

*District of Columbia*  
*Office of the State Superintendent of Education*

Office of Review and Compliance  
Student Hearing Office  
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**Confidential**

<p>STUDENT<sup>1</sup>, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>“DCPS”</p> <p>Respondent.</p> <p>Case:</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: April 21, 22, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Roberta Gambale 1220 L Street NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Daniel McCall, Esq. Assistant Attorney General District of Columbia DC Public Schools 1200 First Street, NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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STUDENT HEARING OFFICE  
2009 APR 23 AM 9:17

<sup>1</sup> 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.

A Due Process Hearing was convened April 21, 2010, at the Van Ness School, 1150 5<sup>th</sup> Street, SE, Washington, DC 20003, in Hearing Room 1 and concluded on April 22, 2010. The hearing was held pursuant to a due process complaint submitted by counsel for the parent and student filed on February 19, 2010, alleging the issue(s) outlined below. A pre-hearing conference in this matter was conducted on March 24, 2010, and a pre-hearing order was issued on March 29, 2010. Petitioner's counsel filed a motion for continuance based on the unavailability of Petitioner's witnesses. The motion was granted. The date for a final decision in the matter was extended by fifteen (15) calendar days by an interim order dated March 31, 2010.

## **BACKGROUND:**

Student or "the student" is age \_\_\_\_\_ and attends a private special education school with DCPS funding. The student was placed at this school pursuant to a Hearing Officer's Determination ("HOD") dated February 23, 2009. This Hearing Officer concluded in the February 23, 2009, HOD that DCPS had denied the student a Free and Appropriate Public Education ("FAPE") by failing to timely review a psychological evaluation that resulted in the student being in an inappropriate program and placement for approximately two years. Petitioner sought but this Hearing Officer did not award compensatory education. Rather, I stated I would consider, if Petitioner filed a subsequent complaint, appropriate compensatory education services if the parties were not able to agree to an award of compensatory education after having conducted current evaluations and convening a multidisciplinary team ("MDT") meeting to review the evaluations.

At a subsequent MDT meeting the parties did not agree to a compensatory education award. Petitioner filed the current due process complaint seeking an award of compensatory education from this Hearing Officer for the denials of FAPE that were found in February 23, 2009, HOD. In addition, Petitioner alleged in the current complaint that DCPS denied the student a FAPE based on inappropriate transitions goals in the student's current individualized educational program ("IEP").

Petitioner seeks the following as relief for the alleged denial(s) of FAPE: DCPS provide compensatory education consistent with the compensatory education plan presented by Petitioner at the hearing, and that DCPS conduct a transition assessment and convene a MDT meeting in which the student's IEP can be amended to include what Petitioner considers an appropriate transition plan and goals.

DCPS, in its response to the complaint, claimed that the right to compensatory education was an equitable remedy that was not provided by the February 23, 2009, HOD and seeking

compensatory education in the current complaint was an attempt to reopen litigation barred under the principles of collateral estoppel (issue preclusion) and res judicata (claim preclusion).

In its response and during the pre-hearing conference DCPS asserted the student's IEP and transition plan is appropriate and that DCPS has procedurally and substantively provided the student a FAPE. The Hearing Officer considered DCPS arguments during the pre-hearing conference and ruled that the matter would not be dismissed prior to a hearing on the merits but that DCPS would be allowed to assert its defense at the hearing.

#### **ISSUE(S):<sup>2</sup>**

The issues to be adjudicated are: (1) Whether the student is entitled to compensatory education for the denials of FAPE determined in the February 23, 2009, HOD and if so what are the appropriate compensatory services to be awarded? And (2) Whether DCPS denied the student a FAPE by failing to provide the student an appropriate transition plan in his IEP? Petitioner alleges the transition plan in the IEP is not based on an assessment and the transition goals therein are not appropriate.

#### **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) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 & 36 and DCPS Exhibits 1-2) which were admitted into the record. The parties presented a joint exhibit at the hearing which was admitted: the February 23, 2009, HOD.

#### **FINDINGS OF FACT<sup>3</sup>:**

1. The student is \_\_\_\_\_ years old and resides in the District of Columbia with his parent(s), (hereinafter "Petitioner" or "Parent"). At the start of the 2008-09 School Year ("SY") the student attended School A, a DCPS public high school. The student was in the \_\_\_\_\_ The student's Individual Educational Program ("IEP") developed at School A on March 11, 2008, identified the student as a student with mental retardation (MR) who required 26.5 hours of specialized instruction, 30 minutes of speech and language services and 30 minutes of counseling in a full time out of general education setting. (February 23, 2009, HOD)
2. The student had been classified as MR since he was in elementary school was placed in School A's MR program for the SY 2008-09. On September 24, 2008, Petitioner's

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<sup>2</sup> 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.

