

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: 202-478-2956

Confidential

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p style="text-align: right;">B5-6 W B-10-100</p> <p>HEARING OFFICER'S DETERMINATION</p> <p>March 7, 2010</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Douglas Tyrka, Esq.</p> <p>Counsel for DCPS: Blair Matsumoto, Esq.</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
---	---

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

I. JURISDICTION

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

II. PROCEDURAL BACKGROUND

Petitioner filed its Complaint on December 23, 2009, alleging that DCPS failed to comply with the terms of a February 26, 2008 Hearing Officer’s Determination (“2/26/08 HOD”), failed to review evaluations, and failed to review and revise Student’s IEP. DCPS filed a Response on or prior to February 16, 2010², asserting therein that one of Student’s evaluations had already been reviewed pursuant to the 2/26/08 HOD, and although the other two evaluations had not yet been reviewed, DCPS had 120 days to review Student’s occupational therapy (“OT”) evaluation and a “reasonable time period” to review Student’s vocational evaluation, and those time periods had not yet passed at the time the Complaint was filed. DCPS further asserted that it had offered Petitioner meeting dates to review the evaluations and, if necessary, revise Student’s IEP.

The prehearing conference for this matter was held on February 16, 2010. At the conference, Petitioner voluntarily withdrew its claims that DCPS failed to comply with the 2/26/08 HOD and failed to review Student’s independent comprehensive psychological evaluation. Moreover, after the hearing officer observed that DCPS seemed to be relying on timelines/standards for conducting evaluations instead of reviewing evaluations, it was agreed that the parties would file memoranda addressing the correct standard to be applied. Finally, the hearing officer advised Petitioner’s counsel of the hearing officer’s general rule against delegating authority to determine and award the judicial remedy of compensatory education to MDTs. Nevertheless, the hearing officer invited Petitioner’s counsel to submit its memorandum citing and explaining the relevant case law.

On February 18, 2010, the hearing officer issued a Pre-Hearing Order that memorialized the proceedings at the prehearing conference.³

² The record does not clearly indicate exactly when the Response was filed. DCPS provided the Response to the hearing officer in the body of an email dated February 16, 2010, and the hearing officer provided the Response to the SHO as the SHO’s electronic docketing system did not contain the Response. Although the Response, itself, is dated January 27, 2010, the Response indicates in its text that it is a “Motion to Dismiss,” and the Certificate of Service attached to the Response lists February 16, 2010 as the date of Service. On the other hand, Petitioner’s counsel indicated at the February 16, 2010 prehearing conference that he had received the Response on a date prior to the conference. As the SHO’s electronic docketing system reflects February 16, 2010 as the date the Response was received, the hearing officer will use that date as well.

³ DCPS subsequently submitted a memorandum on the appropriate timeline for reviewing evaluations and Petitioner submitted its responsive memorandum. Petitioner also submitted a memorandum regarding the hearing officer’s authority to order a compensatory education meeting.

The parties submitted their Five-Day disclosures by cover letters dated February 18, 2010, with Petitioner submitting 4 documents (Petitioner's Exhibits 1 - 4) and DCPS submitting fourteen documents (DCPS-1 through DCPS-14).

The due process hearing for this matter was held on February 25, 2010, and the parties' disclosed documents were admitted into the record without objection. During the hearing, DCPS conceded that Student's vocational and OT evaluations have not been reviewed by DCPS, and DCPS did not dispute that the vocational evaluation was delivered to DCPS on October 7 and November 12, 2009, and the OT evaluation was delivered to DCPS on November 3, 2009. Moreover, Petitioner withdrew from consideration its claim for compensatory education as a result of DCPS's failure to review Student's OT evaluation. After Petitioner presented the testimony of two witnesses, DCPS was unable to produce any witnesses. Therefore, the hearing officer brought the hearing to a close without receiving any testimonial evidence from DCPS.

III. ISSUE(S)

1. Is Student entitled to compensatory education as a result of DCPS's admitted failure to review Student's vocational evaluation and, if necessary, revise Student's IEP to reflect the results of that evaluation?

