

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

on behalf of

RECEIVED

DEC 27 2011

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a year-old male, who presently attends a private full-time special education school located in the District of Columbia at DCPS's expense.

On October 12, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to timely respond to Parent's requests for re-evaluations, resulting in delays in correcting the misdiagnosis of Student, and failed to comprehensively evaluate Student by failing to conduct an adaptive assessment to confirm the proposed diagnosis of intellectual disability ("ID"). As relief for these alleged denials of FAPE, Petitioner requested findings in its favor; compensatory education services in the form of independent tutoring and related services.

On October 21, 2011, DCPS filed its Response to the Complaint. In its Response, DCPS asserted that it was ordered to review a Department of Health assessment that included an adaptive measure, and DCPS agreed with the determination therein that Student had ID; DCPS timely conducted a reevaluation in 2010; DCPS provided IEPs reasonably calculated to provide educational benefit; it is inappropriate to use evaluations retroactively to find prior IEPs inappropriate; some of Petitioner's allegations appear to be barred by the two-year statute of limitations; there is no cognizable claim for an incorrect classification; Student has been receiving full-time services in a non-public setting since at least 2008; and DCPS has been providing Student a FAPE and none of the requested relief is warranted.

The parties concluded the Resolution Meeting process by participating in a resolution session on October 27, 2011. No agreement was reached, and the parties did not agree to shorten the resolution session. Hence, the 45-day timeline will begin on November 12, 2011 and will end on December 26, 2011, which is the HOD deadline.

On November 1, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer issued the Prehearing Order on November 4, 2011.

By their respective disclosure letters dated December 7, 2011, Petitioner disclosed forty-two documents (Petitioner's Exhibits 1 - 42) and DCPS disclosed six documents (Respondent's Exhibits 1 - 6).

The hearing officer convened the due process hearing on December 14, 2011.¹ Petitioner's Exhibits and DCPS's Exhibits 1 and 3-6 were admitted into the record without objection. DCPS's Exhibit 2 was admitted into the record over Petitioner's relevance objection. Thereafter, Petitioner made an opening statement, but DCPS waived its opening. Then, Petitioner presented testimonial evidence and DCPS attempted to do so as well, but DCPS's sole witness was prohibited from testifying because DCPS counsel failed to provide the witness with the parties' five-day disclosures in advance of the hearing, as required by the Prehearing Order, and DCPS counsel indicated that she could not get the disclosures to the witness during the hearing even if a break was allowed for that purpose. Thereafter, the hearing officer received closing statements and concluded the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 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.").

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS deny Student a FAPE by failing to timely respond to Parent's request for reevaluations, resulting in delays in correcting the misdiagnosis of Student from ID to Learning Disability ("LD")?
2. Did DCPS fail to comprehensively evaluate Student by failing to conduct an adaptive assessment to confirm the proposed diagnosis of ID, with the result that expectations were minimized and Student was denied a FAPE?

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

FINDINGS OF FACT²

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a _____ year-old male, who attends a separate private day school. Student began attending this school in August/September of 2010. Prior to attending the current school, Student attended another private day school that worked with severely disabled children with disabilities such as cerebral palsy.³
2. When Student was attending his previous private school, he exhibited behavior problems, such as lying, stealing, fighting, making up stories to get attention, and engaging in improper behavior with other students. Parent received complaints from the previous school about Student's behavior approximately three times per week. However, Student's behavior and skills have improved since he began attending the Learning Disabled LD program at his current school. The lying and stealing have stopped, he is reading and counting money, he does well on spelling tests, his self-esteem has increased and his social behavior has changed.⁴
3. Student's current IEP is dated October 13, 2011. The IEP identifies Student's primary disability as "Intellectual Disability (also known as Mental Retardation)" and requires Student to receive 25.25 hours per week of specialized instruction, 60 minutes per week of speech-language pathology services, and 60 minutes per week of behavioral support services, with all instruction and related services to be delivered outside general education. The IEP indicates that Student is eligible for ESY, but his ESY needs are satisfied at the summer session of the full year program at his current non-public school.⁵
4. At Student's October 13, 2011 IEP meeting, the team noted that Student has matured socially/emotionally since beginning at the new school, made amazing progress in speech therapy, and made approximately one year of auditory comprehension progress. When the team "discussed outstanding compensatory education issued (sic) from last year's meeting[, the] DCPS LEA Rep noted that she was awaiting a Compensatory Education Plan from the parent and ha[d] not received one."⁶
5. At Student's October 13, 2011 IEP meeting, DCPS and Parent agreed that Student was entitled to compensatory education, but the DCPS representative was waiting to receive Parent's proposed compensatory education plan.⁷

