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STUDENT HEARING OFFICE

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

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a year-old male, who currently attends a private full-time special education school at DCPS's expense. Student was initially placed at the private school as an interim placement by the undersigned hearing officer in a November 4, 2010 HOD, and DCPS subsequently determined to leave Student at the private school for the remainder of the current school year.

Nevertheless, on March 4, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied Student a FAPE by (1) failing to comply with the 11/4/10 HOD by (a) failing to hold an MDT meeting within the time specified in the HOD, (b) failing to award an appropriate amount or form of compensatory education, and (c) unilaterally determining to remove Student from the interim placement; and (2) failing to provide an appropriate location of services at the March 1, 2010 meeting held pursuant to the 11/4/10 HOD. Petitioner further asserted that Student was entitled to compensatory education for DCPS's failure to provide a FAPE to the extent that it (i) failed to comply with the 11/4/10 HOD, (ii) failed to follow proper procedures in suspending Student during SY 2010/11 prior to his move to the prior school, (iii) failed to develop an appropriate IEP that included sufficient behavioral support services and specialized instruction, and (iv) failed to implement Student's IEP by failing to provide Student with speech and language services.

On March 16, 2011, DCPS filed its Response to the Complaint. In its Response, DCPS asserted that the hearing officer's 11/4/10 HOD included a final order on all issues concerning Student's education prior to 11/4/10, with the result that any claims in the current Complaint relating to facts and/or issues that existed prior to 11/4/10 were barred by *res judicata* and/or claim preclusion. DCPS further asserted that the hearing officer lacks authority to enforce the 11/4/10, even though DCPS complied with the terms of the HOD. Finally, DCPS responded that Parent participated in the March 1, 2010 IEP meeting and signed the IEP indicating her agreement with all deliberations, and that DCPS proposed an appropriate placement in the LRE for Student and parent was in agreement with all deliberations.

On April 14, 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 ruled that after an initial comparison of the claims at issue in the 11/4/10 HOD and the claims asserted in the March 4, 2011 Complaint, the hearing officer saw no overlap that would justify application of the bar of *res judicata* or issue preclusion. The hearing officer issued the Prehearing Order on April 20, 2011.

On April 28, 2011, DCPS filed a Motion to Dismiss, primarily asserting therein that Petitioner's claims were barred by collateral estoppel and *res judicata.* On May 2, 2011, Petitioner filed its Opposition to DCPS's Motion to Dismiss, noting, *inter alia*, that DCPS had failed to provide a detailed analysis of specific claims or issues that allegedly were already litigated, that the hearing officer had already made an initial determination of no overlapping claims, and that 34 C.F.R. § 300.513(c) allows petitioners to file multiple claims.

By their disclosure letters dated April 26, 2011 and April 29, 2011, respectively, Petitioner disclosed twenty-two documents (Petitioner's Exhibits 1 – 22), and DCPS disclosed DCPS-1, which was a copy of the transcript from the previous due process hearing for Student.

On May 2, 2011, Petitioner filed a Motion to Accept an Additional Exhibit (Exhibit P-23). On May 4, 2011, Petitioner filed another Motion to Accept an Additional Exhibit (Exhibit P-24).

The hearing officer convened the due process hearing on May 6, 2011.[1] All timely disclosed documents, consisting of DCPS-1 and Petitioner's Exhibits 1-22, were admitted without objection. Thereafter, the hearing officer denied DCPS's Motion to Dismiss for the reasons stated in Petitioner's Opposition, as set forth above, as well as due to the following fundamental misconception contained in the Motion: the Motion asserted that the hearing officer had decided all issues concerning Student's education prior to the issuance of the 11/4/10 HOD, but in reality, the hearing officer decided only the specific claims alleged in the underlying Complaint. The hearing officer also denied Petitioner's Motions to Accept Additional Exhibits, relying upon 34 C.F.R. § 300.512(a)(3) and DCPS's refusal to agree to the inclusion of the untimely exhibits in the administrative record.

