

I. PROCEDURAL BACKGROUND

On July 21, 2009, parent's counsel filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by not providing transportation to the Student's educational placement from May 4, 2009 through June 4, 2009, as required by a May 4, 2009 Hearing Officer's Determination ("HOD") and by not providing the hours and services outside the general education setting as required by the Student's Individualized Education Program ("IEP").

The Petitioner requested the Respondent be deemed to have denied the Student a FAPE and ordered to provide a compensatory education plan.

On August 21, 2009, the DCPS filed a Response to the Parent's Administrative Due Process Complaint. The Respondent asserted that as of June 12, 2009 the Student's transportation had not yet begun. There was a resolution session held on this matter, and the Respondent offered thirty hours of compensatory education in order to compensate Petitioner for the three weeks delay in transportation services. The team and parent agreed to the proposal of thirty hours of compensatory education. However, due to a dispute over attorney's fees the case was not resolved via the resolution session. The Respondent asserted that the District's offer of compensatory education as relief for the claims enumerated in the Complaint was adequate, as was the Respondent's offer to pay reasonable attorney fees. The Respondent asserted that the offer of a compensatory education award of thirty hours is appropriate for the Student based on the three week transportation delay. The Respondent further argued that all other claims enumerated in the Complaint stem from the failure to provide transportation to the private educational placement. Additionally, the Respondent argued the Student's transportation began on June 12, 2009 and therefore the claims are now moot. The Respondent alleged the Petitioner was granted relief for her claims by the Respondent. The Respondent asked for the Hearing Officer to deny the Petitioner's request for relief.

The Hearing Officer held a pre-hearing conference call with Counsel for both parties on August 21, 2009 at 3:30 P.M. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session. Counsel for the Petitioner reiterated her claims and clarified that the claims in this Complaint include an allegation of a violation of a prior HOD and that the Student was in an inclusion educational setting at a DCPS from May 2009 until June 11, 2009. Counsel for the Respondent reasserted its defense and stated that she was not aware of the setting of the Student from May-June 2009. The parties stipulated the transportation services for the Student began June 12, 2009. The Respondent withdrew its assertion that the Petitioner had been granted relief for her claims by the Respondent. The Respondent was ordered to supplement its Response by September 1, 2009.

An August 23, 2009 Order required the Petitioner to prove at the hearing how the HOD was violated, and what services the Student did not receive. The Petitioner was advised to

sustain the request for the compensatory education award she must meet the *Reid*² standard; she had to prove that but for the violation, the Student would have progressed to a certain academic level, and that the plan is 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. The Petitioner must also provide an explanation on the calculation or rationale for the proposed plan and how the hours will be integrated into the Student's current educational program. The Respondent was to demonstrate that it provided the services as prescribed by the Student IEP, that the Student has not been harmed and that FAPE has not been denied.

A hearing was held on September 1, 2009. The Petitioner presented a disclosure letter dated August 25, 2009 to which eleven documents were attached, labeled P-1 through 11 and which listed five witnesses. Two witnesses testified. The Respondent presented a disclosure letter dated August 25, 2009 identifying six witnesses and to which two documents were attached, labeled DCPS 1 through 5. No witnesses testified. The documents were admitted without objections.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

II. ISSUE(S)

1. Did the Respondent fail to implement the Student's IEP by not providing transportation services to the Student's educational placement?
2. Did the Respondent provide the hours and services outside the general education setting as required by the Student's IEP?
3. Was the Student denied a FAPE?
4. Is the Student entitled to a compensatory education award?
5. Did the Petitioner meet the Reid standard?

III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. Since 2008 the Student has been enrolled in a DCPS.³
2. The Student is a student with disabilities under the IDEIA. The Student's October 22, 2008 IEP provides 27.5 hours of specialized instruction, 1 hour of speech language pathology and

² Discussed further in the Conclusion of this decision.

³ P#2 Complaint filed July 21, 2009

.5 minutes of behavioral support services⁴ weekly. The Student's primary disability is identified as multiple disabilities, other health impaired and learning disabled. It indicates the Student requires special transportation services.

3. The Student is a special education student at a private educational setting; funded by the Respondent. The Student commenced attending the private school June 4, 2009; previously he attended a DCPS.⁵
4. A Hearing Officer's Determination ("HOD") dated May 4, 2009 found the Student was denied FAPE and ordered the Respondent to fund one half-hour of tutoring in reading, writing and arithmetic each week for the remainder of school year 2008-2009 and for the entirety of [redacted]. The HOD also required the Respondent to place the Student at the private school and cover the cost through 2010.
5. On May 12, 2009 the Petitioner, through counsel, sent a transportation request to the Respondent.⁶
6. The parties stipulated:
 - a. the Respondent was ordered to place and fund the Student at the private school as a result of a HOD issued May 4, 2009;
 - b. the Respondent was ordered to provide transportation for the Student to the private school;
 - c. transportation began June 4, 2009;
 - d. the Student currently attends the private school.
7. The Student was placed at a private school in May 2009. The Student was to receive full time services; but remained at the DCPS without receiving his IEP services from May 12, 2009 through June 4, 2009. He should have received transportation service no more than a one week after the HOD, based on her experience. She has designed approximately 20-25 compensatory education plan; she is not sure if any of the plans were approved. She has received training on the changes in the law; when asked if she knew the *Reid* standard.⁷ Her response was "in third grade students need to read fluently", (she spoke to reading standards). When asked what she understood the standard for compensatory education, she testified it was the services the Student did not receive and was suppose to receive and needs to make up for the harm for the denial of FAPE. The witness reviewed the Student's evaluations, academic evaluation, speech evaluation, spoke with the parent about what her

⁴ P #3 reflects .5 minutes per week. The Petitioner indicates in the Complaint it's the equivalent of half an hour of services.

