

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened September 30, 2011, at the OSSE Student Hearing Office 810 First Street, NE, Washington, DC 20003, in Hearing Room 2004.

BACKGROUND:

Student or "the student" is age _____ and has been determined eligible as a child with a disability under IDEA with a disability classification of emotional disturbance ("ED"). The student attends a District of Columbia public charter school hereinafter referred to as "School A." The District of Columbia Public Schools ("DCPS") is the local educational agency ("LEA") for School A. Prior to attending School A the student attended a DCPS public elementary school, hereinafter referred to as "School B." The student began attending School A in its summer program in the summer of 2010 and was in fifth grade School A at the start of the 2010-2011 school year.

Petitioner filed a due process complaint on May 26, 2010, while the student was attending School B. The complaint alleged DCPS had failed to timely evaluate and determine the student's eligibility for special education services. Petitioner executed a settlement agreement on June 17, 2010, settling the due process complaint. Pursuant to the settlement agreement DCPS agreed to conduct evaluations of the student within forty-five (45) calendar days of June 28, 2010, and within fifteen (15) calendar days of completion of the last evaluation convene an eligibility meeting to review the evaluations and determine the student's eligibility and if the student was found eligible develop an individualized educational program ("IEP").

On December 27, 2010, Petitioner filed another due process complaint alleging DCPS had not complied with the June 17, 2010 settlement agreement. The complaint alleged *inter alia* DCPS had not conducted adequate evaluations pursuant to the settlement agreement and alleged that although an eligibility meeting had been convened the student was not found eligible and DCPS did not reconvene the eligibility meeting as it had allegedly promised. Petitioner entered into a second settlement agreement dated January 12, 2011, settling the December 27, 2010, due process complaint.

The January 12, 2011, authorized Petitioner to obtain an independent comprehensive psychological evaluation also provided for DCPS to convene an IEP meeting within thirty (30) business days of its receipt of the independent evaluation. Petitioner obtained the independent comprehensive psychological evaluation on March 3, 2011. On May 9, 2011, DCPS convened an eligibility meeting for the student at School A. The team reviewed the student's evaluations and found him eligible and developed his initial IEP. The IEP prescribed the student be provided 5 hours of specialized instruction in general education and 6 hours of specialized instruction per week out of general education. The IEP also prescribed the student be provided 240 minutes of behavioral support services per month out of general education.

On August 12, 2011, Petitioner filed the current due process complaint alleging DCPS failed to provide the student compensatory education at the May 9, 2011, IEP meeting. Petitioner is seeking a compensatory education award of 150 hours of independent tutoring in reading, math and written language and 50 hours of independent mentoring. On August 31, 2011, a resolution meeting was convened. The parties did not resolve the complaint.

On September 14, 2011,² this Hearing Officer convened a pre-hearing conference and issued a pre-hearing order on September 19, 2011, stating the issues to be adjudicated, the relief Petitioner is seeking and Respondent's position with regard to the complaint and/or defenses.

On August 19, 2011, DCPS filed its response to the complaint. In the response DCPS asserted the terms of the settlement agreement state that the team will discuss and determine if compensatory education is warranted, there was a discussion of compensatory education at the May 9, 2011, meeting and the team determined no compensatory education was warranted. Thus, DCPS asserted it complied with the stated terms of the settlement agreement. DCPS also asserted that there is no requirement under IDEA that IEP development must include a compensatory education discussion and thus Petitioner's alternative argument regarding the appropriateness of the IEP should fail as well. DCPS asserts there have been no procedural or substantive violations and no harm to the student.

On September 1, 2011, DCPS filed a motion to dismiss the complaint asserting the same arguments and legal basis asserted in its response. DCPS maintained that the IEP team discussed compensatory education at the May 9, 2011, meeting and determined the student is due no compensatory education and thus Petitioner is barred by the settlement agreement from now seeking compensatory education. On September 7, 2011, Petitioner's counsel filed an opposition to the motion to dismiss. On September 21, 2011, the Hearing Officer issued an order denying DCPS' motion to dismiss. Although the basis of DCPS' response and motion to dismiss is that the terms of the settlement agreement were complied with and thus Petitioner may not litigate matters that were settled by the settlement agreement, the Hearing Officer determined that the Petitioner would be allowed to present evidence of the compensatory education discussion had at the eligibility meeting and evidence and legal authority regarding the alternative argument that the IEP is inappropriate because of that discussion which Petitioner alleges was inappropriate.