During the course of Petitioner's opening statement, DCPS counsel pointed out that the March 1, 2011 Meeting Notes indicate that Student was not removed from the interim placement at the

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

meeting. Instead, the MDT determined not to remove Student from the private school and to reconvene at a later date to determine an appropriate location of services for SY 2011/12. In light of this information, Petitioner withdrew Claim #1(c) alleging failure to comply with the 11/4/10 HOD by determining to unilaterally remove Student from the interim placement and Claim #2 alleging failure to provide an appropriate location of services at the March 1, 2011 meeting. Moreover, the hearing officer determined that no remedy would be awarded for Claim # 1(a) alleging DCPS's failure to comply with the 11/4/10 HOD by failing to hold the MDT meeting within the time period specified in the HOD, because the HOD provided that if DCPS failed to timely hold the meeting it would have to continue funding the interim placement until the meeting was convened. Hence, the remedy for the alleged violation was specified in the HOD and Petitioner had already received the benefit of the remedy.

Once Petitioner had presented all of its testimonial evidence, DCPS made a motion for a directed finding on all remaining claims. The hearing officer received argument in favor of and against the motion and examined the relevant testimonial and documentary evidence. Thereafter, the hearing officer granted a directed verdict in DCPS's favor on Claim #1(b) alleging DCPS's failure to comply with the 11/4/10 HOD by failing to award an appropriate level of compensatory education, based upon evidence proving that although DCPS came to the meeting prepared to award a certain amount of compensatory education, DCPS personnel and Petitioner's educational advocate discussed the level of compensatory education to be awarded, the personnel from the private school made a conscious choice not to participate in the compensatory education discussion, and Parent ultimately disagreed with the amount of compensatory education DCPS awarded. This ruling effectively eliminated the remainder of Claim #1. Hence, the hearing officer also granted a directed verdict in DCPS's favor on the related Claim #3(a), where Petitioner sought compensatory education for DCPS's alleged failure to comply with the 11/4/10 HOD.

In connection with the Motion for Directed Verdict, DCPS counsel led the hearing officer and Petitioner's counsel through a review of certain portions of DCPS-1. During the course of this review, the hearing officer dismissed Petitioner's Claim #3(c), on the ground that the appropriateness of the IEP had already been adjudicated in the previous action based on Petitioner's claim that the IEP was inappropriate for failure to include a BIP. Hence, Petitioner was precluded from relitigating the issue of the inappropriateness of the IEP for failure to include sufficient behavioral support services and specialized instruction, because that was the exact same issue asserted under a different theory, as opposed to a different issue that could be separately asserted pursuant to 34 C.F.R. § 300.513(c).

The hearing officer denied the Motion for Directed Verdict on the remaining claim that Student was entitled to compensatory education due to DCPS's alleged failure to hold MDR meetings for suspensions of Student during SY 2010/11 and DCPS's alleged failure to implement Student's IEP at his previous school by failing to provide speech and language services. However, based on the review of DCPS-1 under the direction of DCPS counsel, which showed on pages 119-123 that Petitioner's previously proposed compensatory education plan was based in part on the assumption that Student had missed 80 hours of speech/language services over the course of 1 year, the hearing officer agreed to allow the parties to submit post-hearing briefs on the issue of whether any speech/language services Student missed had already been accounted for in the

compensatory education awarded to Student in connection with the previous action. It was agreed that Petitioner would be allowed until close of business on May 11, 2011 to file its brief, and DCPS would be allowed until close of business on May 13, 2011 to file its responsive brief.[2]

Ultimately, DCPS decided to rest on the record without presenting any testimonial evidence. Thereafter, the hearing officer received closing statements and brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issue to be determined is as follows:

Is Student entitled to compensatory education as a result of (a) DCPS's alleged failure to hold MDR meetings for suspensions of Student during SY 2010/11, and (b) DCPS's alleged failure to implement Student's IEP at his previous school by failing to provide speech and language services?

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 a year-old male, who currently attends a private full-time special education school at DCPS's expense. Student was initially placed at the private school as an interim placement by the undersigned hearing officer in a November 4, 2010 HOD, and DCPS subsequently determined to leave Student at the private school for the remainder of the current school year.[3]

2. Student's current IEP is dated March 1, 2011, and it requires Student to receive 25.5 hours per week of specialized instruction outside general education, 90 minutes per week of reading instruction outside general education, 60 minutes per week of speech/language services outside general education, and 60 minutes per week of behavioral support services outside general education.[4]

3. On March 1, 2011, DCPS issued a letter that authorized Parent to obtain compensatory education for Student in the following forms and amounts: 40 hours of tutoring by an

