

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

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**Confidential**

2009 JUL 31 AM 11: 51

STUDENT HEARING OFFICE

<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>Respondent.</p>	<p><b>HEARING OFFICER'S DETERMINATION</b></p> <p>July 30, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Domiento Hill, Esq.</p> <p>Counsel for DCPS: Kendra Berner, Esq.</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
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<sup>1</sup> 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

On June 1, 2009, Petitioner filed an Administrative Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS"), alleging that (1) DCPS denied Student a free appropriate public education ("FAPE") by failing to complete Student's parentally requested evaluation, or (2) in the alternative, if DCPS completed Student's evaluations, then it denied Student a FAPE by failing to reconvene his IEP team to review the evaluations, make appropriate educational decisions, and update Student's IEP, and (3) DCPS failed to participate in Student's February 23, 2009 MDT meeting.

The Student Hearing Office ("SHO") issued a Due Process Hearing Notice that set a prehearing conference date and provisionally scheduled a due process hearing. However, after the SHO's receipt of DCPS's waiver of the resolution session for this case, the case was placed on a 45-day timeline, and the prehearing conference and due process hearing were rescheduled accordingly.

On June 3, 2009, DCPS filed District of Columbia Public Schools' Notice of Insufficiency and Response to Petitioner's Due Process Complaint. In its Notice of Insufficiency, DCPS focused on the lack of a parental signature on the Complaint. In its Response, DCPS asserted that it authorized independent evaluations on April 23, 2009, that it had received the independent comprehensive psychological evaluation report and was in the process of reviewing the evaluation and scheduling a meeting, and that the failure of the LEA representative to attend Student's meeting did not cause any substantive harm because Student attends a non-public, full-time special education school and has been receiving his IEP services.

On June 4, 2009, Petitioner submitted its Memorandum of Points and Authorities in Support of the Petitioner's Opposition to the Respondent's Notice of Insufficiency. Therein, Petitioner maintained that its Complaint satisfied the requirements of 34 C.F.R. § 300.508(a) and that the SHO's Standard Operating Procedures ("SOPs") does not trump the sufficiency requirements of IDEIA.

On June 10, 2009, the hearing officer issued an Interim Order Denying DCPS's Notice of Insufficiency but Requiring Parent to Participate in the Due Process Hearing. In the Order, the hearing officer essentially held that a petitioner's failure to comply with the signature requirement of the SOPs does not result in the insufficiency of the Complaint, within the meaning of IDEIA.

On June 26, 2009, the hearing officer convened the prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. During the conference, Petitioner withdrew its claim regarding DCPS's failure to participate in Student's HO Decision/Case

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MDT meeting, indicated that all independent assessments had been completed, and represented that the only claim to be addressed was Petitioner's compensatory education claim. Petitioner also stated its intent to present at the due process hearing a written compensatory education plan, as well as testimony from the independent evaluators with respect to compensatory education. On July 6, 2009, the hearing officer issued a Pre-Hearing Order that summarized the proceedings at the prehearing conference.

By their respective Disclosure Statements dated June 29, 2009, DCPS disclosed five potential witnesses and three documents labeled DCPS-01 through DCPS-03, and Petitioner disclosed nine potential witnesses and twenty-four documents (hereinafter Petitioner's Exhibits 1 – 24).

On June 30, 2009, DCPS submitted a Supplement Disclosure Statement that added three additional documents labeled DCPS-04 through DCPS-06. On July 13, 2009, Petitioner submitted a Supplemental Disclosure Statement that added one document (hereinafter Petitioner's Exhibit 25).

The hearing officer convened the due process hearing on July 7, 2009, with full knowledge of that the two hours scheduled might not be sufficient. DCPS's documents and Petitioner's Exhibits # 1- 9, 17-21, and 23-24 were admitted into the record without objection. DCPS objected to the admission of Petitioner's Exhibits # 10-16 and 22, on the ground that the documents were more than 2 years old and irrelevant to the hearing. After Petitioner pointed out that the documents at issue were Student's previous evaluations and IEP, the hearing officer admitted the documents into the record over DCPS's objection.

Upon the hearing officer's inquiry into whether the parties had managed to hold an IEP meeting to review Student's evaluations, Petitioner represented that no meeting had been held or attempted. After opening statements and Petitioner's presentation of the testimony of two witnesses, the hearing officer continued the hearing because more time was required.