<sup>3</sup> The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer may only one party's exhibit.

- counsel requested reevaluation of the student. On or about October 3, 2008, a due process complaint was filed which resulted in a Hearing Officer's Determination (HOD) issued November 10, 2008. The HOD required DCPS to convene a multidisciplinary team (MDT) meeting to, inter alia, determine if additional evaluations were necessary and to review and revise the student's IEP. (February 23, 2009, HOD)
3. On December 1, 2008, the parent was provided with a copy of a psychological evaluation conducted by DCPS in June 2006 that had not previously been provided to the parent or reviewed by a MDT. The 2006 psychological evaluation found that "test results conclude that the student does not meet the criteria for a mentally retarded student" and diagnosed the student with a specific learning disability (SLD). DCPS never reviewed the evaluation at a MDT meeting. Consequently, the student's disability classification was not changed consistent with the evaluation's conclusions. (February 23, 2009, HOD)
  4. In December 2008 a Woodcock Johnson-III ("WJIII") education assessment was administered that determined the student's math skills were on the 4<sup>th</sup> grade level, his reading skills were on the 2<sup>nd</sup> grade level and his written expression skills were near the 4<sup>th</sup> grade level. (Petitioner's Exhibits 17 & 24)
  5. The student remained in a MR program from June 2006 through March 2009 when this Hearing Officer in the HOD dated February 23, 2009, placed the student at School B on an interim basis until evaluations were conducted and the student's IEP was revised and a long term placement determined. School B is a private full time special education school the student currently attends. (February 23, 2009, HOD)
  6. This Hearing Officer in the February 23, 2009, HOD concluded: the student was disserved by being in a MR classroom since he began attending School A and as a result had been in an educational program with students below his cognitive ability; had the student been programmed with a disability classification of SLD rather than MR the student would probably have progressed academically far more than he did; the student would benefit from tutoring and counseling services to address the lack of appropriate services the student received in a MR program when the evaluations indicated years prior the student has a disability classification of SLD. (February 23, 2009, HOD)
  7. In September 2009 an MDT/IEP meeting was convened for the student at School B. The team determined the student would have a Specific Learning Disability ("SLD") classification and that he would remain at School B until another placement determination was made in January 2010. The team discussed compensatory education for the denials of FAPE but the team came to no agreement and determination. The parent's educational advocate did not ask for a specific amount of services for the student. DCPS made an offer of 45 individualized tutoring hours. The advocate and parent did not believe the offer was sufficient. testimony, Petitioner's Exhibit 10)
  8. The student's IEP team reconvened at School B on January 22, 2009, and reviewed and updated the student's IEP. The team determined the student would continue his placement at School B. (DCPS Exhibit 1)

9. The student's first and second quarter grades during SY 2009-10 reflect the student has been making progress. In the second quarter he received "As" in all subjects. In math he received a letter grade of "C" and "Bs" or "As" in all other subjects. (Petitioner's Exhibit 22)
10. Since March 2009 the student has made steady progress in academic performance and his willingness to participate in class. Although the student has demonstrated social/emotional growth since he began attending School B, he continues to display behaviors that suggest he will continue to need counseling supports to be successful within the school environment. (testimony, Petitioner's Exhibit 17)
11. The student is currently receiving counseling at school. His therapist at the last IEP meeting noted the student is functioning below expected level, however this depends on the day or if he is under stress. He is respectful and needs to be able to ask for help." (DCPS Exhibit 2)
12. School B has two academic groups of students - one that is operating significantly below grade level and the other which has student's at or near grade level performance. Usually students in the higher functioning group are operating no more than 3 grade levels behind. (testimony)
13. When the student arrived at School B he was operating a grade equivalency level of first or second grade in reading and math. The student has made significant enough progress in the year that he has attended School B that he is being recommended to move from the lower functioning group to the higher level group for his grade year: SY 2010-11. (testimony)
14. The student is in a program that is preparing him for a DCPS high school diploma and should complete the requirements the diploma by the end of his 12<sup>th</sup> grade year – SY 2011-12. The completion of the high school requirements, however, do not guarantee the student will be reading or performing math on grade level as this is not a requirement for graduation. There has been no formal educational assessment of the student since he began attending School B. (testimony)
15. School B's principal who was one of the student's teachers during SY 2009-10 acknowledged the student would benefit from additional tutoring to assist bringing him to academic grade level in both reading and math. The student has problems decoding two syllable words and work on extending his vocabulary would be beneficial. (testimony, Petitioner's Exhibit 21)
16. The student's current IEP includes a post-secondary transition plan. The plan was based on a picture interest career survey and career game that was administered to the student at School B during the fall of 2009. The IEP includes annual goals including the goal to participate in mock job interviews. (DCPS Exhibit 1)

