

DC Office of the State Superintendent of Education
Office of Compliance & Review

State Enforcement & Investigation Division

STUDENT HEARING OFFICE

Van Ness Elementary School

1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003

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STUDENT HEARING OFFICE
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Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

CONFIDENTIAL

In Re the Matter of:	*	
	*	CASE NO.
Parent on behalf of Student *	*	
	*	
Petitioner,	*	Complaint Date: 02/23/09
	*	Hearing Date: 03/26/09
vs.	*	
	*	Hearing Site:
	*	Van Ness Elementary School
The District of Columbia Public Schools	*	1150 5th Street, S.E., 1st Floor
	*	Washington, D.C. 20003
Respondent.	*	
	*	

HEARING OFFICER DETERMINATION

Petitioner's Attorney:

Christopher West, Esq.
James E. Brown & Associates, PLLC
1220 L Street, N.W., Suite 700
Washington, D.C. 20005

Respondent's Attorney:

Harsharen Bhuller, Esq.
Assistant Attorney General
Office of the Attorney General as Counsel
for D.C. Public Schools
825 North Capitol Street, N.E., 9th Floor
Washington, D.C. 20002

*Personally identifiable information is attached as an Index to this decision and must be removed prior to public distribution.

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JURISDICTION

The Due Process Hearing was convened and this Hearing Officer Determination (“HOD”) and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 C.F.R. Part 300; Title V, Chapter 30, of the District of Columbia Municipal Regulations (D.C.M.R.); and the District of Columbia Code, Title 38, Chapter 25B.

INTRODUCTION

On 02/23/09, a Due Process Complaint Notice (“Complaint”) was filed by the foster parent (“Parent” or “Petitioner”) on behalf of the year old student (“Student”) alleging that the District of Columbia Public Schools (“DCPS”) denied Student a Free Appropriate Public Education (“FAPE”) in violation of IDEIA when DCPS failed to provide Student with an appropriate educational placement and when DCPS failed to implement Student’s Individualized Education Program (“IEP”). Petitioner asserts that the denial of a FAPE entitles Student to compensatory education.

DCPS filed a response (“Response”) to the Complaint on 03/11/09.

The parties did not engage in mediation or the resolution process prior to the due process hearing.

THE PRE-HEARING CONFERENCE

Due to scheduling conflicts, a Pre-Hearing Conference did not convene until 9:00 a.m. on 03/26/09, immediately prior to the due process hearing. Christopher West, Esq. represented Petitioner (“Petitioner’s Attorney”) and Harsharen Bhuller, Esq. represented DCPS (“DCPS’ Attorney”).

Petitioner’s Attorney clarified that Petitioner intended to proceed on all of the issues stated in the Complaint, i.e., whether DCPS failed to provide Student with an appropriate educational placement, whether DCPS failed to implement Student’s IEP, and whether Student is entitled to compensatory education?

The parties reached the following stipulation:

Stipulation #1 - On 01/08/09, the Multidisciplinary Team (“MDT”) at conducted an initial determination of eligibility and found Student eligible for special education services with a disability classification of Emotional Disturbance (“ED”). The MDT developed an IEP that required 27.5 hours/week of specialized instruction and behavioral support services in a therapeutic full time out of general education setting, with placement to be determined at a later date.

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THE DUE PROCESS HEARING

The due process hearing convened at 9:30 a.m. on 03/26/09 at the Van Ness Elementary School located at 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003.

Petitioner was represented by Christopher West, Esq. ("Petitioner's Attorney") and DCPS was represented by Harsharen Bhuller, Esq. ("DCPS' Attorney"). Petitioner attended the due process hearing.

DCPS was not amenable to settlement discussions.

Issues for Litigation:

- #1 – Whether DCPS failed to provide Student with an appropriate educational placement, thereby denying Student a FAPE?
- #2 – Whether DCPS failed to implement Student's IEP, thereby denying Student a FAPE?
- #3 – Whether Student is entitled to compensatory education?