² To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ Testimony of advocate; testimony of Parent; *see* Complaint; Petitioner's Exhibit 10 at 8.

⁴ Testimony of Parent.

⁵ Petitioner's Exhibit 6.

⁶ Petitioner's Exhibit 5.

⁷ Testimony of advocate.

6. Student's previous IEP is dated November 15, 2010. The IEP identifies Student's primary disability as Specific Learning Disability ("SLD") and requires Student to receive 25.25 hours per week of specialized instruction, 60 minutes per week of speech-language pathology services, and 75 minutes per week of behavioral support services, with all instruction and related services to be delivered outside general education. Although Student's present levels of performance and needs statements were updated, his annual goals remained the same. The IEP indicates that Student is eligible for ESY, but his ESY needs are satisfied at the summer session of the full year program at his current non-public school.⁸
7. At Student's November 15, 2010 MDT meeting, the team reviewed his October 2010 confidential psychological reevaluation and determined to change Student's disability classification from ID to LD, noting that Student is not clinically significant in the adaptive functioning area. The team also reviewed Student's September 2001 speech and language reevaluation, determining that Student continued to exhibit deficits in receptive and expressive language and had not made much growth since his previous 2006 speech and language evaluation. When Petitioner's advocate indicated that she would be submitting a compensatory education plan to DCPS that week, the LEA representative stated that the plan would "be reviewed by DCPS and a response provided."⁹
8. Student's August 3, 2010 IEP identified his primary disability as ID (also known as Mental Retardation). The IEP required Student to receive 28 hours per week of specialized instruction, 60 minutes per week of speech-language pathology, and 60 minutes per week of behavioral support services, with all services to be provided outside general education. The IEP also noted that Student was attending a separate non-public private day school and required ESY.¹⁰
9. At Student's August 3, 2010 IEP meeting, the team reviewed Student's progress, noted that Student 2006 speech language evaluation was the most recent and did not reflect the level of Student's performance, and noted that Student's 2006 psychoeducational evaluation was the most recent and indicated that Student had ADHD, which did not appear to be accurate. When the team discussed location of services, Parent indicated a change of location was forthcoming but DCPS was unaware of and had no documentation concerning a change of location.¹¹
10. On August 16, 2010, DCPS issued a Prior to Action Notice changing Student's location of service to his current private day school. The Notice indicated that Student continued to be eligible to receive special education services as a student with MR.¹²
11. At Student's August 24, 2009 IEP meeting, a possible change in location of services was discussed for Student. Parent and her advocate requested a private full-time special

⁸ Petitioner's Exhibit 10.

⁹ Petitioner's Exhibit 11.

¹⁰ Petitioner's Exhibit 16.

¹¹ Petitioner's Exhibits 18 and 21.

¹² Petitioner's Exhibit 30.

education school located in Virginia and stated that the school had issued a letter of acceptance for Student. A representative from Student's current private day school was available by phone to discuss the program, but Parent stated she was not interested in the program because she had visited and did not like it. DCPS indicated that it would send a referral for Student to the current school anyway to determine whether the school could implement Student's IEP because it was much closer to Student's home and would avoid the unnecessary bus ride. There is no mention in the MDT Notes for Student's August 24, 2009 meeting of a request for reevaluations by Parent and/or her advocate.¹³