17. The parent believes the student has suffered emotionally as a result of having been in a more restrictive program for MR students while attending School A. As result the student suffers from low self-esteem and does not generally engage and interact with his own age peers. His friends are usually much younger. He is also shy and withdrawn. Although the student has counseling at school he would benefit from additional counseling to assist him developing more confidence in both his academic and social abilities. (Parent's testimony)
  
18. Following the January 22, 2010, MDT/IEP meeting the parent's educational advocate prepared a compensatory education plan and presented it to DCPS. In the plan the advocate requested DCPS fund 200 hours of individualized tutoring in reading and math and 75 hours of individualized counseling. The advocate reviewed the student's 2006 and 2008 evaluations and concluded the student had little if any advancement in his educational performance during that period. However, \_\_\_\_\_ did not have an exact reason as to why she proposed the specific number of hours. She simply believed this number of hours would be appropriate for the student. (Petitioner's Exhibit 9, \_\_\_\_\_ testimony)
  
19. The student's cognitive functioning demonstrates the student is capable to performing at least on grade level with proper and modified instruction to address the student's unique learning style and to address the academic deficits the student has as result of his being in an inappropriate program for so many years. The individualized tutoring and individualized counseling would be helpful in ensuring the student is successful and able to meet the educational requirements that he would have made had he been provided appropriate services during the two years he was in an inappropriate program. (Dr. Schmookler's testimony, Petitioner's Exhibit, Petitioner's Exhibit 27)
  
20. DCPS personnel after reviewing the student's educational records, his educational progress since attending School B and the February 2009 HOD and offered the parent 45 hours of specialized tutoring at \_\_\_\_\_ or a comparable program. DCPS personnel in providing such compensatory services to DCPS student have experienced that approximately 18 to 20 hours of intense individualized out of school tutoring services will on average allow a student to progress one grade level in academic performance. \_\_\_\_\_ testimony)

### **Issue Preclusion and Claim Preclusion**

DCPS asserts Petitioner is precluded by the principles of res judicata and collateral estoppel from asserting a claim for compensatory education that could have and should have been proved at the previous due process hearing resulting in February 23, 2009, HOD. The Hearing Officer is not persuaded by DCPS arguments in this regard.

Pursuant to the holding in *Serpas v. District of Columbia* (Not Reported in F.Supp.2d, 2005) WL 3211604 (D.D.C.), a party is not precluded from pursuing a claim that has not been previously litigated and decided. Although, Petitioner asserted the claim of compensatory education in the initial hearing this Hearing Officer did not make a decision on the issue of compensatory

education and clearly preserved the Petitioner's right to bring such a claim for compensatory education following a re-evaluation of the student. This Hearing Officer concluded that the relief granted in the HOD of an interim placement was not intended to be Petitioner's sole remedy. The Hearing Officer gave the parties the opportunity to discuss the student's progress, most current academic testing and functioning and make a determination of appropriate compensatory education for the denial of FAPE resulting from the student being in an inappropriate program and placement for two years. Less compensatory education may be required at this juncture now that the student had been in appropriate program and placement for more than a year than would have been needed in February 2009 when the HOD was issued, but the issue of what compensatory education is appropriate remains a issue and claim available to Petitioner to pursue.

### **CONCLUSIONS OF LAW:**

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief. <sup>4</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Issue: Whether the student is entitled to compensatory education for the denials of FAPE determined in the February 23, 2009, HOD and if so what are the appropriate compensatory services to be awarded? Conclusion: The student is entitled to compensatory education for the denials of FAPE in the amounts that the Hearing Officer determined to be appropriate herein.

In *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the Court stated that "courts and hearing officers may award 'educational services . . . to be provided prospectively to compensate for a past deficient program.'" Id. citing *G. ex. Rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4<sup>th</sup> Cir. 2003). Compensatory education is an equitable remedy crafted to remedy educational deficit created by "an educational agency's failure over a given period of time to provide FAPE to a student" Id. "Appropriate compensatory education must be reasonably

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<sup>4</sup> Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place.” Id.

In *Mary McLeod Bethune Day Academy Public Charter School v. Bland*, Civil Action No. 07-1223, the U.S. District Court for the District of Columbia found that, “if a parent presents evidence that her child has been denied FAPE, she has met her burden of proving that he is entitled to compensatory education.”

Petitioner seeks 200 hours of individualized tutoring as compensatory education. Although the plan Petitioner proposed sighted the student’s educational assessments and noted the student’s lack of educational progress over a two-year period, the plan did not present a logical tie between the loss the student suffered and the 200 hours of tutoring Petitioner sought to remedy the loss.

