

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

1150 5th Street, SE
Washington, DC 20003
Tel: 202-698-3819
Fax: 202-698-3825

Confidential

OSSE
STUDENT HEARING OFFICE
2009 MAR -5 AM 10:42

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>DCPS</p> <p>Respondent.</p> <p>Case #</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Zachary Nahass, Esq. 1726 Connecticut Ave. NW #400 Washington, DC 20009</p> <p>Counsel for DCPS: Daniel McCall, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
--	--

¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.²

PROCEDURAL BACKGROUND:

A due process hearing was held in this matter on September 3, 2008, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was conducted by Hearing Officer Charles R. Jones pursuant to a due process complaint submitted by the counsel for the parent and student filed on August 15, 2008.

Mr. Jones issued a Hearing Officer's Determination (HOD) in this matter on September 13, 2008.³ The HOD granted partial relief and directed Petitioner to present to Mr. Jones a proposed compensatory education plan on or before September 21, 2008, and for DCPS to present a response to the plan, if any, on or before September 23, 2008. The HOD stated the Hearing Officer would approve an appropriate compensatory education plan "consistent with Reid⁴ by issuing an Interim Order on or after September 25, 2008."

Mr. Jones left the position of Hearing Officer as of September 30, 2008, without a subsequent order in this matter being issued. This Hearing Officer agreed to consider Petitioner's request for a final order regarding the compensatory education plan following the filing of a subsequent due process complaint by Petitioner against DCPS related to an alleged failure by DCPS to timely comply with other provisions of Mr. Jones's September 13, 2008, HOD.⁵ This Hearing Officer obtained evidence on the proposed compensatory education plan on February 11, 2009.⁶

² DCPS counsel objected to this Hearing Officer's jurisdiction and authority to issue a final order in this matter. Counsel asserted Petitioner's most appropriate course of relief was to have either filed an appeal of the September 13, 2008, HOD, file a new due process complaint or file a petition with the Special Master under the Blackman/Jones consent decree. This Hearing Officer concluded that issuance of a final decision in this matter was appropriate given the clear indication in the September 13, 2008, HOD that an order on a compensatory education plan would be issued consistent with Reid, and given that this Hearing Officer now has jurisdiction of another complaint involving this student. This Hearing Officer noted DCPS's objection for the record but overruled the objection and proceeded to take additional evidence to render this decision and order.

³ The HOD noted that DCPS did not disclose any documents for the hearing and called no witnesses.

⁴ *Reid v. District of Columbia*, 401 F.3d 516, 43 IDELR 32 (United States Court of Appeals, DC Circuit (2005))

⁵ Petitioner filed a motion for a final HOD with this Hearing Officer in his capacity as Chief Hearing Officer in October 2008. Not until the new complaint was filed and an opinion on the authority to issue such an order was given by the SHO Administration did this Hearing Officer take action on the request.

⁶ Petitioner asserted that the September 13, 2008, HOD contemplated avoiding any subsequent hearing on the

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es), the September 13, 2008, HOD, Petitioner's proposed compensatory education plan, and documents disclosed by Petitioner and DCPS in the due process hearings on the complaints filed August 15, 2008, and January 12, 2009.⁷

ISSUE(S): ⁸

Is the compensatory education plan proposed by Petitioner appropriate?

FINDINGS OF FACT:⁹

1. The student is _____ years old, currently attends School A and resides in the District of Columbia with the student's parent(s), (hereinafter "Petitioner" or "Parent"). Prior to attending School A, the student attended School B, a District of Columbia Public Middle School. (September 13, 2008, HOD)
2. School A is a private full time special education program. The student began attending School A during the first semester of the 2008-09 school year pursuant to the Hearing Officer's Determination (HOD) issued September 13, 2008, by Hearing Officer Charles R. Jones. (September 13, 2008, HOD)
3. A due process hearing was held in this matter on September 3, 2008, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003, and conducted by Hearing Officer Jones pursuant to a due process complaint submitted by the counsel for the parent and student filed on August 15, 2008. (September 13, 2008, HOD)
4. In the September 13, 2008, HOD Hearing Officer Jones cited two issues to be adjudicated: (1) whether DCPS denied the student a FAPE by failing to develop an appropriate IEP? and (2) whether DCPS denied the student a FAPE by failing to provide

compensatory education and because DCPS did not provide a response to the proposed compensatory education plan and did not appeal the HOD the compensatory education plan as proposed should be approved. This Hearing Officer concluded that additional evidence was necessary to clarify the relationship between the services missed and the compensatory education plan proposed and that the automatic acceptance of the proposed plan due to DCPS's failure to respond to it was inappropriate.

⁷ A HOD issued February 21, 2009.