ISSUES:³

The issues adjudicated are:

² The Hearing Officer made attempts to schedule the PHC within a week of the resolution meeting; however, this date was the first date that was mutually available for both counsel.

³ The alleged violation(s) and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined here. However, the parties agreed at the hearing that the issue(s) listed here and as stated in the pre-hearing order are the issue(s) to be adjudicated.

1. (1): Did DCPS deny the student a FAPE by failing to comply with the terms of the January 12, 2011, settlement agreement by failing to award the student compensatory education at its May 9, 2011, IEP meeting? ⁴
2. Did DCPS deny the student a FAPE by failing to develop an appropriate IEP for the student by failing to have an appropriate compensatory education discussion when the student's IEP was developed on May 9, 2011? ⁵

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-21⁶) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁷

1. The student is age _____ and has been determined eligible as a child with a disability under IDEA with a disability classification of emotional disturbance ("ED"). The student attends a District of Columbia public charter school hereinafter referred to as "School A." The District of Columbia Public Schools is the local educational agency ("LEA") for School A. Prior to attending School A the student attended a DCPS public elementary school, hereinafter referred to as "School B." The student began attending School A in its summer program during the summer of 2010 and was in fifth grade at the start of the 2010-2011 school year. (Parent's testimony, _____ testimony, Petitioner's Exhibit 14-1)
2. Petitioner filed a due process complaint on May 26, 2010, while the student was attending School B. The complaint alleged DCPS had failed to time evaluate and determine the student's eligibility for special education services. (Petitioner's Exhibit 1)

⁴ Petitioner alleged there were two settlement agreements one dated June 17, 2010, and the other dated January 12, 2011, (for a complaint filed on December 27, 2010) at that the student was finally determined eligible on May 9, 2011, and DCPS did not as the agreement required discuss compensatory education for the alleged delay in the student being found eligible. Petitioner is alleging the student should have been found eligible at the beginning of SY 2010-2011 school year.

⁵ Petitioner alleges the second issue as an alternative to the first, asserting that the student's IEP developed May 9, 2011, is inappropriate because the IEP prescribes a compensatory education discuss and because the discussion was in appropriate thus, the IEP is inappropriate.

⁶ DCPS disclosed a witness list and no documents.

⁷ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

3. Petitioner executed a settlement agreement on June 17, 2010, settling the due process complaint. Pursuant to the settlement agreement DCPS agreed to conduct evaluations of the student within forty-five (45) calendar days of June 28, 2010, and within fifteen (15) calendar days of completion of the last evaluation convene an eligibility meeting to review the evaluations and determine the student's eligibility and if the student was found eligible develop an IEP. (Petitioner's Exhibit 2-2)
4. On December 27, 2010, Petitioner filed another due process complaint alleging DCPS had not complied with the June 17, 2010 settlement agreement. The complaint alleged *inter alia* DCPS had not conducted adequate evaluations pursuant to the settlement agreement and alleged that although an eligibility meeting had been convened the student was not found eligible and DCPS did not reconvene the eligibility meeting as it had allegedly promised. Petitioner entered into a second settlement agreement executed on January 12, 2011, settling the December 27, 2010, due process complaint. (Petitioner's Exhibits 3, 4)
5. The January 12, 2011, authorized Petitioner to obtain an independent comprehensive psychological evaluation also provided for DCPS to IEP meeting within thirty (30) business days of its receipt of the independent evaluation. (Petitioner's Exhibit 4-2)
6. Petitioner obtained the independent comprehensive psychological evaluation on March 3, 2011. On May 9, 2011, DCPS convened an eligibility meeting for the student at School A. The team reviewed the student's evaluations and found him eligible and developed the student's initial IEP. The IEP prescribed the student be provided 5 hours of specialized instruction in general education and 6 hours of specialized instruction per week out of general education. The IEP also prescribed the student be provided 240 minutes of behavioral support services per month out of general education. (Petitioner's Exhibits 13, 14-6)
7. The student's academic assessment conducted as a part of the independent comprehensive psychological evaluation revealed that student's is performing solidly in the average range in Reading, Math and Written Expression. The evaluator noted the student's academic scores had fallen since his prior testing by DCPS. (Dr. Nelson's testimony, Petitioner's Exhibit 13-7)
8. The emotional/behavioral assessments that were a part of independent comprehensive psychological evaluation revealed that student's had behavioral and emotion concerns that were affecting his educational performance. As a result of the independent evaluation the eligibility team determined the student met the eligibility criteria for emotional disturbance. (Dr. Holman's testimony, Dr. Nelson's testimony, Petitioner's Exhibits 13-9, 14-1)
9. The student's May 9, 2011, IEP form has a section entitled "Compensatory Education" and asked the question of whether compensatory education was discussed at the meeting. The IEP form has the box checked "Yes" that there was a compensatory education discussion. (Petitioner's Exhibit 14-8)