The evidence demonstrates the student has made significant progress in the year he has been in an appropriate program at School B. Although the student is on target to graduate high school, there was no evidence the student will be operating on grade level in reading or math by the time of his graduation. He is at the current time still in the lowest functioning group of the two academic groups in School B. School B’s principal stated that he would be recommending the student be elevated to the higher functioning group for SY 2010-11. Even the highest functioning group, however, has students who are perhaps as much as three grade levels behind. In addition, there is no current formal assessment that demonstrates the student’s academic functioning.

stated that generally 18 to 20 hours of additional tutoring with a service such as results in a student progressing one-grade level. Although alluded to by there was no scientific data to support this assertion presented at the hearing. Assuming, however, that the assertion is correct the student operating three grade levels behind (where according to the student might be operating at the start of the next school year) would require at least approximately 60 hours of intense tutoring services to be on grade level by the time he concludes high school. In addition, this student is demonstrating a significant academic deficit in not just reading but also in math. The Hearing Officer thus concludes the student requires at least an additional 20 hours of intense services in the area math to ensure the student reaches the required grade level by the time of his projected high school graduation.<sup>5</sup> The progress the student has shown in an appropriate program is sufficient evidence that the student could have been operating on grade level had he been provided appropriate services during the period he was denied a FAPE.

This Hearing Officer concluded in the prior HOD that the student would benefit from counseling services as a form of compensatory education. And based on the evidence presented in this hearing such services are still warranted. There was, however, insufficient evidence presented that the seventy-five hours of counseling services requested by the parent had a logical basis. There was sufficient evidence presented that the student is suffering from self-esteem issues and would benefit from additional counseling to assist him engaging in his academics and engaging

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<sup>5</sup> The Hearing Officer notes the student was operating at a higher grade level in math than reading at the time of his last formal educational assessment. In addition, the testimony presented indicated that that the student’s math performance would likely improve as his reading ability improved due the increase in word problems as the student reached higher levels math. Thus, the Hearing Officer concluded that less tutoring would be warranted for math because of the anticipated increase in the student’s reading ability.

more with teachers and peers. Thus, the Hearing Officer will also award the student 20 hours of counseling to assist in addressing the student's social/emotional and behavioral issues. 20 hours at a rate of 1 hour per week seems reasonable to the Hearing Officer to address these concerns given the student is receiving counseling services as a part of his current IEP services.

Issue: Whether DCPS denied the student a FAPE by failing to provide the student an appropriate transition plan in his IEP? Petitioner alleged the transition plan in the IEP was not based on an assessment and the transition goals therein were not appropriate. Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. § 300.320 (b)

Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include--

(1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.

(c) Transfer of rights at age of majority. Beginning not later than one year before the child reaches the age of majority under State law, the IEP must include a statement that the child has been informed of the child's rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under Sec. 300.520.

(d) Construction. Nothing in this section shall be construed to require--

(1) That additional information be included in a child's IEP beyond what is explicitly required in section 614 of the Act; or

(2) The IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

Although the student's IEP was developed in January 2010, and unless amended prior to the student's birthday, it will be the IEP in effect on the date of his birthday. However, the student's IEP could conceivably be amended prior to the student's birthday and there would thus be no violation. Nonetheless, Petitioner asserts the student IEP is to have transition goals prior to his birthday because the student is IEP team determined they were necessary when the team met in the fall of 2009. The MDT notes state that goals would be developed. The evidence demonstrates the student's IEP contains transition goals and the IEP indicates the assessments that were used to develop the goals.

Under the law of the D.C. Circuit, a procedural violation of the IDEA is actionable only if it "affected the student's *substantive* rights" -- that is, only if the procedural violation led to a substantive violation. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

(emphasis in original); see also *Kingsmore ex rel. Lutz v. District of Columbia*, 466 F.3d 118, 120 (D.C. Cir. 2006).

As a result, regardless of whether the lack of transition plan in the student's IEP is denominated substantive or procedural, Petitioner must prove to that the District's actions did or will deny the student a FAPE by depriving him of educational benefits to which he is entitled.

The Hearing Officer is convinced by this evidence that the student's transition goals are appropriate for his age and grade level and have been based on assessments as is required under 34 C.F.R. 300.320 (b). There was in addition, no harm demonstrated by the evidence that the student has been harmed by the transition plan and/or the transition goals in his current IEP. Therefore, the Hearing Officer concludes the Petitioner did not satisfy the burden of demonstrating that there was procedural violation or that that student was in anyway harmed in this regard.

**ORDER:**

DCPS shall fund for this student eighty (80) hours of independent tutoring and twenty (20) hours of independent counseling at the current DCPS approved rates as compensatory education for the two years the student was in an inappropriate educational program and the deprivation of services harm caused to the student thereby.

**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).



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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: May 1, 2010**