⁸ The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

⁹ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding.

an appropriate educational placement for the 2008-2009 school year? (September 13, 2008, HOD)

5. Hearing Officer Jones found, inter alia, that the student's most recent individualized education program (IEP), dated October 17, 2006, was not current and the comprehensive psychological evaluation conducted in June 2008 recommended an occupational therapy and speech and language evaluation and DCPS has failed to conduct those evaluations. Hearing Officer Jones also found that based on the educational records provided by DCPS did not reflect the provision of related services to the student (while attending School B).¹⁰ (September 13, 2008, HOD)
6. Hearing Officer Jones found, based on the student's June 2008 psychological evaluation, the student had a disability classification of mental retardation (MR) despite the fact the student had overall cognitive functioning in the Low Average range with a cognitive score of 86 which was "inconsistent with a mental retardation diagnosis." Hearing Officer Jones cited the following language from the evaluation in the Findings of Fact: "poor educational experiences as related to [the student's] prior mental retardation diagnosis may have significantly impacted his performance in the area of [V]ocabulary particularly." "The Findings of Fact also included the following language: "Due to the in appropriate disability classification of MR the placement at [School B] was an inappropriate placement, as the Petitioner failed to obtain any educational benefit from the inappropriate placement." (September 13, 2008, HOD)
7. The HOD issued by Hearing Officer Jones in this matter on September 13, 2008, granted partial relief resolving both issues in favor of Petitioner and directing DCPS to place and fund the student's at School A and granting Petitioner independent evaluations: occupational therapy (OT) and speech and language (S/L). The HOD also directed Petitioner to present to Hearing Officer Jones a proposed compensatory education plan on or before September 21, 2008, and DCPS to present a response to the plan, if any, on or before September 23, 2008. (September 13, 2008, HOD)
8. The HOD did not specifically state what loss and/or harm the proposed compensatory education plan was to address. However, in addition to finding that the OT and S/L evaluations were not conducted and the student's IEP was not current, Hearing Officer Jones found the disability classification of MR that in the student's last two IEPs¹¹ was inappropriate and the student had not been provided educational benefit while attending School B because of the inappropriate disability classification.¹²

¹⁰ In addition to specialized instruction the 2006 IEP only included counseling as a related service for 30 minutes per week.

¹¹ The IEPs were dated October 17, 2006, and October 14, 2005.

¹² The issue of whether DCPS provided the student an inappropriate placement for years other than 2008-09 was not expressly stated in the "Issues" section of HOD; however, the August 15, 2008, due process complaint alleged that because of the inappropriate MR disability classification the student did not progress academically or gain educational benefit while attending School B.

9. The September 13, 2008, HOD stated Hearing Officer Jones would approve an appropriate compensatory education plan "consistent with Reid by issuing an Interim Order on or after September 25, 2008. (September 13, 2008, HOD)
10. On September 19, 2008, Petitioner's counsel faxed to the Student Hearing Office (SHO) a proposed compensatory education plan in which Petitioner states:

"In order to appropriately compensate [the student] for DCPS' failure to prescribe and provide appropriate placement, instruction and services and upon review of available educational records and evaluations, the Petitioner, together with her Special Education Advocate, recommend that [the student] receive:

- 1000 hours of compensatory specialized instruction to be provided as tutoring and programs;
- 200 hours of speech and language therapy;
- 200 hours of psychological counseling;
- 200 hours occupational therapy and
- A laptop computer offered under class D of the current Blackman/Jones Compensatory Education catalog.

Pursuant to Reid ex rel. Reid v. District of Columbia 401 F.3d 516, (D.C. Cir. 2005), this formulation is intended to place [the student] in the same position he would have occupied but for DCPS' violations of the IDEA."

(Petitioner's Proposed Comp. Ed. Plan)

11. There was no response to the proposed plan filed by DCPS. Hearing Officer Jones left the position of Hearing Officer as of September 30, 2008, without a subsequent order in this matter being issued.
12. The proposed compensatory education plan was prepared by the parent's educational advocate, Ms. Sharon Millis. Ms. Millis acknowledged that a recent speech and language evaluation concluded the student did not need speech and language services. Therefore, the speech language services proposed in the plan are not needed. (Ms. Millis's testimony)
13. Prior to attending School B the student's disability classification had been learning disability (LD). Soon after the student arrived at School B his classification was changed to MR with apparently no supporting evaluation(s) and he was placed in a full time MR program in which he received no related services.¹³ (Mr. Millis's testimony)

¹³ Ms. Millis testified the student's IEP prior to attending School B included OT services. However, there was no documentation supporting this contention. Therefore, the Hearing Officer did not credit the testimony that the student was entitled to compensation for missed OT services.