10. The first settlement agreement signed by the parent and the DCPS representative on June 17, 2010, in of paragraph 4 reads as follows:

“The parties agree to the following:

- a. DPCS agrees to conduct a Comprehensive Psychological, Social History, Speech and Language, and Functional Behavior Assessment within 45 calendar days of June 28th. DCPS will be granted a day for day extension if for any reason the student is not available for testing..
- b. Within 15 calendar days of completion of last evaluation DCPS agrees to hold an eligibility meeting to review evaluations, and if determined eligible will develop an IEP within 10 business days of the eligibility meeting, discuss site location of services, and discuss if compensatory education is warranted and if so develop a plan.” (Petitioner’s Exhibit 2-2)

11. The settlement agreement also stated in paragraph 10 the following:

“The Settlement Agreement is in full satisfaction and settlement of all claims contained in the pending Complaint, including those claims under IDEA and § 504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement. (Petitioner’s Exhibit 2-2)

12. The settlement agreement signed by the parent on January 13, 2011, and by the DCPS representative on January 21, 2010, in of paragraph 4 reads as follows:

“The parties agree to the following:

- a. Parent is authorized to obtain an independent Comprehensive psychological ... at the expense of the District of Columbia to be completed within 45 calendar days of the date of this agreement....”
- b. Within 30 business days of receipt of the final evaluation report, DCPS will convene an IEP meeting to review the independent comprehensive psychological; determine if the student is eligible for special education; develop an IEP, if necessary; discuss and determine site location, if necessary; discuss and determine compensatory education, if warranted.” (Petitioner’s Exhibit 4-2)

13. The settlement agreement also stated in paragraph 10 the following:

“The Settlement Agreement is in full satisfaction and settlement of all claims contained in the pending Complaint, including those claims under IDEA and § 504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement. (Petitioner’s Exhibit 4-2)

14. At the May 9, 2011, IEP meeting the team discussed the issue of compensatory education. The DCPS staff as well as the School A staff members at the meeting stated the student was not due any compensatory education. The parent’s advocate attended the

meeting and expressed her opinion the student was due compensatory education because the student should have been found eligible at the student's first eligibility meeting in September 2010 had the psychological evaluation DCPS conducted been appropriate. The School A staff did not believe the student was due compensatory education because the student's academic performance and behaviors at the time of the first eligibility meeting were not problematic. (Dr. Holman's testimony, testimony)

15. The academic program at School A is extremely rigorous and structured. There is token economy system used in the school for all students to support academic and behavioral performance. During the student's first year at School A, the student did not have significant academic or behavioral difficulties. After the student's first eligibility meeting when he was not found eligible the school began providing the student counseling with the school social worker once per week. The student was also given additional academic support in a math. The student was retained in 5th grade for the 2011-2012 school year after several discussions with the parent. The parent was in agreement with the retention. The student's academic performance, his class participation and focus have also significantly improved in the current school year. (testimony)

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.

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent

⁸ The burden of proof shall be the responsibility of the party seeking relief. 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.

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 : (1): Did DCPS deny the student a FAPE by failing to comply with the terms of the January 12, 2011, settlement agreement by failing to award the student compensatory education at its May 9, 2011, IEP meeting?