⁵ P#2 Complaint filed July 21, 2009

⁶ P#7 Student Transportation Data Form-dated May 12, 2009

⁷ Counsel for the Petitioner objected asserting the witness was not a lawyer. However, the witness was offered as an expert witness on compensatory education plan drafting, the undersigned allowed the question. The witness was accepted by the parties as a Special Education expert; however she was not admitted as a compensatory education plan expert.

concerns, and how the Student is performing at school. She had not observed the Student because she was assigned the client at July. The time the Student should have received services was approximately 10 days; adjusted to allow for the Respondent to process the transportation request sent May 12, 2009. According to her calculations, the Student should have 275 hours compensatory education distributed by 20 hours in reading, 20 hours in math, 20 hours in writing, 150 hours in speech/language, and 65 hours of behavioral support, all provided through one-one services. She stated the Student missed 27.5 hours of services per day, and after questioning; she said per week. The witness stated she was calculating based on ten days of missed services. The witness then clarified that the number of hours the Student should receive were a total of 65 distributed by providing 10 hours in reading, 10 hours in math, 10 hours in writing, 25 hours in speech/language, and 10 hours of behavioral support, all provided through one-one services. She offered a one hour per hour plan because according to the Student's evaluations from October 2008 he has phonological problems and cannot articulate sounds nor pronounce some words, and has poor vocabulary. The Student is not able to follow directions. The speech/language services will help him read and write. He is in the 4th grade but is at a Kindergarten level, and he has ADHD. She said 10 hours of behavioral support are necessary to work on the Student's self esteem for being inappropriately placed; he needs some coping skills. The 10 hours in math services are required because he is 4 grades behind according to his IEP. The Student requires a daily routine; he cannot lose one hour of service because he requires the repetition. The witness had not performed an evaluation or observed the Student. She had not spoken to any of the Student's service providers, special education nor knew how the Student was functioning at the new educational placement.⁸

8. The Student stayed at the DCPS from May 4, 2009; date of the issuance of the HOD until June 4, 2009; when the transportation was provided. The Petitioner went regularly to the school and saw there were no changes in the Student's programming during that time at the DCPS; the Student sat in the classroom doing nothing. The Student is currently receiving tutoring services once a week.⁹
9. There was no evidence that the Petitioner incurred in transportation expenses for the May 12, 2009-June 4 2009 period.
10. The Respondent presented no witness.

IV. CONCLUSIONS OF LAW

Preliminary Matters

The parties admitted that a reasonable waiting period for a transportation request to be process by the Respondent was a week.

⁸ The witness has Certifications in the District of Columbia in Virginia as a School Psychologist and Speech Language Pathologist.

⁹ Petitioner's testimony

FAPE Determination

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as “special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP).”

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that 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 a FAPE.

The Respondent has met its legal obligation under the IDEIA. Here is why.

The IDEIA and D.C. regulations require the Respondent to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living.¹⁰

Individualized Education program.

In accordance with the IDEIA an IEP “means a written statement for each child with a disability that includes a statement of measurable annual goals, including academic and functional goals, designed to—

- aa. Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
- bb. Meet each of the child’s other educational needs that results from the child’s disability.”¹¹

The purposes of the IDEIA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their

¹⁰ See: 20 USC § 1400(d)(1)(A) and 5 D.C.M.R. § 3000.2 (2006

¹¹ 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa), (bb),

unique needs and prepare them for further education, employment, and independent living; and to ensure that the rights of children with disabilities and parents of such children are protected..

Related services

The IDEIA and D.C. regulations also require the Respondent to determine the Student's eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs.¹²

According to the IDEIA transportation is a related service if necessary for student to access education.¹³ The IDEIA has established that *related services* means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology.¹⁴

The Respondent did not provide the Student with transportation to the new private placement during approximately 15 days of classes. The HOD does not indicate the Student will receive transportation. However, it was acknowledged by the parties that because the HOD required the Student to be provided access to FAPE, and to achieve the FAPE the Student required transportation, it therefore is part of the HOD.

Education Placement

In an accordance with 34 C.F.R. § 300.116 of the IDEIA regulations when determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that— (a) 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 placement options. It also states that the determination of the educational placement of a child with a disability must be based on a child's IEP. 20 U.S.C. 1412(a)(5).