IV. FINDINGS OF FACT

1. Student attends a private full-time special education school.⁴
2. Student's current IEP is dated May 18, 2009. The IEP identifies Student as multiply disabled, including learning disability, emotional disability and other health impairment. The IEP provides that Student is to receive 26 hours per week of specialized instruction and 1.5 hours per week of psychosocial counseling. The IEP contains a transition plan, which requires Student to construct a resume, take the Career Interest Assessment, participate in community service school based field trips, identify three career goals and the required education and preparation for each, participate in extracurricular activities as a part of career exploration, and prepare a personal budget. The IEP also contains a DCPS transition services plan, which, *inter alia*, indicates that Student is interested in becoming a drug counselor.⁵
3. On September 8, 2009, an independent evaluator issued an evaluation report entitled, Vocational Evaluation, Level II, for Student. The report indicates that the evaluator administered the following assessments to Student: Interest Determination, Exploration and Assessment System ("IDEAS"), Washington State Children's Administration Life Skills Inventory, Self-Concept Inventory, and Learning Styles Inventory. The evaluator also conducted a Student interview and staff interviews.

⁴ See DCPS-6.

⁵ DCPS-6.

The report indicates that Student scored high in the Social, Enterprising, and Conventional career areas of IDEAS. Based on those results, the evaluator listed approximately 45 job titles ranging from pediatrician, developmental psychologist and religious leader to child care worker, retail salesperson, and food preparation worker that potentially may be of interest to Student.

The report further indicates that during the Student Interview portion of the evaluation, Student stated that she wants to go to college, has visited one local college, and has taken the SAT. Student also stated that her primary career goal is to become a professional hair stylist, but she would also consider becoming a gynecologist, lawyer, pediatric dentist, pediatrician or veterinarian.

With respect to staff interviews, the report indicates that Student's transition coordinator stated that Student is eligible to participate in a supported employment program for students with special needs that is offered at her present school.

Most importantly, however, in the Comprehensive Summary & Impact of Disability section of the report, the evaluator states the following:

[On the career interests inventory, Student's] response pattern indicates that her responses were not genuine and do not truly reflect her interests. There is some indication that results from the other assessments administered as parts of this evaluation were also ineffective at measuring [Student's] true interests, knowledge and capacities.

Despite this observation, which calls into question the reliability of all data obtained during the evaluation, the evaluator recommended the following for Student: a cosmetology certification program or course, supported part-time employment, a thorough review of the evaluation report with Student and her support team, IEP transition goals and objectives and a transition plan based on the report and further assessment and evaluation, a home economics/life skills course, a volunteer schedule with a non-profit organization, and an established relationship with the Rehabilitation Services Administration.⁶

4. On October 16, 2009, an independent evaluator conducted an OT Evaluation of Student. The evaluation included the following assessments and sources of information: Clinical Observations, Bruininks-Oseretsky Test of Motor Proficiency, Developmental Test of Visual-Motor Integration, Motor-Free Visual Perception Test, and Print Tool. In summarizing Student's performance on the assessments administered, the evaluator noted that Student demonstrated mild deficits that may impact her accuracy when copying information from the board and may impact her ability to copy information with expected accuracy and speed for her age, but the evaluator also noted that Student's overall scores did not qualify her for OT intervention within the academic environment. Therefore, although the evaluator recommended certain strategies for weak areas, the evaluator ultimately determined that "Occupational Therapy intervention is NOT recommended

⁶ Petitioner's Exhibit 1,
HO Decision/Case

within the academic environment.”⁷

V. CONCLUSIONS OF LAW

At issue in this case is whether Student is entitled to compensatory education as a result of DCPS’s admitted failure to review Student’s vocational evaluation and, if necessary, revise Student’s IEP to reflect the results of that evaluation. As the party seeking relief in this case, Petitioner bears the burden of proof. *See* 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

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 516, 522 (D.C. 2005). Compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA. *Reid*, 401 F.3d at 518.