Conclusion: The evidence does not support a finding that the student is entitled to compensatory education. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

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." "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." *Reid, 401 F.3d 522 & 524*. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Petitioner entered into a settlement agreement executed on January 21, 2011, settling a prior due process complaint. DCPS agreed under this settlement to fund an independent evaluation, convene an eligibility meeting and if the student was found eligible develop an IEP and "discuss and determine compensatory education, if warranted." As to compensatory education the terms of the agreement did not state that the student was entitled to compensatory education or that DCPS agreed to provide the student compensatory education. The terms simply state that at the IEP meeting compensatory education would be discussed and determined, if warranted.

Petitioner alleges that at the meeting DCPS did not engage in a discussion but simply stated the student was due no compensatory education. Although Dr. Holman testified that in her opinion there was no discussion of compensatory education, the Hearing Officer was not convinced of this by her testimony. Compensatory education was an item clearly brought forth in the meeting and Dr. Holman made a request for compensatory education. The School A members of the team did not agree compensatory education was warranted. The Hearing Officer concludes this evidence demonstrates there was a discussion at the meeting of compensatory education as the settlement agreement required.⁹

The settlement agreement terms regarding compensatory education may have been due to inartful drafting. However, the Hearing Officer is not going to attempt to redraft the agreement. The Hearing Officer concludes based on the language of the meeting notes that compensatory education was discussed and the provision of the agreement were satisfied. Consequently, the

⁹ Although Petitioner's counsel in his opposition to the motion to dismiss asserted that compensatory education for periods prior to the settlement agreement could be reviewed, the Hearing Officer did not conclude there was any basis for such a review in this instance because the language of the agreement was clear and had been satisfied.

Hearing Officer concludes that the compensatory education the student might have been due for any violations alleged in the complaints that were the subject of the settlement agreements will not be granted.

Pursuant to contract law “where the language in question is unambiguous, its interpretation is a question of law for the court. A court must honor the intentions of the parties as reflected in the settled usage of the terms they accepted in the contract...and will no torture words to import ambiguity where the ordinary meaning leaves on room for ambiguity. *Independence Manufacturing Co Inc. v. Anderson and Summers LLC*, 874 A.2d 862, 867 (D.C. 2005).

It is clear from the evidence that the IEP team discussed whether or not compensatory education was warranted and that is all that was required by the settlement agreement. This is not a case of breach of a settlement agreement, but apparently Petitioner’s dissatisfaction with the results of the terms of the settlement agreement after the fact.

ISSUE : (2): Did DCPS deny the student a FAPE by failing to develop an appropriate IEP for the student by failing to have an appropriate compensatory education discussion when the student’s IEP was developed on May 9, 2011?

Conclusion: There was insufficient evidence presented that the student’s IEP is inappropriate because it did not include a compensatory education discussion.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education (“FAPE”). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student’s IEP, which in turn is to be developed according to a student’s unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982) (“The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program (“IEP”)).

20 U.S.C. 1414(a)(i) defines Individualized Education Program as a “written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child’s present levels of academic achievement and functional performance.” It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child’s parent, general education teachers, LEA special education teachers and anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

Petitioner alleged the second issue as an alternative to the first, asserting that the student’s IEP developed May 9, 2011, is inappropriate because the IEP prescribes a compensatory education discussion and because the discussion was allegedly inappropriate. The student’s May 9, 2011, IEP form has a section entitled “Compensatory Education” and asked the question of whether compensatory education was discussed at the meeting. The IEP forms has the box checked

“Yes” that there was a compensatory education discussion. There is no provision of the IDEA that requires that an IEP contain compensatory education and no requirement under IDEA that a compensatory education discussion be made in order for an IEP to be appropriate. This alternative argument by Petitioner lacks merit. The compensatory education discussion was, as discussed in the issue analyzed above, a provision of the contractual settlement agreement the parties executed. There was no requirement for compensatory education and the evidence, including that of Dr. Nelson and Dr. Holman offered in support of the student receiving compensatory education, was unconvincing and insufficient to override the plain language of the settlement agreements Petitioner entered. Accordingly, the Petitioner did not sustain the burden of proof as to this second issue asserted.

ORDER:

The due process complaint in this matter is hereby dismissed with prejudice and the relief requested by the Petitioner is hereby denied.

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. §1415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: October 15, 2011