Stipulations:

Stipulation #1 - On 01/08/09, the MDT at _____ conducted an initial determination of eligibility and found Student eligible for special education services with a disability classification of ED. The MDT developed an IEP that required 27.5 hours/week of specialized instruction and behavioral support services in a therapeutic full time out of general education setting, with placement to be determined at a later date.

Admissions:

Petitioner's Admission #1 - Student is currently attending _____ and has been attending since September 2007.

Petitioner's Admission #2 - DCPS' 03/05/09 Letter of Invitation/Notice to a Meeting of the IEP Team proposing a meeting date of 03/13/09 to revise the existing IEP, discuss placement, discuss Extended School Year services and discuss compensatory education was received by Petitioner's Attorney by facsimile on 03/05/09.

Petitioner's Admission #3 - DCPS' 03/13/09 Letter of Invitation/Notice to a Meeting of the IEP Team proposing two different meeting times on 03/19/09 to revise the existing IEP, discuss placement, discuss Extended School Year services and discuss compensatory education was received by Petitioner's Attorney by facsimile on 03/13/09.

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Disclosures:

Petitioner's Five-Day Disclosure letter dated 03/19/09, contained Exhibits #1-13. Petitioner's Exhibits #1-13 were admitted into evidence without objection.

DCPS' Disclosure Statement dated 03/10/09, contained Exhibits #1-10. Exhibits #1-10 were admitted into evidence without objection. DCPS sought to admit a supplemental exhibit that had been disclosed to Petitioner on 03/25/09. Petitioner objected to its admission, and it was excluded pursuant to 34 C.F.R. 300.512(a)(3).

Witnesses:

For Petitioner:

- (1) Petitioner;
- (2) Melody Washington, social worker; and
- (3) Director of (via telephone).

For DCPS:

- (1) Barbra Bailey, Special Education Specialist (via telephone).

Relief Requested by Petitioner:

- (1) A finding of a denial of a FAPE on Issues #1 and #2;
- (2) DCPS to place and fund Student at or another appropriate placement identified by Petitioner; and
- (3) Within 45 days of placement within the program, DCPS to convene an IEP Team meeting to review all evaluations and determine compensatory education.

FINDINGS OF FACT

#1. On 01/08/09, the MDT at conducted an initial determination of eligibility and found Student eligible for special education services with a disability classification of ED. The MDT developed an IEP that required 27.5 hours/week of specialized instruction and behavioral support services in a therapeutic full time out of general education setting, with placement to be determined at a later date. (*Stipulation #1; DCPS' Exhibit #8, IEP dated 01/08/09*). The MDT issued a Prior Notice indicating that Student's placement at was no longer appropriate because the extent of Student's disability precluded Student's participation in an inclusion program and Student's ED disability required an out of general education, therapeutic setting. (*DCPS' #9, Prior Notice dated 01/08/09*). The MDT agreed that Student would remain at until a placement meeting could be scheduled (*DCPS' Exhibit #9, MDT Meeting Notes dated 01/08/09*). Petitioner understood that the placement decision would be made by a group of people that included Petitioner, the MDT, Student's social worker and Student's Guardian ad litem, and that the placement decision would be made at a placement meeting. (*Testimony of Petitioner*).

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#2. Petitioner was present and participated in the 01/08/09 MDT meeting, but due to computer problems in generating the paper IEP, Petitioner was unable to sign the IEP until 01/15/09. (DCPS' Exhibit #8, IEP dated 01/08/09; Testimony of Petitioner). Petitioner signed the IEP dated 01/08/09, indicating consent to the implementation of special education services, and indicating consent for Student to remain at until an appropriate placement could be identified. (Testimony of Petitioner).

