DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Hearing Officer: Kimm Massey, Esq.

Case No:

OSSE STUDENT HEARING OFFICE 2011 JUN -1 AM 9:13

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a year old young woman, who recently graduated with a high school diploma from a DCPS night school.

On April 18, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to comply with the terms and conditions of an August 20, 2010 Settlement Agreement ("8/20/10 SA"), and failed to develop and implement an appropriate IEP. The gravamen of Petitioner's Complaint was DCPS' failure to make an award of compensatory education to Student at her March 29, 2011 IEP/MDT meeting.

On May 16, 2011, DCPS filed its Response to the Complaint. In its Response, DCPS denied the allegations of the Complaint and asserted that it complied with the 8/20/10 SA because compensatory education was discussed at Student's March 2011 MDT meeting, but the team determined that compensatory education was not warranted because Student had not been denied a FAPE.

On May 20, 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 May 25, 2011.

By their respective disclosure letters dated June 14, 2011, Petitioner disclosed twenty-seven documents (Petitioner's Exhibits 1 – 27), and DCPS disclosed DCPS-1 through DCPS-7.

On June 15, 2011, DCPS filed a Motion to Dismiss, asserting therein that Petitioner was barred by the terms of the 8/20/10 SA from seeking redress for the claims alleged in the Complaint, that some of the allegations in the underlying Complaint extended beyond the two-year limitations period and DCPS was not the LEA for most of the time period at issue. On June 17, 2011, Petitioner filed its Opposition to the Motion to Dismiss, asserting therein that Petitioner's claims concerned events that took place subsequent to the 8/20/10 SA, and disputing any suggestion that Petitioner should be estopped from pursuing claims arising out of the 8/20/10 SA.

The hearing officer convened the due process hearing on June 21, 2011.[1] DCPS's disclosed documents and Petitioner's Exhibits 1 - 7 were admitted into the record without objection. Petitioner's Exhibits 6 and 7 were excluded from the record on DCPS's objection that they were outdated and, therefore, irrelevant. However, Petitioner's Exhibits 10 - 14 and 15 - 21 were admitted over DCPS's relevance objection.

Thereafter, the hearing officer heard argument for and against DCPS's Motion to Dismiss. The hearing officer denied the Motion on grounds that (1) the claims were not barred by the SA because Petitioner had alleged violations that occurred subsequent to the date of the SA, and (2) the phrase "discuss and determine" in the 8/20/10 SA seemingly implied that a determination would be made, which admittedly could have been zero compensatory education under proper circumstances. The hearing officer ruled that she would hear the evidence concerning the claims in the underlying Complaint but would not hear anything beyond the statute of limitations and would not issue a ruling on the underlying claims that were dismissed due to settlement. Instead, the hearing officer would receive factual evidence concerning Student's educational circumstances during the previous two years and the nature of the compensatory education discussion and determination that took place at Student's MDT meeting and determine whether it appeared that DCPS had made a good faith attempt to comply with its obligation under the 8/20/10 SA to "discuss and determine."

Accordingly, the hearing officer received opening statements, which Petitioner chose to waive, and the hearing officer received Petitioner's testimonial evidence and offered DCPS the opportunity to present testimonial evidence, which DCPS was unable to do based on its inability to locate desired witnesses, then the hearing officer brought the hearing to a close. The hearing officer left the record open until the close of business on Monday, June 27, 2011, to allow the parties an opportunity to file written closing statements. Petitioner subsequently filed its written closing prior to the deadline, and DCPS filed its written closing slightly after the deadline. However, as DCPS counsel acknowledged at the hearing that it would be difficult to meet the deadline due to a heavy caseload, and DCPS's delay in filing its closing statement did not in any way prejudice Petitioner, the hearing officer will consider both parties' written closing statements in deciding this matter.

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.

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

§§ 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 issue to be determined is as follows:

1. Did DCPS fail to comply with the terms and conditions of the 8/20/10 SA by failing to award Student compensatory education at the 3/29/11 IEP meeting when the SA required DCPS to "discuss and determine" compensatory education, or alternatively, did DCPS fail to develop and implement an appropriate IEP by failing to have an appropriate compensatory education discussion at the 3/29/11 IEP meeting?

FINDINGS OF FACT

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 years old. On June 10, 2011, she graduated from a DCPS night school and received her high school diploma.[2]

2. Student attended regular DCPS high schools through SY 2006/07. However, near the end of SY 2006/07, when Student was 18 in the 12th grade, staff at the DCPS school she was attending told her that she could not graduate because she did not have enough credits and had been taking primarily special education classes. Student moved to another DCPS school and was told the same thing. However, Student really wanted to earn a high school diploma. So, she enrolled with a home-study school that she learned about on television and obtained a diploma from there, but when she took that diploma to the University of the District of Columbia ("UDC") to enroll, she learned that the home-study school was not accredited and UDC would not accept the diploma.

