have not been implemented. 9, pp. 3-4. The 10/15/08 HOD concluded that DCPS denied a FAPE by failing to comply with the June 2007 HOD, thereby establishing a rebuttable presumption of harm under *Blackman Jones*. See *id.*, p. 3, Conclusions of Law ¶1.

8. Compensatory education issues were not litigated at the hearings preceding either the 6/25/07 or 10/25/08 HODs. As DCPS stated prior to the 10/15/08 due process hearing: "While it was DCPS' understanding that petitioner was going forward solely to seek compensatory education, parent's counsel indicated today [10/08/08] that *updated evaluations are needed before compensatory education can be determined.*" -8 (emphasis added) "DCPS then issued a letter authorizing petitioner to obtain all the required evaluations independently...." *Id.*

9. Following the 10/15/08 HOD, the Student's MDT/IEP team held a meeting on December 16, 2008 to review the Student's progress and update the IEP. *See* 10. The parent felt that the placement at was working well, and the team noted that independent evaluations were being obtained. *Id.* The updates to the team also indicated that the Student was benefitting greatly from the small class sizes and group therapy, and should continue to be educated in a small structured environment. *Id.* As a result, the team was in agreement that the Student's placement at should continue. *Id.* An updated IEP was issued on 12/16/08 confirming continuation of the placement. DCPS-4.

10. In late November-early December 2008, the parties began a dialogue primarily via email correspondence to see if they could develop a mutually agreeable compensatory education plan, in anticipation of the updated evaluations. *See* DCPS-3; 17.⁴ The parties recognized that the independent evaluations had not yet been completed, so that development and consideration of a firm plan was difficult. *Id.*

11. In early February 2009, the following independent evaluation reports were completed and submitted to DCPS: Psycho/educational and Neuro/psychological 1); Occupational Therapy 12); Speech/Language -13); and Auditory Processing 14).

12. On March 3, 2009, while this case was pending, DCPS' Compliance Case Manager Riley Kirby issued a Letter of Invitation for an MDT meeting. The stated purposes of the meeting were to "develop/review IEP" and "review evaluation or reevaluation information." DCPS-5. The box for "discuss CompEd" was *not* checked. *Id.*

13. On March 5, 2009, Petitioner's counsel responded to the "meeting invitation to review the new independent evaluations," and suggested that school schedule this meeting at a time convenient with the parent and the school staff." DCPS-3 (3/5/09 email between Ms. Houck and Mr. Riley). Due to the limited purpose of the meeting, Petitioner's counsel indicated that she did not need to attend. *Id.*; *see also* 19. Mr. Riley confirmed that, at the meeting, DCPS "will be reviewing all of the evaluations that you recently submitted to DCPS, including the occupational therapy, speech and language, auditory processing, psycho/educational, and neuropsychological assessments." DCPS-3. There was no mention of considering compensatory education at this meeting.

14. On March 17, 2009, a second Letter of Invitation was issued for an MDT meeting, with the same description of purposes as the 3/03/09 invitation. *See* 17-8. Again,

⁴ The email correspondence included: Mr. Riley Kirby, the Compliance Case Manager charged with ensuring DCPS' compliance with the 10/15/08 HOD; and Laura Fogliano, DCPS' Project Coordinator. *See* DCPS-3.

the box for “discuss CompEd” was *not* checked, and no other mention was made of that issue. *Id.*

15. The MDT meeting to review the evaluations pursuant to the Letters of Invitation was eventually held on or about April 3, 2009. *See* Riley Testimony; Parent Testimony. The parent was present at the meeting. The team received a progress report on the Student and reviewed the independent evaluations, consistent with the stated purposes of the meeting. *Id.* It was generally determined that the Student had progressed well in his placement at School. The team confirmed that the Student continued to be eligible for special education as a child with Multiple Disabilities, including Autism. *Id.*

16. Although it was not set forth in the meeting notice, DCPS apparently also raised the issue of compensatory education at the 4/3/09 meeting. DCPS indicated that it had proposed a compensatory education plan to Petitioner’s counsel, which had not been accepted, and was awaiting a counter-offer. Petitioner did not respond to the proposed plan at that meeting, but stated that she would consult with her counsel. *See* Riley Testimony; Parent Testimony; 19.