#3. On 01/26/09, four school days after Petitioner signed the IEP, DCPS sent a letter to Petitioner's Attorney offering meeting dates of 02/06/09, 02/09/09 and 02/17/09 for Petitioner to meet with DCPS to discuss and determine an appropriate placement for Student. (DCPS' Exhibit #1, Correspondence from Special Education Coordinator ("SEC") at dated 01/26/09). Petitioner never saw this letter and was unaware that was trying to schedule a placement meeting. (Testimony of Petitioner).

#4. On 02/23/09, Petitioner filed a due process complaint alleging that DCPS had failed to provide Student with an appropriate educational placement and had failed to implement Student's 01/08/09 IEP. (Petitioner's Exhibit #1, Due Process Complaint Notice filed 02/23/09).

#5. On 02/24/09, DCPS sent a Letter of Invitation to Petitioner proposing meeting dates of 03/06/09, 03/09/09 and 03/11/09 for Petitioner to meet with DCPS to meet and revise the existing IEP, discuss placement, discuss Extended School Year services and discuss compensatory education. (DCPS' Exhibit #2, Letter of Invitation/Notice to a Meeting of the IEP Team dated 02/24/09). After receiving this letter, Petitioner spoke with the SEC at and was informed that DCPS was waiting for Petitioner's Attorney to provide a suitable date for the placement meeting. (Testimony of Petitioner).

#6. On 03/05/09, DCPS sent a Letter of Invitation to Petitioner proposing a meeting date of 03/13/09 for Petitioner to meet with DCPS to revise the existing IEP, discuss placement, discuss Extended School Year services and discuss compensatory education. (DCPS' Exhibit #3, Letter of Invitation/Notice to a Meeting of the IEP Team dated 03/05/09 with facsimile confirmation to Petitioner's Attorney). The letter was received by Petitioner's Attorney. (Petitioner's Admission #2). Petitioner never saw this letter and was not aware that DCPS was trying to schedule a placement meeting on 03/13/09. (Testimony of Petitioner).

#7. On 03/12/09, Petitioner's Attorney informed DCPS in writing that Petitioner would not attend the proposed 03/13/09 placement meeting because proposed placements had not been identified to Petitioner, and Petitioner wanted to visit the placements prior to the placement meeting. Petitioner indicated a willingness to attend a placement meeting only after possible placements had been identified. (DCPS' Exhibit #6 and Petitioner's Exhibit #2, Correspondence from Petitioner's Attorney dated 03/12/09).

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Petitioner never saw this letter but was aware that Petitioner's Attorney wrote it. (*Testimony of Petitioner*).

#8. On 03/13/09, DCPS sent a Letter of Invitation to Petitioner's Attorney proposing two different meeting times on 03/19/09 for Petitioner to meet with DCPS to revise the existing IEP, discuss placement, discuss Extended School Year services and discuss compensatory education. (*DCPS' Exhibit #4, Letter of Invitation/Notice to a Meeting of the IEP Team dated 03/13/09 with facsimile confirmation to Petitioner's Attorney*). The letter was received by Petitioner's Attorney. (*Petitioner's Admission #3*). Petitioner never saw the letter and was unaware that DCPS was trying to convene a placement meeting on 03/19/09. (*Testimony of Petitioner*).

#9. On 03/17/09, DCPS informed Petitioner by email that _____ was a proposed placement. (*Petitioner's Exhibit #3, email correspondence from SEC at _____ Student's neighborhood public school, has an ED cluster program consisting of a self contained classroom with 8-10 children in the class, a special education teacher and an instructional aide in the class, and a full time social worker and psychologist. Student's IEP of 27.5 hours of special education services allows Student to share lunch, art, music, and physical education classes with non-disabled peers. Students in the ED cluster at _____ do not travel alone in the building; they are escorted by a teacher, aide or social worker. This program was selected based on Student's IEP as well as a classroom observation of Student, and because it is the least restrictive environment ("LRE") in which Student's IEP can be implemented. There was no indication in Student's IEP or the MDT Notes that Student could not interact with non-disabled peers, and since Student was just beginning with special education services, the LRE was chosen. (Testimony of Barbra Bailey, DCPS Special Education Specialist)*).