The hearing officer reconvened the due process hearing on July 20, 2009, as scheduled, and received the testimony of Petitioner's remaining witnesses, as well as the testimony of DCPS's two witnesses. After closing statements, the hearing officer brought the hearing to a close.

### III. ISSUE(S)

1. Is Student entitled to compensatory education as a result of DCPS's delay in conducting or authorizing recommended triennial evaluations?

#### IV. FINDINGS OF FACT

1. Student is      years old, and he attends a private, full-time special education school as a mentally retarded ("MR") student who has been determined eligible to receive special education and related services.<sup>2</sup>
2. At a December 12, 2007 multidisciplinary team ("MDT") meeting for Student, Student's team determined that Student needed triennial evaluations. Based on this determination, a student evaluation plan ("SEP") was developed that required Student to receive psychological, speech/language, educational, and occupation therapy ("OT") reevaluations, and Guardian signed a Consent for Evaluation form authorizing DCPS to conduct a 3-year reevaluation of Student.<sup>3</sup>
3. On February 23, 2009, DCPS convened another MDT meeting for Student. The team reviewed Student's progress and determined that he had progressed in his reading comprehension and had performed on a fourth-grade level on a reading assessment administered on February 20, 2009. Student had also progressed on his number of spelling words, increasing from 10 to 15 words, and he had progressed in his memorization of multiplication facts. The team noted that Student had slightly regressed with respect to his socio-emotional goals, but stated that the team was making regular contact with Student's home and continuing to work closely on that issue. Student's social worker indicated Student's socio-emotional goals and stated that she had added a new goal to focus on Student's accountability for his behavior. Student's speech pathologist indicated that Student's articulation goals had been mastered and removed from his IEP, but services would be continued with new goals. Student's OT provider indicated that Student had mastered all of his OT goals and recommended the discontinuation of his OT services. However, upon discovering that DCPS had failed to conduct the OT evaluation recommended for Student at his December 12, 2007 meeting, the team agreed to reduce Student's OT services to one 30-minute consult per month until completion of the evaluation. The team also approved ESY services for student, on the ground that he would benefit from such services and could possibly regress without them. Student's advocate requested that DCPS administer not just an OT reevaluation, but all of the reevaluations that previously had been ordered at the December 12, 2007 meeting.<sup>4</sup>
4. On February 23, 2009, the team also revised Student's IEP to include new goals for specialized instruction, speech, OT, and counseling based on progress reports provided by his teacher and related service providers. With respect to hours of service, the IEP provided that Student was to receive 28.5 hours of specialized instruction per week, 1 hour of speech services per week, 30 minutes of psychological counseling per week, and a 30-minute OT consult per month. The IEP also provides that Student shall receive the following accommodations: extra time, short breaks, test given at best time for student,

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<sup>2</sup> See Complaint at 2; Petitioner's Exhibit 21.

<sup>3</sup> Petitioner's Exhibits 17-19.

<sup>4</sup> Petitioner's Exhibit 20; see also, DCPS-03 (Student's February 2009 social work, OT, and educational progress summaries).

one on one, preferential seating, simplified, repeated direction, read aloud entire test, read aloud response to scribe, and calculator and/or word processor if needed.<sup>5</sup>

5. By a letter dated February 24, 2009 that was directed to DCPS's Placement Monitor for Student's school, Petitioner's counsel advised DCPS of the IEP team's realization that the reevaluations recommended for Student on December 12, 2007 had not yet been completed, and Petitioner's counsel asked DCPS to fax to him by the close of business on Friday, February 27, 2009, a copy of the recommended reevaluations.<sup>6</sup>
6. By letter dated April 23, 2009, DCPS authorized Guardian to obtain independent comprehensive psychological, speech and language, and OT evaluations of Student.<sup>7</sup>
7. By letter dated May 28, 2009, Petitioner's counsel forwarded to DCPS a copy of Student's independent comprehensive psychological evaluation. Petitioner's counsel asked DCPS to review the evaluation report and send a copy of the review to his attention. However, Petitioner's counsel did not request an MDT to review and act upon the evaluation report.<sup>8</sup>
8. Student's May 27, 2009 independent comprehensive psychological evaluation report revealed that a variety of assessment procedures and information sources had been utilized in connection with the evaluation. Student's performance on cognitive testing indicated that he is in the Borderline Average range of overall intellectual functioning, which was consistent with previous testing. However, on a nonverbal ability test, Student performed in the Average Range, which was also consistent with previous testing.