14. The student apparently attended School B three school years from 2005-06 through the end of 2007-08. The student's October 14, 2005, IEP cited an October 10, 2005, assessment in the present levels of performance section. The student was according to this section of the IEP was age 11, in the sixth grade, and operating at a second grade level in reading and math.¹⁴ (October 14, 2005, IEP)
15. The student's June 2008 educational assessment (Woodcock Johnson) revealed the student was operating significantly below age and grade expectancy. The student was age fourteen when the evaluation was conducted. However, his academic skills were at an age equivalency of approximately 8 years and his grade equivalency at approximately third grade.¹⁵ When compared with the present levels of performance in the student's October 2005 IEP, the student apparently progressed approximately one and half grade levels in reading and math in the three years he attended School B. (June 2008 Psycho-educational evaluation, October 14, 2005, IEP)
16. The student has cognitive scores which indicate the student could have achieved more had he been provided a more challenging curriculum than he was presented during his time at School B. During the educational advocate's observations of the student in his classroom at School B he was routinely engaged activities that did not develop his academic abilities. The proposed 6 hours per week¹⁶ of tutoring and programs¹⁷ would make up for the lost academic instruction and build a foundation the student should have gotten during his three years at School B. (Ms. Millis's testimony)
17. The student's June 2006 psycho-educational evaluation noted that "with feedback during assignments, [the student] may be able to achieve more than he is currently demonstrating." (June 2008 Psycho-educational evaluation)
18. The student learned very few social skills because he was in the MR classroom at School B. As a result, when he arrived at School A he had significant difficulties with peers because of his underdeveloped social skills and low self esteem. The student would benefit from additional counseling of approximately two hours per week.¹⁸ The student currently receives 1 hour of counseling per week at School A. (Ms. Millis's testimony)

¹⁴ The student's reading comprehension was 2.5 and his basic reading was 2.0. His math calculation was 2.0 his math reasoning was 1.5.

¹⁵ The student's Reading Scores were at a grade equivalency of 3 years 6 months and his math calculation skills were at a grade equivalency of 3 years 5 months.

¹⁶ Ms. Millis testified she arrived at the 1000 total hours proposed by multiplying 6 hours of tutoring/programs per week at 50 weeks for 3 calendar years. However, the Hearing Officer notes that using this calculation the number of hours would add to 900 not 1000.

¹⁷ Ms. Millis testified the student also would benefit greatly if some of these hours were used giving the student educational experiences like visiting museums that would complement what he is learning in the classroom and further remediate his academic abilities.

¹⁸ Ms. Millis testified that she arrived at 200 hours of counseling by multiplying 2 hours per week for two calendar

CONCLUSIONS OF LAW:

The September 13, 2008, HOD stated Hearing Officer Jones would approve an appropriate compensatory education plan “consistent with Reid by issuing an Interim Order on or after September 25, 2008.

In the September 13, 2008, HOD the Hearing Officer Jones found: “due to the inappropriate disability classification of MR, the placement at [School B] was an inappropriate placement, as the Petitioner failed to obtain any educational benefit from the inappropriate placement. Additionally, the educational records provided by DCPS do not reflect the provision of related services to the Petitioner. These facts were not disputed by DCPS.” Hearing Officer Jones concluded: “As a direct and proximate result of the inappropriate IEP and the inappropriate disability classification, the Petitioner’s educational placement was also significantly inappropriate.”

The record sufficiently demonstrates by a preponderance of the evidence the student remained in a MR classroom during his time at School B, received no related counseling services and was significantly harmed thereby. The student made little academic progress and suffered significant diminishment in self esteem during the time he was at School B in a MR classroom. The student was in the eighth grade in his final year at School B in June 2008 when his psycho-educational evaluation was conducted but was actually functioning on a third grade level. The student as of June 2008 was approximately five years behind academically.

The correct legal standard for compensatory education in this jurisdiction has been established in Reid. According to Reid, once a violation of IDEA has occurred, in order to craft an appropriate remedy, there must be a showing of the educational benefits denied to the student as a result of the school’s failure to comply with IDEA. Here, the student failed to make this showing and the hearing officer therefore concluded that any award of compensatory education services would be arbitrary. The court found that the hearing officer’s conclusion and reliance on Reid was justified and documented in the record. Gregory-Rivas v. District of Columbia 577 F. Supp. 2d 4, 51 IDELR 42 (United States District Court, District of Columbia. (2008)).

In rejecting a “lump sum” award of compensatory education which the Court described as a ‘cookie cutter’ approach, the Court held that the award of compensatory education must be reasonably calculated to provide the educational benefits that would have likely accrued from the special education services the student should have been provided in the first place. The inquiry must be “qualitative, fact intensive and above all, tailored to the unique needs of the disabled student” (Branham V. District of Columbia 427 F.3d 7, 44 IDELR 149 (United States Court of Appeals, DC Circuit (2005))).