The evidence is that a HOD dated May 4, 2009 found the Student was denied FAPE and ordered the Respondent to fund to place the Student at the private school and cover the cost through 2010. There was no evidence that during the 15 days of school the Student received the specialized instruction *outside the general education setting* as required by the Student's IEP.

The Student's current educational placement is an inclusion program and cannot provide five hours of pull-out services.¹⁵ The evidence also is that DCPS failed during approximately three weeks months to provide the Student hours a week of *outside the general education setting*, denying the Student services he was entitled to receive. The DCPS has failed to provide the Student with a placement that addresses his needs and not providing services his IEP required and as ordered in a prior HOD.

¹² See: 20 USC § 1400(d)(1)(A) and 5 D.C.M.R. § 3000.2 (2006)

¹³ See: 20 U.S.C. § 1401 (26); 34 C.F.R. § 300.34.

¹⁴ See: 20 U.S.C. 1401(26))

¹⁵ Testimony of the Petitioner.

Compensatory Education

The Petitioner argued at the hearing that the failure to comply with May 4, 2009 HOD has established a presumption of harm that the Respondent must rebut. The Petitioner asserted the Consent Decree in *Blackman v. District of Columbia*, 2006 WL 2456413 (D.D.C. Aug. 24, 2006) ("Consent Decree") established "a rebuttable presumption of harm ... for students who failed to timely implementation of HODs and SAs." The Hearing Officer agrees and also notes that in *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the Court held that, once a finding has been made that a student has been denied FAPE, the student is entitled to compensatory education services.

After reviewing the documents in the record, the representations made by counsel for the parties and the findings of fact, this Hearing Officer determines that the Respondent failed to present evidence to rebut the facts; the presumption of harm has not been refuted consisting therefore in a denial of FAPE to the Student.

Compensatory education award is an equitable relief. A Petitioner must demonstrate the student's specific educational deficits resulting from a loss of FAPE and the specific compensatory measures needed to best correct those deficits, if any. The Petitioner has an obligation to argue the need and reasonableness of the amount of compensatory education requested and how the hours would be integrated into the student's current educational program.

"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." See, *G. ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308 (4th Cir. 2003). More specifically, as the Fourth Circuit has explained, "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *G. ex rel. RG*, 343 F.3d at 309 (**emphasis supplied**).

In every case, the inquiry as to the compensatory education 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. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

A Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides him with "insight about the precise types of education services [the student] needs to progress." *Branham v. D.C.*, 427 F.3d 7, 12 (D.C. Cir. 2005).

The evidence in this Complaint to support a request for compensatory education consisted of the Petitioner in her opening statement requesting compensatory education award in the amount of 200 hours of one-one tutoring. Then the testimony of the expert witness who testified that the Student needed 275 hours distributed in areas of alleged need; all provide through one-one services. She then reviewed the plan and clarified that the number of hours were 65 hours based on a one hour per hour lost.

The Reid decision demands substantial evidence of a link between the compensatory education sought and the expected educational benefit. The student "is not entitled, however, to an amount of such instruction predetermined by a cookie-cutter formula, But rather to an informed and reasonable exercise of discretion regarding what services he needs to elevate him to the position he would have occupied absent the school district's failures." The student did not provide evidence to meet the qualitative standard imposed by the Reid case.

The Petitioner did not offer any evidence on the level of proficiency the Student would have reached but for the violation or where the Student is currently. There was no information on how the recommended hours were 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 and how the hours would be integrated into the Student's current educational program.

Petitioner's counsel cited Mary McLeod Bethune Day Academy Public Charter School v. Bland Civil Action No. 07-1223 (D.D.C. February 20, 2008) asserting that the DCPS' violation entitles Petitioner to a compensatory education award determination to be made by the Hearing Officer.

The Hearing Officer agrees that when there is a denial of FAPE a compensatory award should be granted. However, the Hearing Officer's responsibility to determine a compensatory education services is based on receiving sufficient evidence which includes the appropriate assessments, records, an explanation of the calculations of hours and information on the programs available to address the individual needs of the Student. The Petitioner failed to provide the evidence that would allow the Hearing Officer to draft a compensatory education plan that would suffice the *Reid* standard.

V. SUMMARY OF DECISION

The Petitioner failed to provide evidence that the plan she submitted for the consideration of the hearing officer was calculated with the Student's unique needs in mind to address specific concerns. The witness suggested 275 hours of compensatory education as reasonable for approximately 65-68 hours of missed services. The witness later upon prompting from the Petitioner's Counsel stated that it was a miscalculation and recommended 65 hours. The Petitioner did not offer any evidence on the level of proficiency the Student would have reached but for the violation or where the Student is currently. There was no information on how the recommended hours were 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 and how the hours would be integrated into the Student's current educational program.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Petitioner has not met her burden of proof and issues the following:

VI. ORDER

ORDERED, the Petitioner's request for relief is DENIED.

This order resolves all matters presented in the Petitioner's July 21, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the **FINAL ADMINISTRATIVE DECISION**. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)



Wanda Iris Resto - Hearing Officer

Signed: September 6, 2009

Copies:
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