As a general rule, 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). Where a procedural violation has been alleged, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child’s right to a FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

In this case, Petitioner contends that Student is entitled to compensatory education because DCPS failed to review Student’s vocational evaluation within a reasonable time period, and as a result Student’s IEP has not been revised to reflect the evaluation results and Parent has not been allowed to engage in informed decision-making. As compensatory education for Student, Petitioner seeks updated IEP transition goals and objectives, a life skills course, a supported certified cosmetology program, a supported part-time job after Student obtains her cosmetology certification, a life skills coaching session one time per week for 6 months after graduation, and a job skills coaching session one time per week for 6 months after graduation from high school.

On the other hand, DCPS contends that a reasonable time period for review of the vocational evaluation has not yet passed. DCPS further contends that even if a reasonable time period has passed, the proposed compensatory education plan is excessive considering that only approximately five months have passed since Petitioner provided DCPS with a copy of the vocational evaluation, the proposed plan is unworkable given Student’s remaining degree requirements, and the proposed plan is undefined because Petitioner was unable to identify part-time certified cosmetology programs for Student.

The evidence in this case and the undisputed allegations demonstrate that an independent evaluator issued a Vocational Evaluation report for Student on September 8, 2009. In the report, the evaluator expressed her opinion that the career interests inventory and other assessments

⁷ Petitioner’s Exhibit 2.
HO Decision/Case

administered to Student as part of the evaluation were “ineffective at measuring Student’s true interests, knowledge and capacities.” Nevertheless, the evaluator recommended a cosmetology certification program or course, a life skills course, and various other items for Student. On October 7, 2009, and again on November 12, 2009, Petitioner provided a copy of Student’s vocational evaluation to DCPS. On December 23, 2009, Petitioner filed the Complaint that initiated this action. As of February 25, 2010, the date of the due process hearing in this case, DCPS had failed to review the vocational evaluation and revise Student’s IEP to reflect the results of the evaluation.

Petitioner’s claim that DCPS failed to review Student’s vocational evaluation and revise Student’s IEP alleges a procedural violation. As noted above, where a procedural violation has been alleged, a hearing officer may find a denial of FAPE only if the procedural inadequacy impeded the child’s right to a FAPE, significantly impeded the parent’s participation in the decision-making process, or caused a deprivation of educational benefit. In this case, however, the independent evaluator who conducted the vocational evaluation essentially determined that the evaluation was invalid because it was ineffective at measuring Student’s true interests, knowledge, and capacities. As a result, DCPS’s admitted failure to review the invalid evaluation and revise Student’s IEP to reflect the results of that invalid evaluation could not have impeded Student’s right to a FAPE, significantly impeded parent’s participation in the decision-making process, or caused a deprivation of educational benefit. Under these circumstances, the hearing officer concludes that Petitioner failed to meet its burden of proving that DCPS denied Student a FAPE by failing to review Student’s vocational evaluation and revise Student’s IEP to reflect the results of that evaluation. Moreover, as Petitioner failed to prove a denial of FAPE, the hearing officer further concludes that an award of compensatory education would be inappropriate.⁸ *See Reid, supra* (compensatory education should be awarded to address violations of IDEA).

The hearing officer notes that Student’s October 2009 OT evaluation report indicates that Student does not qualify for OT services, but the report nevertheless states that Student has several mild deficits and recommends certain strategies to address those deficits. Given these findings, the hearing officer will order DCPS to review Student’s OT evaluation at Student’s forthcoming annual MDT/IEP meeting, which should take place in or about May of 2009.

⁸ In light of these conclusions, the hearing officer finds it unnecessary to determine what was a reasonable time period for the review of Student’s vocational evaluation under the circumstances of this case, whether such reasonable time period was exceeded, and whether Petitioner’s proposed compensatory education plan is appropriate.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner failed to meet its burden of proving Student's entitlement to compensatory education.

VII. ORDER

1. Petitioner's December 23, 2009 Complaint is hereby **DISMISSED**, and its requests for relief therein are hereby **DENIED**.
2. DCPS shall review Student's October 16, 2009 occupational therapy evaluation at Student's forthcoming annual MDT/IEP meeting.

/s/ Kimm H. Massey

Kimm H. Massey, Esq.

Impartial Due Process Hearing Officer

Dated this 7th day of March, 2010.

NOTICE OF APPEAL RIGHTS

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. § 1415(i)(2).