17. Following the 4/3/09 MDT meeting, Petitioner’s counsel sent DCPS a written proposal for a compensatory education plan for the Student. The proposal was based on a March 23, 2009, plan prepared by Ms. Brandy Cox, a behavior analyst and consultant for Petitioner. *See* -16.

18. The parties were unable to develop a mutually agreeable compensatory education plan and proceeded to a due process hearing on this issue.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Claim Preclusion/ Res Judicata

1. DCPS asserts that the complaint should be dismissed because Petitioner is barred by the doctrine of claim preclusion/*res judicata* from relitigating matters that were or could have been raised in prior actions. Specifically, DCPS claims that the prior HODs “dealt with the issue of FAPE, compensatory education, and/or the Petitioner has had every reasonable opportunity to present the claim and failed to do so.”⁵ DCPS argues that “any claim for relief is attempting to reopen, and/or collaterally attack, the underlying claim/finding in [the] October 2008 HOD. Therefore, the Petitioner’s issues are basically the same in both cases and the hearing officer has already found in the parent’s favor and provided relief on these issues in this matter, the claims raised in the complaint are precluded and DCPS is entitled to a dismissal on all issues.”⁶

⁵ DCPS’ Response, Notice of Insufficiency, and Motion to Dismiss, filed Feb. 26, 2009, at 3; *see also* DCPS’ First Amended Response, Notice of Insufficiency, and Motion to Dismiss, filed March 30, 2009, at 2-3; DCPS’ Closing Argument and Second Amended Motion to Dismiss, filed April 27, 2009, at 2-3.

⁶ DCPS’ Closing Argument and Second Amended Motion to Dismiss, filed April 27, 2009, at 3.

2. For the reasons discussed below, the Hearing Officer disagrees and concludes that Petitioner's current complaint seeking the remedy of compensatory education is not subject to dismissal under the doctrine of claim preclusion *res judicata*.⁷

3. DCPS correctly notes that claim preclusion requires a showing of three elements: "(1) the presence of the same parties or privies in the previous and current suits; (2) claims arising from the same cause of action in both suits; and (3) a final judgment on the merits in the previous suit." *IDEA Public Charter School v. Belton*, 48 IDELR 90 (D.D.C. 2007), slip op. at 4 (citing *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004)). Claims "arise from the same cause of action" when they are based on the same "nucleus of facts." *Id.* "To answer this question, the court should consider whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations of business understanding or usage." *Serpas v. District of Columbia*, 108 LRP 9952 (D.D.C. 2005), slip op. at 5.

4. In this case, the issue of compensatory education is undoubtedly related in time, space and origin to the denials of FAPE found in the June 2007 and October 2008 HODs. However, under the particular circumstances involved here, the Hearing Officer concludes that the current claim for compensatory education does not arise from the same cause of action as the prior claims of FAPE denial due to inappropriate placement, failures to evaluate, etc. It appears that these different sets of claims did not "form a convenient trial unit," and their treatment as a unit would not conform to the parties' legitimate expectations. *Serpas, supra*.

5. As the *Serpas* court explained, application of claim preclusion "is inappropriate when, as here, as plaintiff conscientiously asserts her rights in the first forum." 108 LRP 9952, slip op. at 5. As in *Serpas*, it appears from the record that Petitioner "did not intend to subject DCPS to the burden of defending multiple lawsuits, but rather endeavored to raise all relevant issues" in a prompt and orderly fashion. *Id.* at 6. Thus, the 8/16/08 complaint and 9/3/08 amended complaint filed in the prior action included the funding of a compensatory education plan in its requested relief. *See* DCPS-2. However, as the case progressed toward hearing, the parties recognized that updated evaluations were needed before compensatory education could be determined. *See* -8 (DCPS' Amended Response, dated Oct. 8, 2008).⁸ DCPS therefore issued a letter authorizing Petitioner to obtain all the requested evaluations independently. *Id.* Because it "appear[ed] that the offer would not have been made but for the complaint being filed," Hearing Officer Ruff then granted the requested remedy of independent evaluations and a MDT meeting to review the evaluations and update the Student's IEP. 9, at p. 4. As Petitioner notes, "DCPS clearly understood that Petitioner would be reserving the issue of compensatory education and would be going forward only on the issue of DCPS' failure to evaluate,"⁹ as well as failure to comply with the June 2007 HOD.