12. On February 14, 2008, a hearing officer issued a Hearing Officer Decision ("HOD") that required DCPS to, *inter alia*, convene an MDT/IEP/Placement meeting on or before April 8, 2008 to review all of Student's existing assessment results to determine his continued eligibility for special education services; determine if additional assessments are warranted, and if so, either perform them or fund independent assessment(s); review and revise, if necessary, Student's March 5, 2007 IEP; and discuss and decide placement for Student and issue a Prior Written Notice of Placement for Student for SY 2007/8 at the conclusion of the meeting.¹⁴
13. Student's November 29, 2006 psychological evaluation was Court-ordered and conducted by the D.C. Department of Mental Health. The procedures utilized during the evaluation included an Adaptive Behavior Assessment System-Second Edition ("ABAS-II") and a Mental Status Exam. Based on the results of the procedures utilized, the evaluator diagnosed Student with ADHD-Combined Type, Adjustment Disorder with Depressed Mood, and Mild Mental Retardation.¹⁵
14. Student's November 6, 2006 speech and language evaluation was conducted at Children's Hospital. Based on the results of the assessments administered, the evaluator determined that Student presented "significant impairment in terms of articulation due to decreased intelligibility for spontaneous speech, moderate impairment in terms of expressive and receptive vocabulary, with severe impairment overall for receptive and expressive language."¹⁶
15. Petitioner filed the Complaint that initiated the instant matter on October 12, 2011.
16. In July 2009, Petitioner, through her counsel, requested a comprehensive battery of reevaluations for Student.¹⁷
17. In July 2010, Petitioner, through her counsel, requested a comprehensive battery of reevaluations for Student. This written request did not reference Parent's July 2009 request for evaluations.¹⁸

¹³ Petitioner's Exhibit 22.

¹⁴ Respondent's Exhibit 2.

¹⁵ Petitioner's Exhibit 29.

¹⁶ Petitioner's Exhibit 28.

¹⁷ Petitioner's Exhibit 2.

¹⁸ Petitioner's Exhibit 3.

18. On August 3, 2010, DCPS prepared a Student Evaluation Plan for Student, which indicated that Student's MDT was recommending he receive a comprehensive psychological evaluation and a speech/language evaluation.¹⁹
19. On October 7, 2010, DCPS issued a Speech and Language Reevaluation report for Student, which indicated that Student was demonstrating below average language and receptive vocabulary skills, and low average expressive vocabulary skills.²⁰
20. On October 20, 2010, DCPS issued a Confidential Psychological Re-evaluation report for Student, which concluded, *inter alia*, that Student was functioning in the Low Average range of intellectual ability; his academic abilities were much lower than expected based on his cognitive abilities, and he demonstrated considerable difficulty with tasks within all academic areas; and he did not present with significant deficits or impairments in adaptive functioning in the school environment.²¹
21. In this action, Student is requesting compensatory education in the following form and amount: 1 year of 1:1 tutoring at 4 hours per week, to be divided into two sessions per week to assist Student in the areas of math, reading, and written expression. Petitioner's advocate developed the plan to address Petitioner's contention that Student was in an improper placement for 1 year due to his misdiagnosis as ID instead of LD, with the result that he was not being challenged enough, he was not making any real progress, and he was exhibiting behavior problems due to frustration.²²
22. On October 17, 2011, the DCPS LEA representative advised Petitioner's educational advocate by email that she, the LEA representative, had received the proposed compensatory education plan for Student but, pursuant to the October 13, 2011 IEP team's decision, the issue should be decided through the resolution/mediation process for Petitioner's October 2011 Complaint and the team would abide by the decision made through that process.²³

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. Alleged Failure to Timely Respond To Parent's Reevaluation Requests

IDEA requires a public agency to ensure that a reevaluation of each child with a disability is conducted if the child's parent or teacher requests a reevaluation. 34 C.F.R. § 300.303(a)(2).

¹⁹ Petitioner's Exhibit 17.

²⁰ Petitioner's Exhibit 26.

²¹ Petitioner's Exhibit 25.

²² Testimony of advocate; Petitioner's Exhibit 40.

²³ Petitioner's Exhibit 41.