[2] Petitioner timely filed its Post-Hearing Brief, but DCPS never filed its responsive brief.
[3] Petitioner's Exhibits 2 and 20.
[4] Petitioner's Exhibit 5.

independent provider and 12 hours of counseling by an independent provider. These services are to be completed by June 30, 2011.[5]

4. Student's previous IEP was dated December 2009 and required Student to receive 15 hours per week of specialized instruction, 120 minutes per month of speech/language services, and 90 minutes per month of behavioral support services. Petitioner failed to include the previous IEP in the administrative record for this case. However, according to the memory of one of Student's current speech and language providers at the private full-time special education school he now attends, she initially provided Student with speech and language services in the amount listed on his previous IEP, but based on her informal observation of Student because he had no speech and language evaluation and no speech and language goals on the previous IEP. Indeed, as of the date of the due process hearing, a formal speech and language evaluation still had not been administered to Student.[6]

5. At the March 1, 2011 MDT meeting for Student, the IEP team increased Student's speech and language services from 30 minutes per week to 1 hour per week. However, the speech/language pathologist from the current private school who participated in the meeting stated that there was not sufficient data to classify Student as Speech/Language Impaired. The speech and language pathologist noted that Student's strengths appear in the area of receptive language, he is usually diligent and on task with respect to for following instructional directions, and he completes his academic work in a timely manner. However, Student's vocabulary skills are in the low range and his limits in that area would make accessing the general curriculum difficult. As a result, the speech and language pathologist suggested, and the team ultimately agreed, to double the amount of speech and language services Student receives.[7]

6. During the initial portion of SY 2010/11 prior to Student's move to his current private school, Student attended a DCPS middle school and he was suspended for a total of 14 days. There were two suspensions in total – one for 5 days and one for 9 days. Student received a packet of work from the school near the end of the 9-day suspension after the Assistant Principal visited Student at home on October 15, 2010. Parent does not recall attending a meeting to discuss the suspensions with the IEP team. However, Parent does recall receiving several phone calls and messages from the DCPS middle school personnel indicating that they wanted to schedule a meeting to discuss Student's behavior, but they never left a message or sent home a letter indicating an exact date for the meeting. When Parent received each message, she returned the phone calls and was told they would get back to her with a date.[8]

7. Student does not recall ever receiving any speech and language services at the previous DCPS middle school. Parent is not sure whether Student received any speech and

[5] Petitioner's Exhibit 3.
[6] *See* Petitioner's Exhibit 2 at 3; testimony of speech/language pathologist.
[7] Petitioner's Exhibit 20.
[8] Testimony of Parent.

language services during SY 2009/10, but she recalls that he did not receive the services at the beginning of the current school year.[9]

8. When Student attended his previous DCPS middle school, he had many unexcused absences from school, he frequently failed to attend his classes when he was in school, and he would wander the hallways and leave classes at will.[10]

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:

Under the theory of compensatory education, courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. 2005). However, compensatory is an equitable remedy to be awarded within a court or hearing officer's discretion. *Id.*

Under IDEA, public agencies must hold a manifestation determination review ("MDR") within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct to determine if the conduct in question was caused by, or had a direct and substantial relationship to the child's disability, or if the conduct in question was the direct result of the LEA's failure to implement the IEP. 34 C.F.R. § 300.530(e)(1).

The sole issue here is whether Student is entitled to an award of compensatory education. However, the evidence shows that as a result of previously proven denials of FAPE, Student has been attending a private, full-time special education school at DCPS's expense since November of 2010, which was just a few months into the current school year. Hence, whereas Student was previously being provided with only 15 hours of specialized instruction per week, since November 2010, Student has been receiving full-time specialized instruction in an outside general education private setting. As a result, on March 1, 2011, Student's IEP was revised to reflect that he now receives 25.5 hours per week of specialized instruction and 90 minutes per week of specialized reading instruction, all in an outside general education environment at his publicly-funded private school. Moreover, DCPS also awarded Student 40 hours of independent tutoring and 12 hours of independent counseling at the March 1, 2011 meeting to compensate Student for the previous denials of FAPE.