⁷ Of course, claim preclusion by definition cannot apply to Petitioner's claim that DCPS has violated the October 2008 HOD, since that claim obviously could not have arisen prior to the HOD or been presented at the prior hearing.

⁸ *Cf. Friendship Edison Public Charter School v. Nesbitt*, 583 F.3d 169 (D.D.C. 2008) (ordering updated vocational and psycho-educational evaluations to permit an adequate compensatory education plan to be developed).

⁹ Petitioner's Response and Objection to respondent's Notice of Insufficiency and Motion to Dismiss, filed April 2, 2009, at p. 3.

6. Accordingly, it is clear that the issue of compensatory education “has never been adjudicated in a due process hearing.” *Serpas, supra*, slip op. at 7. Similarly, “there is no danger of an inconsistent judgment when no initial judgment has been made.” *Id.* at 6. As a result, “[a]pplying claim preclusion in this instance fails to effectuate the policy considerations underlying the doctrine.” *Id.*¹⁰

B. Issues/Alleged Violations by DCPS

7. The burden of proof in a special education due process hearing generally is on the party seeking relief, *i.e.*, Petitioner. DCMR 5-3030.3; *see also Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). 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. *See* DCMR 5-3030.3. The standard generally is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

8. To the extent set forth below, the Hearing Officer concludes that Petitioner has carried her burden of proof with respect to both Issues 1 and 2.

- (1) ***Whether DCPS violated an October 27, 2008 HOD by (1) failing to convene an MDT meeting within 15 school days of receiving independent evaluations, and (2) failing to comply with the provisions of a prior June 25, 2007 HOD incorporated therein, regarding compensatory education.***

9. Petitioner alleges that DCPS has violated the October 27, 2008 HOD, by (a) failing to convene an MDT meeting in a timely manner, and (b) failing to carry out compliance with the earlier June 2007 HOD (specifically the compensatory education section), which the 10/27/08 HOD had ordered.

10. With respect to the first alleged violation, the 10/25/08 HOD ordered DCPS to convene a meeting within 15 business days of receiving five independent evaluations. The record indicates that all independent evaluation reports had been received by DCPS by 2/23/09; and the 15th business day thereafter was March 16, 2009. No meeting had been scheduled as of the date the amended complaint was filed, *i.e.*, March 19, 2009. DCPS eventually convened a meeting on April 3, 2009. This was untimely under the October 2008 HOD, although only by about two weeks.

11. With respect to the second alleged violation, the June 2007 HOD ordered that the “form, amount, and delivery of compensatory education, if any, will be discussed and determined” at an appropriate MDT meeting. The October 2008 HOD again ordered compliance with that directive. DCPS did not take the necessary steps to accomplish this until April 2009. Again, however, it appears from the date of the evaluations that it would not have been required to do so under the terms of the 10/15/08 HOD until approximately mid-March.

¹⁰ *See also* 20 U.S.C. §1415(o) (“Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.”).

12. Under IDEA, “a hearing officer’s determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. §300.513(a)(1). “In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies – (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit.” *Id.* § 300.513 (a)(2). *See also Lesesne v. DC*, 447 F.3d 828, 834 (D.C. Cir. 2006); 20 U.S.C. §1415(f)(E).

13. With respect to the above procedural violations, Petitioner has not proven by a preponderance of the evidence that DCPS’ procedural inadequacies met either of the three tests specified in Section 300.513 (a)(2). The procedural inadequacies have not been shown to (a) impede the Student’s right to a FAPE, (b) significantly impede the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE, or (c) cause a deprivation of educational benefit to the Student, for the reasons set forth below. The violations (approximately two-week delay in convening an MDT meeting) appear extremely minor, and there is no evidence that the violations adversely impacted the Student or Petitioner.¹¹

(2) ***Whether Petitioner is entitled to an award of compensatory education services for DCPS’ denials of FAPE during the 2006-07 and 2007-08 school years, which were adjudicated in previous HODs.***

14. Turning to Petitioner’s primary claim, the complaint alleges that DCPS has failed to develop, as part of the Student’s IEP, an adequate and appropriate compensatory education plan for its denials of FAPE during the 2006-07 school year and the 2007-08 (and extending into the beginning of 2008/09) school years. These denials of FAPE were previously adjudicated in the June 2007 and October 2008 HODs, respectively. As a result, Petitioner requests that DCPS be ordered to fund the compensatory education plan she has submitted (*see* 16). Petitioner defines the time periods to be covered by compensatory education as approximately **January to June 2007** (while the Student was at _____ and then **August 2007 to October 2008** (while at _____

15. 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.’” *Reid v. District of Columbia*, 401 F. 3d at 521 (quotations omitted). “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.” 401 F.3d at 524. *See also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “‘qualitative, fact-intensive’ inquiry used to craft an award ‘tailored to the unique needs of the disabled student’”).

¹¹ Even assuming that Petitioner is entitled to a rebuttable presumption of harm for students who fail to receive timely implementation of HODs, *see Blackman v. District of Columbia* (D.D.C. July 26, 2006), ¶74 — an issue not raised by Petitioner with respect to the 10/15/08 HOD — the Hearing Officer concludes that the presumption (considered with the other record evidence) does not operate in this case to establish the specific criteria in 34 CFR 300.513.

16. There is little question that the Student suffered substantial harm as a result of the denials of FAPE that were previously adjudicated. DCPS was found to have failed to evaluate the Student and failed to provide appropriate placements over the course of two school years. At School, the educational placement was inappropriate and a denial of FAPE, for the reasons stated in the June 25, 2007 HOD 3). Then at the Student's IEP was not implemented; he was mistreated and verbally abused by both students and staff; and the Student did not progress academically. See 10/15/08 HOD, p. 2 9). Despite complaints about the placement during that year, DCPS made no attempt to provide another placement. *Id.* Additional testimony as to the harm suffered by the Student during these earlier time periods was received at this hearing, from both Petitioner and the Student. In addition, as the 10/15/08 HOD recognized, a rebuttable presumption of harm was established due to DCPS' violation of the June 2007 HOD, which was not rebutted either in this hearing or earlier hearings.¹²

17. As described at hearing by Ms. Cox and in Exhibit 16, Petitioner seeks an award of compensatory education services consisting of the following elements:

(a) **Speech therapy** - to address deficits in the area of articulation, no less than twice per week for one-hour increments from a licensed and parent-agreed upon clinician, for a period of one year. This proposed intervention takes into account (*inter alia*) that the Student did not receive appropriate speech therapy while attending See 16-1.

(b) **Educational tutoring** - to address deficits in auditory extraction and auditory memory span, no less than three (3) hours per week, from a licensed and parent-agreed upon provider, for a period of one year.

(c) **Life skills instruction** - to address deficits in the areas of career planning, nutrition and eating habits, independent living skills, consumer skills, and community transportation, no less than two (2) hours per week, from a parent-agreed upon provider, for a period of one year.

(d) **Social skills instruction** - including personal and group-based direct instruction within the home and community, in the areas of social awareness and social assertiveness, no less than three (3) hours per week, for a period of one year. The plan calls for these services to be provided by a "Board Certified Behavior Analyst with experience with students with High Functioning Autism and agreed upon by the family." 16-2. This proposed instruction is designed to "re-teach appropriate coping and interaction behaviors" due to the Student's experiences at where he was exposed to "a history of punishment and maladaptive responses with regard to social interaction." *Id.*

(e) **Individual psychotherapy** - focused on interpersonal relationships, personal advocacy and appropriate conflict resolution behaviors, provided by a licensed clinician agreed upon by the family, with treatment duration beginning at the conclusion of social skills instruction and continuing for eight (8) months at no less than one hour per week.

18. Based on the foregoing, and careful consideration of all the testimony and evidence adduced in this case, the Hearing Officer concludes that the compensatory education plan put forth by Petitioner should be adopted, subject to the modifications set forth below. For

¹² Petitioner estimated that the Student may have missed nearly 2000 hours of specialized instruction and related services due to inappropriate placements over the course of two school years, and this denial resulted in significant academic and social regression. See Petitioner's Closing Argument, filed April 27, 2009, at 2; Parent Testimony.

the most part, the plan meets the *Reid* standard because it has been shown to be (a) reasonably calculated to provide the educational benefits that likely would have accrued from special education services that DCPS should have supplied in the first place during the relevant time periods listed above, and (b) reasonably tailored to the unique needs of the Student. As described above, Petitioner's compensatory education plan addresses the Student's specific deficiencies by enabling him to gain skills he otherwise would have obtained had he not been placed in an inappropriate learning environment during the two school years at issue.

19. DCPS proposed a much smaller volume of compensatory education that does not fully address all of the Student's deficits resulting from the past deficient program.¹³ It does not appear 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. Moreover, it does not appear to be tailored to the unique needs of the Student, as evidenced in the testimony of DCPS' Compliance Case Manager who developed the plan.¹⁴ Accordingly, the Hearing Officer concludes that the DCPS proposal is inadequate to compensate for the significant denials of FAPE to the Student.

20. Several modifications to Petitioner's proposed plan are appropriate based on the testimony and other evidence adduced at hearing and to avoid unnecessary burden and expense. The modifications ordered by the Hearing Officer are as follows:

(a) **Speech therapy** – No modifications.

(b) **Educational tutoring** – This component may be partially offset by the 48 hours of additional specialized instruction in math and reading comprehension skills provided under an existing Compensatory Education Plan dated June 5, 2008 (see DCPS-4), which DCPS maintains is still in effect and covers the 2006-2007 school year at Eliot (Riley Testimony), but only to the extent such services are actually provided over the next year.

(c) **Life skills instruction** - This component will be reduced to **six months**, provided that DCPS reimburses Petitioner for the Summer 2008 program attended by the Student, which shall be added as an element of the plan (at a cost not to exceed \$6500). See DCPS-3.

(d) **Social skills instruction** - The services under this component may be provided by any licensed and parent agreed upon provider, subject to approval of the overall program of instruction by a Board-certified Analyst with experience with students with High Functioning Autism selected by parent.

¹³ DCPS proposed to provide: (a) no speech therapy; (b) educational tutoring in the amount of two hours/week for three months; (c) no life skills instruction (20 total hours were originally proposed, but this was dropped in exchange for reimbursement of the summer 2008 program at (d) social skills instruction of one hour/week for three months; and (e) no individual psychotherapy. See Riley Testimony; DCPS-3.

¹⁴ Mr. Riley testified (*inter alia*) that he had never met or spoken directly with the Student or parent; that he had not spoken with the Student's teachers; that he had no formal training or experience with autistic students; that he did not know what benefits were derived from the summer Seeds of Tomorrow program (even though he reduced or eliminated components of the plan based on that program); and that he had developed the plan without reviewing the five independent evaluations (even though DCPS had deferred consideration of compensatory education until their completion). See Riley Testimony.

(e) **Individual psychotherapy** – The evidence presented by Petitioner was insufficient to demonstrate that these services were reasonably calculated to provide educational benefits missed as a result of the past inappropriate placements. Accordingly, this component will be deleted from the plan.

C. Relief

21. The IDEA authorizes district courts and hearing officers to fashion “appropriate” relief, *e.g.*, 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations,” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid*, 401 F.3d at 521-23. *See also* 34 C.F.R. § 300.513 (a) (3) (“Nothing in [Section 300.513(a)] shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§ 300.500 through 300.536.”).

22. As noted above, compensatory education is an equitable remedy available to a hearing officer, exercising his authority to grant “appropriate” relief under IDEA. In this case, the Hearing Officer finds that compensatory education in the amount and type described under paragraph 17 above, with the modifications specified in paragraph 20 above, is appropriate. This relief is based on the record developed in this proceeding and the FAPE denials previously adjudicated. No other equitable relief is deemed necessary or appropriate, other than as set forth in the Order below.

V. ORDER

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

1. Within 30 calendar days of this Order, DCPS shall fund and implement the compensatory education plan submitted by Petitioner, as summarized in Exhibit MM-16 and Paragraph 17 of the Conclusions of Law herein, subject to the modifications contained in Paragraph 20 of the Conclusions of Law herein.
2. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Carolyn Houck, Esq., via facsimile (301-951-4248), or via email (cwhouck@aol.com)
3. This case shall be, and hereby is, **CLOSED**.

Dated: May 8, 2009

/s/


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 State court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).