IDEA further provides that a parent may file a due process complaint on any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. 34 C.F.R. § 300.507(a)(1). However, the due process complaint must allege a violation that occurred not more than two years before the date the parent knew or should have known about the alleged action that forms the basis of the due process complaint, unless the LEA made specific misrepresentations that it had resolved the problem forming the basis of the due process complaint or the LEA withheld information from the parent that it was required to provide under IDEA's regulations. 34 C.F.R. § 300.507(a)(2); 34 C.F.R. § 300.511(f).

a. **July 2009 Request**

In the instant case, Petitioner has alleged that DCPS denied Student a FAPE by failing to timely comply with Parent's July 2009 and July 2010 written requests for reevaluations. However, Parent's July 2009 request for reevaluations was made more than two years prior to the filing of the current October 12, 2011 Complaint, and there is no claim that DCPS made specific misrepresentations or withheld information from Parent in connection with this request. Instead, Petitioner seeks to avoid the bar of the 2-year limitations period by arguing that its claim did not accrue until DCPS failed to respond to the reevaluation request and/or since the evaluations should have been completed at the end of October/early November 2009, allowing a reasonable time for completion of the evaluations, the statute of limitations did not begin to run until then. Petitioner has presented no statutory or case law authority in support of this argument, and the hearing officer is not aware of any either. Hence, based upon the plain language of the governing regulations, the hearing officer concludes that any claim stemming from Petitioner's July 2009 request for reevaluations is barred by IDEA's two-year statute of limitations because the request was made more than two years prior to the filing of the instant Complaint.

b. **Alleged August 2009 Request**

Petitioner also asserts that Petitioner's advocate requested reevaluations for Student at Student's August 24, 2009 MDT meeting. However, the record contains no documentary or testimonial evidence in support of that assertion. Therefore, the hearing officer concludes that Petitioner has failed to prove that an August 24, 2009 verbal request for reevaluations was made, and the hearing officer declines to rule on the timeliness of a claim based on such a request.

c. **July 2010 Request**

Petitioner has also asserted that DCPS denied Student a FAPE by failing to timely comply with Parent's July 2010 written request for evaluations. However, the evidence in this case reveals that DCPS prepared an SEP for Student on August 3, 2010, and subsequently completed Student's reevaluations in October 2010, which was approximately three months, and within a reasonable time, after Parent's written request. *See Herbin v. District of Columbia*, 362 F. Supp. (254 D.D.C. 2005) (reevaluations must be conducted without undue delay; four-month delay was not unreasonable). Under these circumstances, the hearing officer concludes that DCPS did not deny Student a FAPE by failing to timely comply with Parent's July 2010 request for reevaluations.

2. **Alleged Failure to Comprehensively Evaluate by Failing to Conduct an Adaptive Assessment to Confirm ID Diagnosis**

IDEA requires an LEA conducting an evaluation of a child to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child that may assist in determining whether the child is a child with a disability. 34 C.F.R. § 300.304(b)(1)(i). Indeed, the LEA must ensure that the child is assessed in all areas related to the suspected disability. 34 C.F.R. § 300.304(c)(4).

In the instant case, Petitioner argues that DCPS failed to comprehensively assess Student by failing to conduct an adaptive assessment to rule out or confirm Student's suggested diagnosis of ID. However, as DCPS points out, Student's Court-ordered November 29, 2006 psychological evaluation included the administration of an ABAS-II, which is an adaptive assessment. As there is no suggestion that said adaptive assessment was somehow defective or invalid, the hearing officer concludes that this claim must fail as well.

3. **Compensatory Education**

Compensatory education is an equitable remedy that a hearing officer has discretion to award to address an educational agency's failure to provide a disabled child with a FAPE. *See Reid v. District of Columbia*, 401 F.3d 516 (D.C. 2005). As Petitioner has failed to prove any cognizable denials of FAPE in the instant case, there is no justification for an award of compensatory education and the hearing officer declines to award same.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. All claims in Petitioner's October 12, 2011 Complaint are **DENIED** and **DISMISSED WITH PREJUDICE**.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Date: 12/26/2011

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer