District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

Terry Michael Banks, Due Process Hearing Officer
1150 - 5th Street, S.E.; Room 3
Washington, D.C. 20003
(202) 698-3819
Facsimile: (202) 698-3825
Tmbanks1303@earthlink.net

Confidential

STUDENT, through the legal guardian[1]	)	Complaint Filed: February 2, 2009
	)	
Petitioner,	)	Prehearing Order: March 26, 2009
	)	
v.	)	Interim Orders: April 17, 2009
	)	May 6, 2009
THE DISTRICT OF COLUMBIA	)	May 15, 2009
PUBLIC SCHOOLS	)	
	)	Hearing Date: May 15, 2009
and	)	May 26, 2009
	)	
	)	Docket No.
SCHOOL	)	
	)	
Respondents.	)	
	)	
Student Attending:	)	
School	)	

HEARING OFFICER'S DECISION

Counsel for the Petitioner: Chesseley Robinson, Esquire
4401A Connecticut Avenue, N.W.
Suite 190
Washington, D.C. 20008
(202) 380-9296; Fax: same

[1] Personal identification information is provided in Attachment A.

Counsel for Nia:

Ellen Douglass Dalton, Esquire
Dalton & Dalton, P.C.
1008 Pendleton Street
Alexandria, Virginia 22314-1837
(703) 739-4300; Fax: (703)739-2323

Counsel for DCPS:

Daniel Kim, Esquire
Office of the General Counsel, DCPS
825 North Capitol Street, N.E.; 9th Floor
Washington, D.C. 20002

Jurisdiction

This proceeding was conducted in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

Background

Petitioner is a year-old student attending On February 2, 2009, Petitioner filed a Due Process Complaint Notice ("*Complaint*") alleging that Nia and the District of Columbia Public Schools ("DCPS") had failed to (1) identify Petitioner as a child with a disability, (2) develop an appropriate Individualized Education Program ("IEP"), and (3) provide an appropriate placement. Prior to the hearing in this matter, Petitioner entered into a settlement agreement with On April 17, 2009, Petitioner filed *Petitioner's Motion for Default Judgment* in light of DCPS' failure to dispute Petitioner's allegation that DCPS failed timely to complete childfind procedures. The due process hearing was convened on May 15, 2009 and completed on May 26, 2009. The parties' Five-Day Disclosure Notices were admitted into evidence at the inception of the hearing. At the hearing on May 15th, the Hearing Officer ruled that DCPS was bound by its concession that it had not evaluated Petitioner. Thus, the only issue in dispute at the hearing was Petitioner's entitlement to compensatory education services for DCPS' failure timely to complete childfind procedures.

Record

Due Process Complaint Notice dated February 2, 2009
Answer to Due Process Complaint dated February 10, 2009
Prehearing Order dated March 26, 2009
DCPS' Disclosure Statement and Motion to Compel dated March 31, 2009 (No Exhibits)
Five-Day Disclosure dated March 31, 2009 (Exhibit Nos.1-17)
Supplemental Disclosure dated April 2, 2009 (Exhibit Nos. 18-19)
Interim Order dated April 17, 2009
Petitioner's Motion for Default Judgment dated April 21, 2009
Motion Requesting Continuance in This Matter dated April 24, 2009
Interim Order dated May 6, 2009
Petitioner's Five-Day Disclosure dated May 15, 2009 (Exhibit Nos. 1-11)
Interim Order dated May 17, 2009
District of Columbia Public Schools' Response to Parent's Administrative Due Process Complaint Notice and Response to Petitioner's Motion for Default dated May 18, 2009
Attendance Sheet and CD-Rom of hearing dated May 26, 2009

Witnesses for Petitioner

Petitioner's Mother

Associate Center Director,

Processes

Witnesses for DCPS

None

Findings of Fact

1. Petitioner is a year old student attending

2. On May 15, 2008, when Petitioner attended DCPS convened a Multidisciplinary Team ("MDT") meeting "to discuss evaluating [Petitioner] as part of an initial evaluation." The MDT determined that Petitioner "is slightly below grade level" and recommended that she be evaluated to determine her eligibility for special education services. The MDT developed a Student Evaluation Plan ("SEP") that ordered psychoeducational and social history evaluations for Petitioner.[3]

3. DCPS failed to conduct the evaluations ordered by the MDT on May 15, 2008.[4]

4. Petitioner's mother initially enrolled Petitioner at for the 2008-2009 school year, but moved her to after the first two days of the school year.[5]

5. Mr. Mitchell Reid, of Charlot-Swilley & Associates, completed a Psychological Evaluation of Petitioner for on December 17, 2008. Mr. Reid's findings and conclusions, *inter alia*, include the following:

> [Petitioner's] cognitive and academic abilities were assessed utilizing the WISC-IV and the WIAT-II. Her overall cognitive functioning, as measured by the WISC-IV, is in the Average range with a Full Scale IQ of 96. This score indicates that her thinking and reasoning abilities are relatively equal to her same-aged peers. [Petitioner] received her highest score on the Processing Speed Index (PRI=118) suggesting that her ability to process routine information quickly and efficiently is a strength. Results indicate that her nonverbal reasoning (PRI=92) and her short term memory skills (WMI=102) are similarly developed in that they are both in the

---

[2] *Complaint* at 1.
[3] Petitioner's Exhibit ("P.Exh.") No. 3.
[4] Stipulated by DCPS at prehearing conference.
[5] Testimony of Petitioner's mother.

> Average range of functioning. She obtained her lowest score on the Verbal Comprehension Index (85) indicating that her verbal reasoning and concept information skills are underdeveloped when compared to her other cognitive skills…
>
> [Petitioner's] overall academic functioning is in the Low Average range of functioning. [Petitioner] earned her highest score in Oral Language where her performance places her in the Average range. [Petitioner] did not perform as well in Reading, Mathematics and Written Language; specifically, her scores placed her in the Low Average range of functioning.
>
> Recommendations
>
> It is recommended that [Petitioner] receive additional support services that address her reading, spelling, writing, and math compromises…
>
> Given her difficulty with mathematics, it is strongly recommended that [Petitioner] receive greater one-on-one instruction to address those concerns…[6]

6. convened an MDT meeting on April 1, 2009 to develop an initial IEP for Petitioner. The MDT classified Petitioner with a learning disability ("LD") and prescribed eight hours per week of specialized instruction.[7]

Conclusions of Law

Childfind Violations

The LEA must evaluate a child suspected of a disability in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.[8] No single procedure should be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.[9] Obviously, the results of the evaluations must be given considerable weight in determining the child's eligibility for services and in the development of the child's IEP.[10] Once a child has been determined to be eligible for services, he or she must be reevaluated at least every three years.[11]

---

[6] P.Exh. No. 9 at 11-13.
[7] P.Exh. No. 10 at 1.
[8] 34 C.F.R. §300.304(c)(4).
[9] 34 C.F.R. §300.304(b)(2).
[10] 34 C.F.R. §300.305(a).
[11] 34 C.F.R. §300.303(b)(2).

Under local law, "DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment."[12] In this case, Petitioner was referred for evaluations on May 15, 2008. Before the expiration of the 120 day deadline to complete initial evaluations, Petitioner's mother withdrew Petitioner from DCPS and placed her at a Local Education Agency ("LEA") Charter School. LEA Charter Schools are responsible for special education evaluations, IEPs, and placements for children with disabilities enrolled in their facilities.[13]

The Hearing Officer ruled at the hearing on May 15th that DCPS was bound by its concession at the prehearing conference that it had not evaluated Petitioner. However, local rules of civil procedure require that "No judgment by default shall be entered against the United States or the District of Columbia, or an officer or agency of either, unless the claimant establishes a claim or right to relief by evidence satisfactory to the Court."[14] The Hearing Officer precluded DCPS from contesting the fact that it did not evaluate Petitioner as it promised to do on May 15, 2008. However, as a matter of law, DCPS was not obligated to complete the childfind process for 120 days, by which time Petitioner had voluntarily moved to another LEA.[15] Therefore, the Hearing Officer concludes that Petitioner has failed to meet her burden of proving that DCPS failed timely to complete childfind procedures.

Compensatory Education Services

In light of the Hearing Officer's determination that DCPS did not violate IDEIA, Petitioner is not eligible for an award of compensatory education services. Even if Petitioner had met her burden of proving a violation, her showing as to compensatory education services was also insufficient to warrant an award. In *Reid v. District of Columbia*,[16] the D. C. Circuit held that in determining awards of compensatory education services, Hearing Officers could no longer simply award services on an hour-for- hour basis, or by use of a standard formula.