   Thereafter, Student learned about DCPS night school and started at one of the night schools in SY 2009/10 with the 7 credits she had obtained in her previous regular DCPS high school. She told the night school staff bout her IEP, although they knew anyway and said she would continue to have an IEP. Student had a meeting at some point during SY 2009/10 but can't remember exactly when. Student signed a document stating that she wanted to receive a diploma, and the staff indicated that they would still provide her with additional assistance. Beginning at some point between 1st and 2nd advisory, a special education teacher came to Student's English 2 class 2 hours per day twice per week and assisted Student with her work. However, Student did not receive any counseling services at night school during SY 2009/10. Student earned 9 credits from night school during SY 2009/10. The next year, SY 2010/11, Student transferred to another DCPS night school to earn the rest of the credits she needed to graduate. Student

[2] *See* Petitioner's Exhibit 1; testimony of Student.

feels that she learned more at the night school than she did at regular school, but math is still really difficult for her. Student feels that she does pretty well with reading and comprehension, but her writing could some help as well, although her writing is neat and understandable when she takes her time.[3]

3. Student would like to study to become an EMT/paramedic. Student would also like to become a police officer, but she wants to do the paramedic coursework first. Student believes that she will need help with any EMT classes she takes because the class will include math, reading and comprehension, and she is not very good with math. Student is aware that DCPS offers an EMT program at three of its schools.[4]

4. The independent evaluator who conducted Student's September 16, 2010 Comprehensive Psychological Evaluation[5] opined at the due process hearing that Student would have great difficulty pursuing careers as an EMT and as a law enforcement officer because of her low cognitive and achievement scores, especially the low reading scores. Petitioner's advocate also opined that Student would need tutoring to help her with the EMT training because the texts for that class are written at a 5th-6th grade level.[6]

5. On August 5, 2010, when Student was years old, Petitioner filed a Complaint ("the underlying Complaint") against DCPS. In the Complaint, Petitioner alleged that DCPS failed to timely conduct a triennial evaluation of Student, failed to develop an appropriate IEP, failed to develop an appropriate IEP containing appropriate measurable transitional or vocational goals, failed to provide an appropriate placement, and owed Student compensatory education as a result.[7]

6. On August 20, 2010, Petitioner and DCPS settled the underlying Complaint by executing the 8/20/10 SA, pursuant to which DCPS agreed to fund specified independent evaluations, and within 30 business days of receipt of the final evaluation report, convene an IEP meeting to review the independent evaluations, review and revise Student's IEP, if necessary, and discuss and determine compensatory education and discuss site location.[8]

7. On September 14, 2010, an Impartial Due Process Hearing Officer entered an Order of Withdrawal that dismissed the underlying case based on Petitioner's withdrawal of the underlying Complaint due to settlement.[9]

8. On March 8, 2011, Petitioner's educational advocate prepared a compensatory education plan for Student, which proposed that DCPS award Student the following items as compensatory education: a Linda Mood Bell assessment for reading and written language and tuition for placement in the recommended programs; tuition and supplies

[3]Testimony of Student.
[4]Testimony of Student.
[5]*See* Finding of Fact ("FOF") 11, *infra*.
[6]Testimony of Licensed Clinical Psychologist; testimony of advocate.
[7]DCPS-2; Petitioner's Exhibit 1.
[8]Petitioner's Exhibit 2 DCPS-1.
[9] DCPS-3.

for an EMT training program; 150 hours of tutoring during the EMT training program; tuition, books and supplies for a law enforcement program; and 250 hours of tutoring during the law enforcement program.[10]

9. Available educational records indicate that Student's most recent evaluations prior to the independent evaluations conducted pursuant to the 8/20/10 SA were as follows: 5/19/03 Psychological Report, 5/21/96 Vineland Adaptive Behavior Assessment, 5/31/96 Speech-Language Evaluation, and 9/21-22/95 Comprehensive Psychological Evaluation. However, Student testified that she received a reading and math assessment during SY 09/10. Student stated that DCPS attempted to evaluate her when she was attending her regular DCPS high school, but she ducked the evaluations because she wanted to stay in her regular education classes and did not want to receive special education.[11]

10. On September 13, 2010 Student received an Adaptive Behavior Assessment. Student's performance resulted in the following standard scores: Adaptive Behavior Composite – 74 (moderately low range); Communication Domain – 67 (low range); Daily Living Skills – 83 (moderately low range); Socialization Domain – 80 (moderately low range); and Motor Skills Domain – 121 (moderately high). Based on these scores, the evaluator recommended a classification of Mild Mental Retardation and recommended, *inter alia*, that Student begin receiving transition services to assist her in making the transition from high school.[12]

11. On September 16, 2010, Student received an independent Comprehensive Psychological Evaluation. Student's performance on the Woodcock Johnson III, Tests of Cognitive Abilities, revealed that Student has a General Intellectual Ability score of 59 and that her Verbal Ability, Thinking Ability and Cognitive Efficiency are in the Very Low range of functioning. Similarly, Student's performance on the Woodcock Johnson III, Tests of Achievement, resulted in Broad Reading, Broad Mathematics, and Broad Written Language scores in the Very Low range of functioning. Based on these scores and the results of other assessments administered, the evaluator opined that Student required intensive special education remediation in all academic subjects, as well as cognitive-behavior therapy in school due to her at risk scores on the depression, anxiety, withdrawal, and sense of inadequacy domains. Ultimately, the evaluator rendered a diagnosis of Mild Mental Retardation.[13]

12. On September 18, 2010, Student received an independent Speech and Language Evaluation. Student's performance on the Comprehensive Receptive and Expressive Vocabulary Test 2 revealed global deficiencies within her knowledge and use of single vocabulary terms, and her performance on the Comprehensive Assessment of Spoken Language disclosed a moderate language disorder involving deficiencies in vocabulary, knowledge of the rules of Standard American English, and comprehension of non-literal linguistic forms along with the social meaning of language. Ultimately, the evaluator

[10]Petitioner's Exhibit 4.
[11]Petitioner's Exhibits 10 and 12 – 14; testimony of Student.
[12]Petitioner's Exhibit 18.
[13]Petitioner's Exhibit 17.

opined that Student meets the criteria to receive special education and related services as a student with a Speech Language Impairment and recommended Student receive speech language therapy for 30 minutes per week.[14]

13. On October 11, 2010, Student received an independent Vocational Level II Evaluation. Based on the results of the assessments administered, the evaluator determined that Student displayed many precursor skills and some areas of need in terms of transition. The evaluator also suggested the following vocational options: security guard; crossing guard; firefighter; bailiff; correctional officer; police officer, probation officer, nurse aide, emergency medical technician, or dental assistant.[15]

14. On January 11, 2011, Student received an independent Auditory Processing Evaluation. The evaluator determined that Student has a very slight hearing loss in the low frequencies for both ears, slightly poorer for the right ear than the left. However, the evaluator determined that Student has no hearing problems that would account for any specific auditory information processing deficits ("ADP"), but she does have significant deficits in processing auditory-linguistic information due to deficits with auditory extraction at both the phonemic and temporal levels, as well as a deficit with lexical integration and a deficit with organization and sequencing. The evaluator indicated that Student's ADP can have significant effects on her listening, communication and learning, leading to her having speech-language impairments. The evaluator also noted that Student's ADP problems have likely been present in some form throughout her school career, but were never identified or treated. Ultimately, the evaluator recommended both accommodations to help Student appropriately access her education and direct treatment services to help Student overcome her ADP problems. One form of direct treatment that would prove beneficial to Student is the Linda Mood Bell intensive 10-week program designed to address ADP problems.[16]

15. Student's most recent IEP, dated April 7, 2010, identifies her primary disability as SLD and provides for her to receive 5 hours per week of specialized instruction in general education and no related services, such as speech/language and behavioral support services. The IEP primarily lists "Woodcock Johnson Test of Achievement" for baseline data, but no results are included. However, in one instance, the baseline data block is completely blank, and in another instance, the IEP lists "With 80% accuracy" as the baseline data. The following classroom accommodations are listed on the IEP: repetition of directions, calculators, preferential seating, flexible scheduling and breaks between subjects. The IEP also contains a Post-Secondary Transition Plan, which states that Student's post-secondary educational and training goal is to graduate with a diploma and attend Howard University, and that her employment goal is to seek an internship upon graduation from high school in order to receive prior training as an Emergency Medical Technician ("EMT"). The Transition Plan lists the following as Student's annual measurable goal for post-secondary education and training: Student will acquire the skills necessary to transition to a two-year or four-year college/university. The Plan

[14]Petitioner's Exhibit 15.
[15]Petitioner's Exhibit 19.
[16]Petitioner's Exhibit 20; testimony of Certified Licensed Audiologist.