#10. On 03/19/09, Petitioner rejected _____ as a placement for Student. (*Petitioner's Exhibit #3, email correspondence from Petitioner dated 03/19/09*). Petitioner did not visit _____ prior to rejecting it; rather, Petitioner spoke with the SEC at _____ and concluded that _____ was not a therapeutic environment. Also, Petitioner did not want Student to mingle with any general education students. (*Testimony of Petitioner*). Petitioner's choice for an educational placement is _____ a non-public therapeutic full time special educational placement with all disabled peers. (*Testimony of Petitioner*).

#11. On 03/25/09, DCPS issued a Notice of Placement to _____ Academic Center per the instruction of the DCPS Attorney. This placement was not discussed or agreed to by the MDT. _____ Academic Center can implement Student's IEP; however, Student will attend all classes with disabled peers and have no opportunity to interact with non-disabled peers. (*Testimony of Barbra Bailey, DCPS Special Education Specialist*). Petitioner was not aware of this proposed placement. (*Testimony of Petitioner*).

#12. The SEC at _____ tried to schedule placement meetings, but was unsuccessful. (*Testimony of Barbra Bailey, DCPS Special Education Specialist*).

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DISCUSSION AND CONCLUSIONS OF LAW

Petitioner's position is that Student was initially determined eligible for special education services on 01/08/09 and an IEP was developed mandating 27.5 hours/week of special education services in a therapeutic full time out of general education setting, and as of the date of the filing of the Complaint (*Finding of Fact #4*), Student had not been placed in an appropriate educational program. Petitioner asserts that because of DCPS' lag in implementing Student's IEP in an appropriate placement, Student has been denied a FAPE. Petitioner proposes the _____ a non-public therapeutic full time special education school as an appropriate program for Student.

DCPS' position at the due process hearing was consistent with its Response to the Complaint. DCPS' overall argument is that Student's initial determination of eligibility occurred on 01/08/09 at which time the MDT determined that Student's placement at _____ was inappropriate and agreed that a placement meeting would be held at a later date. DCPS asserts that the MDT, including Petitioner, agreed that Student would stay at _____ until an appropriate placement was secured. After Petitioner signed the IEP on 01/15/09, DCPS attempted to schedule several meetings to discuss and determine placement; however, Petitioner was uncooperative and a placement meeting could not be scheduled. DCPS asserts that any delay in convening a MDT meeting and determining an appropriate placement was the fault of Petitioner, and not DCPS, and therefore Student has not been denied a FAPE.

"The burden of proof shall be the responsibility of the party seeking relief. Based solely upon 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 with a FAPE." 5 D.C.M.R. 3030.3. "The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. Weast, 44 IDELR 150 (2005)*.

Issue #1 – Whether DCPS failed to provide Student with an appropriate educational placement, thereby denying Student a FAPE?

DCPS shall make a FAPE available to each child with a disability, ages three to twenty-two, who resides in, or is a ward of the District of Columbia. 5 D.C.M.R. 3002.1(a).

On 01/08/09, Student was initially determined eligible for special education services and an IEP was created mandating 27.5 hours/week of special education services in a therapeutic full time out of general education setting. (*Finding of Fact #1*). Everyone at the 01/08/09 MDT meeting, including Petitioner, agreed that Student would remain at _____ until an appropriate placement was found. (*Finding of Fact #1, #2*). On 01/15/09, Petitioner signed the IEP (*Finding of Fact #2*), thereby consenting to

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the initial provision of special education services (*See 34 C.F.R. 300(b)(1)*), and at that point in time, it became DCPS' responsibility to find an appropriate school placement for Student.