Student's performance on achievement testing led the evaluator to conclude that his reading skills range from the Below Average to the Extremely Low Range, his math skills are in the Low Average Range to Below Average Range, and his written expression skills are in the Extremely Low Average Range.

Student's scores on the Beery-Buktenica Test of Visual-Motor Integration fell in the Average Range, and the evaluator concluded that Student is able to adequately manage tasks such as handwriting, copying information from the blackboard, and using a pencil to perform math calculations.

Several tests designed to determine Student's social and emotional functioning were administered, and the evaluator determined that these tests revealed patterns of low self esteem, anger and irritability, themes of anxiety and frustration, and concerns that in the school setting Student suffers from a short attention span, distractibility, poor task completion, and related problems.

An adaptive behavior assessment was also administered. Student's overall general adaptive composite was in the Borderline Average Range, which is consistent with previous ratings of his adaptive and cognitive functioning.

The evaluator ultimately recommended that Student "continue" to receive

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<sup>5</sup> Petitioner's Exhibit 21; DCPS-01; testimony of advocate.

<sup>6</sup> Petitioner's Exhibit 23.

<sup>7</sup> Petitioner's Exhibit 24; DCPS-02.

<sup>8</sup> Petitioner's Exhibit 7.

services under the classification of multiple disabilities. The evaluator also included a host of recommendations in the evaluation report, including recommendations that Student receive a minimum of two 45-minute sessions of individual counseling per week and that he engage in physical activity at school.<sup>9</sup>

9. At the due process hearing, Student's independent psychological evaluator opined that Student requires compensatory education in the form and amount of a minimum of six months of community-based therapeutic interventions. More specifically, the evaluator recommended four to six months of family therapy services for one hour each week, and six months of individual therapy outside of the school setting for Student for one hour every two weeks to address Student's social skills and self-esteem issues, and his disorders as a whole. However, the evaluator admitted that he is not familiar with Student's school program and only knows that the school deals with learning disabled and ED students.<sup>10</sup>
10. On May 31, 2009, Petitioner filed the instant Complaint alleging that DCPS had either failed to complete Student's recommended evaluations or failed to convene an MDT meeting to review same.
11. By letter dated June 2, 2009, Petitioner's counsel forwarded to DCPS a copy of Student's independent speech and language and social history evaluations. Petitioner's counsel asked DCPS to review the evaluation reports and send a copy of the reviews to his attention. However, Petitioner's counsel did not request an MDT to review and act upon the evaluation reports.<sup>11</sup>
12. Student received a number of different assessments as part of his May 26, 2009 speech and language evaluation. The evaluator noted that Student demonstrated decreased attention and had to frequently be redirected, exhibited difficulty understanding concepts and following multiple step directions, did not have strong language memory for lengthy sentences, and also had difficulty expressing himself in complete sentences, explaining the relationships between words, answering questions about a spoken paragraph, repeating numbers forward verbatim, and completing phonemic awareness tasks. On the other hand, Student's strengths included identifying word classes receptively, repeating numbers backward verbatim, providing word associations, and expressive and receptive vocabulary. The evaluator recommended continued speech-language services for Student, as well as accommodations such as preferential seating, adjustments to assignments as needed, and frequent breaks.<sup>12</sup>
13. At the due process hearing, Student's independent speech and language evaluator opined that Student requires compensatory education in the form and amount of 45 minutes to 1 hour with a reading specialist a few times per week for 1 to 2 years until he is proficient

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<sup>9</sup> *Id.*

<sup>10</sup> Testimony of independent psychologist.

<sup>11</sup> Petitioner's Exhibit 8.

<sup>12</sup> *Id.*

with phonemic awareness and reading skills. However, the evaluator did not know what “proficient” would be for an MR Student. Moreover, the evaluator admitted that Student’s IEP goals that require him to use strategies to complete multi-step instructions and to sequence up to 4 events address some of the recommendations contained in his May 2009 independent speech and language evaluation. Similarly, the accommodations listed in Student’s current IEP satisfy some of the recommendations in the independent evaluation. On the other hand, the IEP does not include all of the recommendations included in the evaluation report.<sup>13</sup>