states that a 9/3/10 Woodcock Johnson III, a 4/7/11 Woodcock Johnson Test of Achievement and a 4/7/10 Interest Inventory Interview were the assessment tools relied upon to prepare the Plan but does not list any assessment data or results. The Plan states that the course of study Student will undertake to support her post-secondary transition goals is Geography/World History. Finally, the Plan lists the following Post-Secondary Transition Activities/Services for Student: Student will meet with guidance counselor/special education teacher to discuss academic requirements of pursuing a college degree – 4 hours per year; Student will develop strategies to enhance her study skills – 2 hours per year; Student will define interests and abilities related to potential career and job opportunities – 4 hours per year; and Student will identify steps necessary to ensure a safe environment, such as obtaining appropriate assistance during emergencies, dealing with strangers, having appropriate ID and knowing how to use it – 2 hours per year.[17]

16. Available educational records reveal that for SY 2009/10, Student earned 6 credits and received final grades of B, B-, C+, three Cs, D, and F. For SY 2010/11, Student earned the following final grades: A, B+, three Bs, C+, C, and two Ds.[18]

17. On March 29, 2011, DCPS conducted an MDT meeting for Student pursuant to the 8/20/10 SA to "review the independent evaluations, revise the, IEP if necessary, and discuss site location and compensatory education." The team noted that Student would be graduating from evening school in June 2010. However, the team questioned the validity of Student's independent assessments, based on certain DCPS team members' assertion that Student has a hearing loss as reflected in her auditory processing assessment and the hearing loss must be corrected before valid assessments can be conducted. The team determined that Student needs assistance in transition planning, as she "is employable but just needs assistance." The team further determined that no changes to the IEP were warranted and that Student's site location would remain the same because it could implement the IEP and service Student. When Student's advocate asserted that Student needs tutoring and assistance to know what was going on inside the classroom, the team Special Education Coordinator said he was more concerned about Student being a productive member of society and he would call RSA. When the conversation turned to compensatory education, Petitioner's proposed compensatory education plan was shared with the team. However, the "DCPS team determined that compensatory education was not warranted as there was no denial of FAPE for the student and that there was no educational harm as the student is graduating."[19]

18. The compensatory education discussion at Student's March 29, 2011 MDT meeting lasted no more than 2 to 3 minutes. Moreover, the reason no changes were made to Student's IEP is that the DCPS SEC was of the opinion that new evaluations would have been required because the independent evaluations were invalid, and it would be better to

[17]Petitioner's Exhibit 9; DCPS-7.
[18]Petitioner's Exhibits 22 and 23; DCPS-4.
[19]DCPS-6.

simply let Student's current IEP run out in light of the fact that she was almost 22 years old.[20]

19. The independent evaluator who conducted Student's September 16, 2010 Comprehensive Psychological Evaluation was advised at the due process hearing of the results of Student's independent Auditory Processing Evaluation and indicated that she would not have changed the way she administered the psychological evaluation to Student, even if she had known of the other evaluation results at the time, because she gave 1-on-1 instructions to Student and it appeared that Student heard what was being said and performed in a manner that did not indicate she was having problems hearing. Moreover, Student received an instruction booklet during the psychological evaluation.[21]

20. The independent evaluator who conducted Student's January 11, 2011 disagreed with DCPS's determination that his Auditory Processing Evaluation was invalid. The evaluator pointed out that he had determined prior to conducting his evaluation that Student's hearing loss did not interfere with testing, because her baseline ability to repeat words, sentences and phoneme strings is normal. However, the evaluator noted that Mental Retardation and ADP are sometimes confused because most psychological evaluations that find cognitive problems are based on verbal tasks, with the result that they can lead to understated IQ scores for individuals with ADP.[22]

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:

Compensatory education is a remedy designed to prospectively compensate a Student for a past deficient program. *See Reid v. District of Columbia*, 401 F.3d 516 (D.C. 2005). In this case, Petitioner has alleged that DCPS failed to comply with the 8/20/10 SA by failing to participate in a good faith discussion of, and render a good faith award of, compensatory education in favor of Student at her March 19, 2011 MDT meeting.

The Consent Decree entered in *Blackman v. District of Columbia*, Civil Action No. 97-1629 (D.D.C. Aug. 24, 2006), establishes a rebuttable presumption of harm for DCPS students who fail to receive timely implementation of SAs. *See* Consent Decree at ¶ 74. Moreover, in the Consent Decree, one subclass of Plaintiff students was defined as "[a]ll children, now [as of January 1, 1995] and in the future, who . . . have been denied [a FAPE] because DCPS . . . failed to fully and timely implement agreements concerning a child's identification, evaluation, educational placement, or provisions of FAPE that DCPS has negotiated with child's parent or education advocate." Consent Decree at 11.