With respect to speech and language services, the evidence reveals that Student's strengths are in the area of receptive language, while his weakness is in the area of vocabulary skills. However, Student has been receiving speech and language services at his current private school since November 2010, and in light of his weakness in vocabulary skills, the IEP team recently doubled the amount of speech and language services Student receives at the March 1, 2011 IEP meeting. Student does not recall ever receiving any speech and language services while he was at his previous DCPS middle school. However, the evidence in this case also reveals that when

[9] Testimony of Student; testimony of Parent.
[10] Petitioner's Exhibit 2 at 4-5.

Student attended his previous DCPS middle school, he had many unexcused absences from school, he frequently failed to attend classes when he was in school, and he would wander the hallways and leave classes at will. Hence, it is highly possible that DCPS was routinely making the necessary speech and language services available to Student, but Student failed to take advantage of those services due to his frequent absences from school and from his individual classes. As a result, even though the hearing officer does not doubt the veracity of Student's testimony that he did not receive speech and language services at his former DCPS middle school, the hearing officer is not convinced that the evidence proves that DCPS failed to make those services available to Student at the DCPS middle school. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS failed to implement Student's IEP at his previous school by failing to provide speech and language services to Student.

With respect to DCPS's alleged failure to conduct an MDR meeting, the only evidence of record is that Parent does not recall attending an MDR for Student during the initial part of SY 2010/11 when Student was attending his previous DCPS middle school, but she does recall that personnel from the school called her to indicate that they wanted to set up a meeting to discuss Student's behavior. The evidence of record further reveals that Student was serving his 9-day suspension – the suspension that put him over the total of 10 cumulative days of suspension – during the Assistant Principal's visit home visit on October 15, 2010, and the following month Student was moved from his DCPS middle school to the current private full-time special education school pursuant to the 11/4/10 HOD. The evidence does not reveal exactly when the 9-day suspension began and ended, nor how many school days passed between the end of the 9-day suspension and Student's removal to the current private full-time special education school. Hence, although the evidence tends to prove that DCPS failed to comply with the strict terms of the rules for MDR meetings, because the evidence suggests that DCPS was attempting to schedule an MDR meeting for Student at or near the time he was removed from the DCPS middle school, the hearing officer is not persuaded that it would be equitable to award Petitioner compensatory education for DCPS's failure to convene an MDR meeting under the circumstances of this case. In making this determination, the hearing officer has taken into account the facts that Student is now attending a private full-time special education school at DCPS's expense and he has already been awarded a total of 52 hours of compensatory education for previous denials of FAPE. Nevertheless, as the evidence proves that DCPS failed to conduct an MDR meeting after suspending Student for a total of more than 10 days during the initial portion of the current school year, the hearing officer will order DCPS to convene an MDR meeting for Student.

ORDER

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

1. Petitioner's claims that DCPS failed to comply with the 11/4/10 HOD by determining to unilaterally remove Student from his interim private placement and led to provide an appropriate location of services at the March 1, 2011 meeting were withdrawn by Petitioner and are **DISMISSED WITH PREJUDICE**.

2. Petitioner's request for a remedy in connection with its claim that DCPS failed to comply with the 11/4/10 HOD by failing to hold an MDT meeting within the time period specified in the HOD is **DENIED** on the ground that Petitioner has already received the relief specified in the 11/4/10 HOD for that violation of the HOD.

3. A **DIRECTED VERDICT IN DCPS's FAVOR** has been awarded on Petitioner's claims that DCPS failed to comply with the 11/4/10 HOD by failing to award an appropriate level of compensatory education and that Student is entitled to compensatory education for DCPS's alleged failure to comply with the 11/4/10 HOD, and those claims are **DISMISSED WITH PREJUDICE**.

4. Petitioner is precluded by the doctrine of *res judicata* from relitigating its claim that Student's IEP is inappropriate; therefore, Petitioner's claim that the IEP is inappropriate for failure to include sufficient specialized instruction and behavioral support services is **DISMISSED WITH PREJUDICE**.

5. Petitioner's claim that Student is entitled to compensatory education due to DCPS's alleged failure to provide Student with speech and language services at his previous school and hold an MDR meeting is **DENIED and DISMISSED WITH PREJUDICE**. However, within 10 school days of the issuance of this Order, DCPS shall convene an MDR meeting to determine whether Student's suspensions during the initial portion of SY 2010/11 were caused by or had a direct and substantial relationship to his disability.

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: 5/18/2011

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