14. Student’s undated social history evaluation report reveals that Student was exposed to several controlled substances *in utero*, but was born relatively healthy and strong. Student was diagnosed with ADHD in 2006 but does not take medication for the condition. Guardian described Student as a pleasant young man who enjoys doing boy things and is well liked by family and his peers in the neighborhood. Student was initially determined eligible for special education in or about first grade. Thereafter, he suffered through a series of inappropriate placements that negatively impacted his self-esteem by placing him with extremely low functioning students. Student began attending his current private, full-time special education school in third grade, and his self-esteem, confidence level, and quality of work have blossomed since that time. Guardian reports that the school is a wonderful educational match for Student, and she is extremely satisfied with the school. Student has received honor roll recognition at his current school for the past two years, and he has also received numerous other awards from the school. Student also has been an active member of the basketball team at a neighborhood faith-based mentoring program for the past three years, and he spends his down time playing with neighborhood friends or playing video games on his personal computer. In the end, the evaluator recommended a review of all of Student’s evaluations and assessments, as well as a mental health evaluation and ongoing individual therapy to address, in particular, issues with Student’s sporadic relationship with his biological father and the potential re-entry of his biological mother into the family.<sup>14</sup>
15. By letter dated June 28, 2009, Petitioner’s counsel forwarded to DCPS a copy of Student’s independent OT evaluation. Petitioner’s counsel asked DCPS to review the evaluation report and send a copy of the review to his attention. However, Petitioner’s counsel did not request an MDT to review and act upon the evaluation report.<sup>15</sup>
16. Based on Student’s performance on his June 25, 2009 OT evaluation, he has Average functional capabilities in the areas of fine motor dexterity and visual perception, and Below Average visual motor integration skills. Despite Student’s mild difficulties in the area of visual motor integration skills, the evaluator stated that OT intervention within the academic environment was NOT recommended because Student’s mild deficits can be addressed within the classroom environment. The evaluator recommended that Student’s teacher be made aware of his OT evaluation so that the necessary adjustments can be

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<sup>13</sup> Testimony of independent speech pathologist.

<sup>14</sup> *Id.*

<sup>15</sup> Petitioner’s Exhibit 9.

made to the curriculum. The evaluator also recommended, *inter alia*, an assistive technology evaluation and various classroom accommodations, such as an appropriate class ratio, breaks as needed, 1:1 tutorials, simplified and reduced language of text and verbal instructions for assignments, and limited auditory distractions.<sup>16</sup>

17. Guardian is aware that Student had not been evaluated since 2007. Since Student's 2007 MDT meeting, the behavior reports Guardian has received indicate that Student constantly gets up and speaks when it is not his turn, has to be told repeatedly to finish his work, has a short attention span, and does a lot of playing in his non-homeroom classes. However, Student's homeroom/special education/main teacher handles Student well and can get him back on track.<sup>17</sup>
18. Student's current special education/homeroom teacher has been teaching Student for two years now. Student currently receives daily rotations in reading, math and writing, instruction in social studies or science, and art and gym as electives. Student is also pulled out of class to work with the reading specialist for 1 hour per week, and to work with the social worker for two separate 30-minute sessions per week. The sessions with the social worker include one session of individual therapy and one session of group therapy. The special education/homeroom teacher uses a behavior modification system that involves a point sheet with four levels of behavior, personal goals and prompts. Student responds really well to the behavior modification system, although he tends to have more trouble behaving in his electives. Student is also making good progress in reading comprehension and fluency, and he received various subtests of the Woodcock-Johnson test from the reading specialist in January and August of 2008, as well as a less formal reading test in February 2009. Student has made progress with adding and subtracting in math, but word problems can be a problem for Student because of the required reading skills.<sup>18</sup>
19. With respect to his therapy sessions with the social worker, Student's year has been up and down. He did well enough at the beginning of the school year, but around mid-school year Student began shutting down often because he did not understand that he was attending therapy sessions to talk – not because he was in trouble. Since mid-April, however, Student has gotten better and he started opening up and talking even more during the summer. In February of 2009, Student's social worker revised his IEP goals to address his existing issues. The social worker decided to continue with two 30-minute sessions because she thought a 1-hour session would be too much for Student. The social worker did not have any updated testing at the time of developing his new IEP goals; the goals were based on Student's behaviors at the time in school. However, even if updated testing had been available at the time, the social worker would have taken it into account but would not have relied solely upon the testing in developing Student's IEP goals.<sup>19</sup>

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<sup>16</sup> Petitioner's Exhibit 9.

<sup>17</sup> Testimony of Guardian.

<sup>18</sup> Testimony of special education teacher.

<sup>19</sup> Testimony of social worker.