DCPS responded rapidly. On 01/26/09, just four school days after Petitioner signed the IEP, DCPS sent a letter to Petitioner's Attorney offering possible meeting dates in February 2009 to discuss placement. (*Finding of Fact #3*). There is no evidence in the record that Petitioner's Attorney responded to the letter. (*Finding of Fact #12*). The second letter from DCPS, dated 02/24/09, offering 3 possible meeting dates in March 2009, was received and acted upon by Petitioner. Petitioner contacted the SEC at [redacted] and was informed that DCPS was waiting for Petitioner's Attorney to confirm a meeting date. (*Finding of Fact #5*). A third letter dated 03/05/09 from DCPS to Petitioner's Attorney, and a fourth letter dated 03/13/09 from DCPS to Petitioner's Attorney, offered Petitioner multiple opportunities to meet with DCPS to discuss placement. (*Finding of Fact #6, #8*). Petitioner's only response to DCPS' letters to schedule a placement meeting was a letter dated 03/12/09 from Petitioner's Attorney stating that Petitioner would not meet with DCPS until Petitioner had an opportunity to visit proposed placements. (*Finding of Fact #7*). Finally, on 03/17/09, DCPS informed Petitioner directly via email that [redacted] had a special education program that could meet Student's needs. (*Finding of Fact #9*). Petitioner was informed that [redacted] had an ED cluster program that could implement Student's IEP; that the school was located in Student's neighborhood; and that [redacted] offered the LRE because Student could receive the required 27.5 hours/week of special education services and still mingle with non-disabled peers during lunch and non-core classes. (*Findings of Fact #9*).

In determining the educational placement of a child with a disability...each public agency must ensure that the placement decision (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the other placement options; and (2) is made in conformity with the LRE (least restrictive environment) provisions of IDEIA... and the child's placement is based on the child's IEP, and is as close as possible to the child's home. *34 C.F.R. 300.116; 5 D.C.M.R. 3013.1*. And, with respect to identifying the LRE, each public agency must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are non-disabled, and special classes, separate schooling, or other removal from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *34 C.F.R. 300.114(a); 5 D.C.M.R. 3011.1; Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley, 458 U.S. 176 (1982)*. Unless the IEP of a child requires some other arrangement, the child shall be educated in the school that the child would attend if not disabled. *5 D.C.M.R. 3013.2*. The record revealed that [redacted] was Student's neighborhood school and could implement Student's IEP. (*Finding of Fact #9*).

Both Petitioner and/or Petitioner's Attorney offered reasons why they could not or did not schedule or attend proposed placement meetings (*Finding of Fact #3, #5, #6, #7,*

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#8); however, the record amply demonstrates that DCPS offered to convene a meeting to discuss placement in a timely manner on numerous occasions. The record is silent on the actual date that _____ was identified as a possible placement, but the record is clear that this placement option was conveyed directly to Petitioner by email on 03/17/09, and when the option was conveyed to Petitioner, Petitioner investigated the option. (*Finding of Fact #10*). There was no inaction or action on the part of DCPS that caused Student not to have an appropriate placement. Rather, it was the delay created by Petitioner's Attorney's non-responsiveness to the Letters of Invitation (*Finding of Fact #3, #5, #8*) and the conditions precedent to a meeting created by Petitioner and/or Petitioner's Attorney (*Finding of Fact #12*) or the requirements of a placement imposed by Petitioner (*Finding of Fact #7, #10*) that prevented DCPS from meeting with Petitioner to make a team decision regarding placement.

Petitioner understood that the placement decision was to be made by a group of persons, including Petitioner, at a placement meeting. (*Finding of Fact #1*). Nonetheless, Petitioner had designs on Student attending a pre-selected non-public special education school, and duly rejected the public placement proposed by DCPS without fully investigating it. (*Finding of Fact #10*). The fact that Petitioner rejected without visiting it is revealing and significant because the whole purpose of Petitioner not attending a placement meeting was because Petitioner wanted the opportunity to visit the proposed public placements. (*Finding of Fact #7*).