[20]Testimony of advocate.
[21]Testimony of Licensed Clinical Psychologist.
[22]Testimony of Certified Licensed Audiologist.

At issue in the underlying Complaint, from which Petitioner's current claim is derived, was whether (1) DCPS failed to timely conduct triennial evaluations for Student, (2) DCPS failed to provide an appropriate IEP for Student on April 7, 2010 by failing to base the IEP on current evaluations, failing to provide the necessary baseline information, and failing to provide appropriate measurable transition/vocational goals based upon age appropriate transition assessments, and (3) DCPS failed to provide an appropriate placement.

With respect to Petitioner's claim concerning triennial evaluations, the data available to the MDT at the time of the March 2011 MDT meeting revealed that Student's last set of evaluations had been conducted in 1995-96, with the exception of a psychological report that was prepared in 2003. Moreover, the data from Student's current independent evaluations revealed an IQ so low that Student was diagnosed with Mild MR; very low functioning in math, reading and written language; auditory information processing deficits that have likely been present throughout Student's school career but were never identified or treated; various speech-language deficiencies that resulted in recommendations of a disability classification of SLI and 30 minutes of speech language therapy per week; and a vocational evaluation that revealed some areas of need in terms of transition.

With respect to Petitioner's claim of an inappropriate IEP, the data from Student's independent evaluations confirmed the educational harm Student had suffered as a result of DCPS's failure to base the IEP on updated evaluation data, and even a cursory glance at the Transition Plan included in the IEP would have informed the team that the Plan was woefully inadequate to address the transition needs of Student, given her cognitive, academic, speech-language and auditory information processing deficits. On the other hand, however, the underlying Complaint challenged an April 23, 2010 IEP that would only be in effect for Student for the final two months of SY 2010/11 until she graduated with her high school diploma.

With respect to Petitioner's claim of an inappropriate placement, the data available to the MDT revealed that Student had spent the past two years attending night school programs where she was able to obtain the credits she required to graduate at the end of SY 2011/12. Weighed against Student's tremendous progress at night school, however, was the fact that her IEP was not fully implemented during SY 2009/10 because she received only 4 hours per week of inclusion services instead of the 10 hours she was entitled to receive along with behavioral support services.

Taking all of this information into account, the hearing officer concludes that the 2 to 3 minute discussion of compensatory education at the March 19, 2011 MDT meeting did not constitute a good faith effort by DCPS to comply with its obligation to discuss compensatory education. The hearing officer further concludes that DCPS's failure to award any compensatory education at all to Student in the face of her impending graduation and obvious need for transition assistance that was not being provided pursuant to her current IEP, as well as her significant deficits that went unaddressed during the two-year statutory limitations period to DCPS's failure to timely evaluate, and the failure of her SY 2009/10 DCPS night school to fully implement her IEP, did not constitute a good faith effort by DCPS to comply with its obligation to determine compensatory education for Student. Hence, Petitioner has met its burden of proving DCPS's

failure to comply with the compensatory education provision of the August 20, 2010 Settlement Agreement.

Upon consideration of all the relevant evidence outlined herein, which was also available to DCPS at the time of the March 19, 2011 MDT meeting, the hearing officer has determined that an appropriate award of compensatory education to Student would consist of the right to attend DCPS's EMT program, or the receipt of funding for a comparable program outside of DCPS, and 3 hours per week of independent individual tutoring in the areas of math, reading and comprehension for the duration of the program, as well as a Linda Mood Bell assessment designed to address Student's auditory information processing deficits and funding to participate in an intensive 10-week Linda Mood Bell program that can address those deficits.

ORDER

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

1. Within 30 calendar days of the issuance of this Order, DCPS shall either permit Student to enroll in and beginning attending a DCPS-taught EMT training program, or DCPS shall provide Student with funding to attend an EMT training program offered by an entity other than DCPS.

2. DCPS shall provide funding for Student to receive 3 hours per week of independent individual tutoring in the areas of math, reading and comprehension for the duration of the EMT training program she participates in pursuant to Paragraph 1, above.

3. DCPS shall provide Student with funding to obtain a Linda Mood Bell assessment designed to explore Student's auditory information processing deficits, as well as funding for Student to participate in an intensive 10-week Linda Mood Bell program that can address those deficits.

4. All remaining claims and requests for relief in Petitioner's April 18, 2011 Complaint are **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 USC §1415(i).

Date: 6/30/2011

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