> We reject... appellants'... mechanical hour-per-hour calculation and instead adopt a qualitative standard: compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.[17]

Thus, Petitioner had the burden of showing that (1) as a result of DCPS' failure to identify her as a child with a disability, she suffered an educational deficiency, (2) but for

---

[12] D.C. Code §38-2561.02(a).
[13] 5 D.C.M.R. §3019.3.
[14] D.C. SCR-Civil Rule 55(e). Federal Rule 55(d) has similar language permitting default judgments against the federal government "only if the claimant establishes a claim or right to relief by evidence that satisfies the court."
[15] The fact that the MDT indicated on the SEP that the evaluations should be completed by July 15, 2008 did not alter DCPS' statutory deadline to complete the childfind procedures within 120 days.
[16] *Reid v. District of Columbia,* 401 F.3d 516 (D.C. Cir. 2005).
[17] *Id.* at 18

the violation, she would have either maintained her current level of academic performance or progressed to a higher level, and (3) that there exists a type and amount of compensatory education services that would bring her to the level she would have been but for DCPS' violation. Petitioner's counsel offered no evidence that Petitioner suffered any educational harm as a result of DCPS' failure to identify her. Since Petitioner's counsel failed to establish that Petitioner suffered an educational deficit or failed to make progress, she was in no position to, and did not, offer evidence of the academic level Petitioner would have been but for DCPS' alleged omission. Therefore, Petitioner has failed to meet her burden of proving his entitlement to compensatory education services.

Hearing Officers may not award compensatory education services based solely on the amount of services a local education agency failed to provide.

> [W]e part company with the Reids regarding how such awards are calculated. They urge us to adopt a presumption that each hour without FAPE entitles the student to one hour of compensatory instruction, a standard apparently embraced by several courts... In our view, this cookie-cutter approach runs counter to both the "broad discretion" afforded by IDEA's remedial provision and the substantive FAPE standard that provision is meant to enforce.
>
> More specifically, as the Fourth Circuit has explained, "compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a give period of time to provide a FAPE to a student... Overlooking this equitable focus, the Reids' hour-for-hour formula in effect treats compensatory education as a form of damages – a charge on school districts equal to expenditures they should have made previously. Yet "the essence of equity jurisdiction" is "to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it..." In keeping with that principle of case-specific flexibility, we agree with the Ninth Circuit that "there is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of IDEA..."[18]

Thus, Petitioner has the burden of establishing the type and amount of compensatory services that will compensate the student for the services that were denied. Absent such a showing, any award by the Hearing Officer would be arbitrary.

> Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, 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

[18] *Id.*, 401 F.3d at 523-24, citations omitted.

have accrued from special education services the school district should have supplied in the first place.[19]

In this case, Petitioner's counsel failed to offer the necessary evidence, pursuant to the standard set forth in *Reid*, to establish that compensatory education services are warranted. Petitioner's evaluations in December 2008 found her to be performing at the low average range and formed the basis of determination that Petitioner qualified for specialized education services. However, prescribed only eight hours of specialized instruction per week, and Petitioner's mother agreed to this level of services. Petitioner's counsel represented Petitioner's mother at the April 1, 2009 MDT meeting at which Petitioner's IEP was developed.

At the hearing, Petitioner's counsel presented testimony from Lindamood Bell that Petitioner was operating well below her grade level in every academic category and that she requires 10-12 weeks of individual tutoring for 6 hours each day. The goal of this tutoring would be to address the "gap" between Petitioner and her peers.[20] However, there was no showing that DCPS' failure to identify Petitioner by mid-September 2008 was the cause of Petitioner performing well below grade level on Lindamood Bell's May 11, 2009 evaluation. Under *Reid*, Petitioner had the obligation of proving that she suffered an educational deficit between September 2008, when DCPS arguably should have identified her, and April 1, 2009, when actually identified her. Further, she had an obligation of showing that a particular type and amount of compensatory services would compensate her for this seven month deprivation of services (approximately 224 hours of specialized instruction). DCPS would be responsible for compensating Petitioner for whatever deficit she suffered as a result of not receiving these services. However, DCPS cannot be held responsible for compensatory education services in this proceeding for the entirety of her educational deficiencies, a deterioration that may have begun at or before the inception of her educational career. Petitioner's remedy at this point is to present her Lindamood Bell evaluation to her LEA as evidence that her current IEP may be inadequate to meet her needs.

ORDER

Upon consideration of Petitioner's request for a due process hearing, the parties' Five-Day Disclosure Notices, the testimony presented during the hearings, and the representations of the parties' counsel at the hearing, this 5th day of June 2009, it is hereby

ORDERED, that the *Complaint* is **DISMISSED WITH PREJUCICE.**

IT IS FURTHER ORDERED, that this Order is effective immediately.

---

[19] *Id.*, 401 F.3d at 524.
[20] Testimony of Ms. Coppersmith.

Notice of Right to Appeal Hearing Officer's Decision and Order

This is the final administrative decision in this matter. Any party aggrieved by the findings and/or decision 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 of the entry of the Hearing Officer's Decision, in accordance with 20 U.S.C. Section 1415(i)(2)(B).

/s/
Terry Michael Banks
Hearing Officer

Date: June 5, 2009