DCPS offered a public placement in the least restrictive environment possible (*Finding of Fact #9*), and Petitioner rejected it in favor of a more restrictive school setting. (*Finding of Fact #10*). Petitioner's choice of schools is not consistent with the tenets of IDEIA. DCPS also has a public school placement option available that parallels the services provided at the _____ (*Finding of Fact #10, #11*). Student is entitled to a public education where Student's IEP can be implemented and where Student may receive educational benefit, and that is all that Student is entitled to. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982). The available and appropriate public placement for Student is the special education ED cluster program at _____. And, if the MDT determines that a more restrictive placement is required, then _____ Academic Center, a public placement, fits the bill. (*Finding of Fact #11*).

D.C. Code Section 38-2561.03 provides that DCPS shall only place a student in a nonpublic special education school or program when DCPS cannot implement the student's IEP or provide an appropriate placement in conformity with DCPS rules, IDEIA, and any other applicable laws or regulations. In this case, Student's IEP can be implemented in a public setting.

The Hearing Officer concludes that DCPS offered Student a public school placement in the LRE where Student's IEP can be implemented. Under *Rowley*, that is all that is required. A FAPE is defined as special education and related services that are provided in conformity with Student's IEP. *5 D.C.M.R. 3001.1* Therefore, DCPS has provided Student with a FAPE.

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Petitioner failed to meet its burden of proof on Issue #1.

Issue #2 – Whether DCPS failed to implement Student’s IEP, thereby denying Student a FAPE?

The Hearing Officer concludes that DCPS did not fail to implement Student’s IEP. At the initial eligibility determination meeting on 01/08/09, the MDT determined that _____ was an inappropriate school and the MDT, including Petitioner, agreed that Student would remain at _____ until an appropriate placement was found. (*Finding of Fact #1, #2*). After Petitioner signed the IEP on 01/15/09, DCPS made earnest efforts to convene a placement meeting so that DCPS could bring proposed placements to the table and the placement decision could be made by the appropriate team of people. Any delay in implementing Student’s 01/08/09 IEP was attributable to the delay in convening a placement meeting, which in turn was attributable to Petitioner and/or Petitioner’s Attorney, as was discussed fully under Issue #1.

There was no action or inaction on the part of DCPS that caused a delay in the implementation of Student’s IEP. The Hearing Officer concludes that DCPS did not fail to implement Student’s IEP, and therefore Student was not denied a FAPE.

Petitioner failed to meet its burden of proof on Issue #2.

Issue #3 – Whether Student is entitled to compensatory education?

“When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.” *Reid v. District of Columbia*, 43 IDELR 32 (2005). Having found no denial of a FAPE on Issues #1 and #2, the Hearing Officer concludes that Student is not entitled to compensatory education.

Petitioner did not meet its burden of proof on Issue #3.

CONCLUSION

DCPS’ efforts to finalize an appropriate educational placement where Student’s initial IEP could be implemented, via the IDEIA endorsed vehicle of the MDT team meeting (*34 C.F.R. 300.116*), was frustrated by Petitioner and/or Petitioner’s Attorney’s non-responsiveness or resistance to DCPS’ attempts to convene a placement meeting. There was no action or inaction on the part of DCPS that resulted in a denial of a FAPE for Student. DCPS sent numerous letters to Petitioner and Petitioner’s Attorney in an effort to schedule a placement meeting, and to no avail. DCPS has offered a public placement where Student’s IEP can be implemented, and the Hearing Officer concludes

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that the placement was offered in a reasonable amount of time, considering all the facts and circumstances of this case. There has not been a denial of a FAPE.

ORDER

WHEREFORE, this Complaint having been fully litigated and there being no basis in fact to support Petitioner's allegations that Student was denied a FAPE and is entitled to compensatory education, it is

ORDERED that this Complaint be and hereby is **DISMISSED** with prejudice.

IT IS SO ORDERED.

This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).

Virginia A. Dietrich /s/
Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

04/04/09

Date

Issued: April 4, 2009