The student’s June 2006 psycho-educational evaluation also noted that “with feedback during assignments, he may be able to achieve more than he is currently demonstrating.” This

years.

statement supports the proposition that the student would benefit from tutoring in addition to his current education program at School A to assist him in making greater academic progress.

Although the educational advocate convincingly testified that the proposed tutoring and programs of six hours per week would make up for the instruction the student missed by being in an inappropriate placement at School B, the Hearing Officer was not convinced by her testimony that the total number of hours of tutoring and programs proposed (1000 hours) had a rational relationship to the loss and harm to the student and what would remediate it. She stated that in her opinion the student should receive the six hours of tutoring for three calendar years. There was nothing in her testimony that was convincing as to why the tutoring would have to continue for that duration. Perhaps it was because the student was in School B for three years; however, this was not clear from her testimony. In addition, the most recent evaluation of the student, which is probably the best measure of the student current functioning, was conducted prior the student attending School A and do not reflect any progress the student has made since being there.

A hearing officer must provide justification how the award was individualized and supported by the record. (Mary McLeod Bethune Day Academy Public Charter School v. Bland 534 F. Supp. 2d 109, 49 IDELR 183 (United States District Court, District of Columbia (2008))).

The student's most recent educational assessment when compared with the IEP present levels of performance when the student started attending School B indicate the student made some, albeit little, progress while at School B.¹⁹ It's is reasonable to conclude based on this nominal progress the student might have made one year of academic progress during a single school year and thus three years academic progress in the three years he attended School B had he been provided appropriate services. Because the student by some measure seemed to have progressed 1.5 years academically during his time at School B the Hearing Officer concludes the remaining 1.5 years of academic progress is what the tutoring should be designed to achieve. At the recommended and presumably maximum tolerable rate for this student of 6 hours of tutoring and programs per week for 50 weeks per year the total number of hours of tutoring to compensate for the loss services would be 450 hours.

The educational advocate also convincingly testified that the student learned very few social skills because he was in the MR classroom at School B. As a result when he arrived at School A he had significant difficulties with peers because of his underdeveloped social skills and low self esteem. The student is currently receiving 1 hour of counseling as a part of his educational program at School A. The educational advocate also convincingly testified the student would benefit from additional counseling of approximately two hours per week to address deficient social skills.

However, as with the recommended total number of hours of tutoring, the educational advocate's testimony as to the total number of hours of counseling was not sufficient for the Hearing Officer to award the total number of counsel hours requested. The recommended total number of hours (two years of services) did not have a rational relationship to the loss of counseling services and

¹⁹ In comparing the student's academic grade equivalency from his 2005 IEP and his 2008 psycho-educational there seems to be a 1.5 increase in progress in the three school years the student attended School B.

harm to the student and what would remediate it. This Hearing Officer will award two hours of independent counseling for the remainder of the school year and instruct Petitioner to obtain or request of DCPS an assessment to assist in determining if additional independent counseling is warranted to compensate the student for the counseling services he missed during his time at School B.

The parent's educational advocate testified the student's IEP prior to attending School B included OT services. However, there was no documentation supporting this contention. Therefore, the Hearing Officer did not credit the testimony that the student was entitled to compensation for missed OT services beyond those recommended by the most recent OT evaluation.

Although the parent's educational advocate testified the student needed a computer also as compensatory education the testimony with regard to the student's use of the computer was not directly tied to the student being in an inappropriate placement or services the student missed during his time at School B. In her testimony the educational advocate stated the student has no computer at home and he would benefit from the computer to assist in keeping up with material is being presented in the student's classroom. This reasoning is more applicable to the student's current program at School A, rather than directly associated with compensation for the any loss the student experienced in the past.

Therefore, the Hearing Officer concludes that such a need should be more appropriately considered as a part of the student's IEP and discussed within the context of a MDT meeting. It was not sufficiently proved to the Hearing Officer that the request for the computer is directly linked to a loss of services the student experienced and any compensation thereof. Therefore, this Hearing Officer concludes that this portion of the proposed compensatory education plan is not warranted.

ORDER:

1. DCPS shall fund a total 450 hours independent tutoring/programs to be provided to the student at a frequency of 6 hours per week.
2. DCPS shall fund 2 hours of independent counseling per week from the date of this Order until the end of the 2008-09 school year including ESY service period for the 2008-09 if the student is eligible for ESY services.
3. At the end of the 2008-09 school year Petitioner may request an assessment to determine if additional counseling services are warranted to further remediate the student for the missed counseling services while at School B.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

/s/ Coles B. Ruff, Esquire

Coles B. Ruff, Esq.
Hearing Officer
Date: March 5, 2009