## V. CONCLUSIONS OF LAW

The sole issue to be determined in this case is whether Student is entitled to an award of compensatory education. As the party seeking relief in this action, 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) (“*Reid*”). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Id.*, 401 F.3d at 524.

Compensatory education is the remedy for a denial of FAPE. *Mary McLeod Bethune Day Academy Public Charter School v. Bland and T.B.*, 550 F.Supp.2d 130 (D.D.C. 2008). However, some students may require only short intensive compensatory programs, other may need extended programs, and others still may not require any compensatory education at all. See *id.*

In this case, the evidence reveals that DCPS violated IDEIA by failing to timely complete Student’s triennial evaluations. See 34 C.F.R. § 300.303(b)(2) (reevaluations must occur at least once every 3 years, unless parent and public agency agree reevaluation is unnecessary). Indeed, DCPS does not dispute that the evaluations were not timely completed, nor does DCPS offer an explanation for the lengthy delay.

On the other hand, the evidence also reveals that Student continued to receive full-time special education services during the period when his reevaluations were delayed, and that Student has made substantial progress in all areas except the social-emotional area, where he has experienced some regression. Moreover, Student’s current IEP contains new goals that are based upon his actual progress in school, and it also includes many of the accommodations recommended in his recent reevaluations.

Finally, the hearing officer notes that the timeline in this case reveals that Petitioner filed this action **after** DCPS authorized independent reevaluations for Student but before all the reevaluations were even completed. The record also reflects that Petitioner never even attempted to obtain an MDT meeting so that DCPS could review the reevaluations and make educational decisions for Student based upon the reevaluations.

Under the circumstances outlined above, the hearing officer concludes that the only area where Student may require compensatory education services is the social-emotional area. A review of the evidence pertaining to this area reveals that Student was performing well enough in his therapy sessions at the beginning of the 2008/09 school year, but he went through a rough period mid-year when he began shutting down before he rebounded and began to open up again in his sessions. The evidence also indicates that Student received two 30-minute therapy sessions throughout the entire school year, and his social worker intentionally decided to limit his

sessions to 30 minutes when she developed new goals for him in February 2009 because she believed that a 1-hour session would be too long for Student. However, Student's May 2009 independent comprehensive reevaluation report recommended that Student receive a minimum of two 45-minute sessions of individual counseling per week. Although Student's social worker testified that she would not have relied solely upon the evaluation report in developing Student's current IEP goals, it is possible that the team would have increased the amount of social-emotional services Student receives based upon his reevaluation report.

Based upon the foregoing analysis, the hearing officer concludes that it would be appropriate to award Student compensatory education in the amount and form of one independent 30-minute therapy session per week for a period of three months. In deference to the testimony of Student's independent evaluator, the hearing officer will allow the independent therapist selected by Petitioner the option of converting up to 50% of the therapy sessions awarded into family therapy sessions for Student and one or more of his family members if the therapist determines that family therapy sessions will be beneficial to Student.

In awarding the form and amount of compensatory education services set forth herein, the hearing officer is attempting to provide Student with the services necessary for him to receive the educational benefits he would have received had DCPS timely conducted, reviewed, and made educational decisions based upon his triennial evaluations. Of course, this calculation involves a certain amount of uncertainty because MDT teams do not always adopt the recommendations made by evaluators in their evaluation reports. And that concern weighs especially heavy in this case, where Petitioner made no effort whatsoever to secure an MDT meeting to allow Student's IEP team to act upon his new reevaluations prior to initiating this action for compensatory education. As a result, the hearing officer strongly encourages the parties to reconvene Student's MDT meeting as soon as possible to review and take any necessary action upon his recent reevaluation reports.

## VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proving Student's entitlement to at least some compensatory education in the area of social-emotional development.

## VII. ORDER

1. Petitioner is hereby awarded compensatory education in the amount and form of one independent 30-minute therapy session per week for a period of three months. The independent therapist selected by Petitioner to provide these therapy sessions shall be allowed the option of converting up to 50% of the therapy sessions into family therapy sessions for Student and one or more of his family members, if the therapist determines that family therapy sessions will be beneficial to Student.
2. Petitioner's June 1, 2009 Complaint is otherwise **DISMISSED**, and the remaining requests for relief therein are hereby **DENIED**.

/s/ Kimm H. Massey

Kimm H. Massey, Esq.  
Impartial Due Process Hearing Officer

Dated this 30th day of July, 2009.

**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).