

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

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STUDENT HEARING OFFICE
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| STUDENT ¹ , by and through his Parent Petitioners, v. DCPS Respondent. Case | HEARING OFFICER'S DETERMINATION Hearing Date: March 11, 2009 <u>Representatives:</u> Counsel for Petitioners: Domiento Hill, Esq. 1220 L Street NW Suite 700 Washington, DC 20002 Counsel for DCPS: Kendra Berner, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u> |
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened March 11, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on February 6, 2009, alleging the issues outlined below.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-19 and DCPS Exhibits 1-5) which were admitted into the record.

ISSUE(S):²

Did DCPS fail to provide the student with a free and appropriate public education by failing to evaluate the student in all areas of suspected disability to determine the student's special education and related services needs?

FINDINGS OF FACT³:

1. The student is _____ years old, currently attends School A and resides in the District of Columbia. (Petitioner's Exhibit 19)
2. On September 23, 2008, the adult student, through counsel, sent a request to the District of Columbia Public Schools ("DCPS") for an initial evaluation of the student in all areas of his suspected disabilities, to determine whether or not he could benefit from special education and its related services needs. Specifically, the request included a psycho-educational assessment, a clinical psychological assessment, a social history assessment,

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding.

a speech and language assessment, a social history and a vocational assessment.
(Petitioner's Exhibit 6)

3. On October 7, 2008, a Student Evaluation Plan (SEP) meeting was convened on behalf of the student. At that meeting, DCPS agreed to conduct a psycho-educational, a speech and language, a social history, and a vocational assessment. DCPS requested and the signed a consent to evaluate form. (Petitioner's Exhibits 7 & 8)
4. DCPS completed the student's social history and psycho-educational evaluation on October 31, 2008, and November 21, 2008, respectively. (Petitioner's Exhibits 18 & 19)
5. On November 25, 2008, DCPS prepared a letter of invitation scheduling a multidisciplinary team (MDT) meeting to review the student's evaluations for January 27, 2009, at 10:00 A.M. The student's counsel responded to the letter and stated the student's independent occupational therapy (OT) evaluation had been referred to the evaluator and counsel was waiting for a report. The date for the MDT meeting was confirmed. (Petitioner's Exhibit 10)
6. On December 9, 2008, School A's special education coordinator wrote to the student's counsel stating that the school was unable to complete all the requested evaluates student because of the student's non-attendance. The student's counsel responded to the letter requesting documentation of when the evaluations were attempted and the student's attendance records. (Petitioner's Exhibit 11 & 15)
7. According to the comprehensive psychological evaluation, the student, although he was only one month shy of his 21st birthday at the time of the administration of the evaluation demonstrated academic functioning ranging from a low of 2nd grade – 2nd month in reading, and a high of 11th grade – 6th month in math fluency. (Petitioner's Exhibit 18)
8. DCPS convened the student's MDT meeting on January 27, 2009. The student's educational advocate attended the meeting. The MDT reviewed the student's evaluations and determined that the student was eligible to receive special education and related services as a result of his being learning disabled and would receive 10 hours a week of specialized instruction and 30 minutes a week in counseling services. The MDT also prescribed transportation assistance. (Petitioner's Exhibits 13 & 17)
9. The MDT noted the student did not attend school regularly during the first semester of the 2008-09 school year. The student's independent OT evaluation was not available at the meeting and the speech and language evaluation had not been completed. DCPS indicated it would be completed as soon as the student was available. The MDT agreed to reconvene within thirty days when the remaining evaluations were available. The student's educational advocate agreed to implementation of the student's individualized educational program (IEP) but did not agree the contents of the IEP were sufficient. (Petitioner's Exhibit 13)

10. As of the date of the due process hearing DCPS had not yet completed the speech and language or vocational assessments or reconvened a MDT meeting to update the student's IEP.
11. The student does not attend school regularly because of the distance of School A from his home and because of his parenting responsibilities. However, he has been informed by the school staff when he is to be evaluated and has attended school on those occasions. He is willing to attend school regularly to ensure that the remaining evaluations are completed and he obtains the educational services that are available to him. (Student's 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.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁴ In this case the student/Petitioner 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.

Did DCPS fail to provide the student with a free and appropriate public education by failing to evaluate the student in all areas of suspected disability to determine the student's special education and related services needs? Conclusion: Petitioner's counsel did not sustain the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. § 300.304(c)(4) and (6), DCPS shall ensure that "the child is assessed in all areas related to the suspected disability...[and] in evaluating each child with a disability...the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." Pursuant to 34 C.F.R. § 300.303(a)(2), DCPS shall ensure "a reevaluation of each child with a disability is conducted...if the child's *parent or teacher* requests a reevaluation. [emphasis added]"

⁴ 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 that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

IDEIA, Section 300.301 (c)(1)(i) provides that the initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation; or of the State established a timeframe within which the evaluation must be conducted. The 60 day timeframe established by IDEIA in completing initial evaluations, only applies if the State fails to establish a timeframe within which an initial evaluation must be conducted. The District of Columbia (D.C.), had established a timeframe in which initial evaluations must be conducted on a student who may require special education services. Specifically, the 120 days DCPS was afforded in conducting an initial evaluation on a student who may require special education and its related services was repealed.⁵

On September 23, 2008, a request was made for the student to be evaluated. On November 27, 2008, DCPS conducted the comprehensive psychological evaluation. DCPS then sent the student's counsel a letter of invitation to convene the student's eligibility meeting. On December 9, 2008, DCPS informed the student's counsel that the remaining evaluations had not been conducted due to the student's absences from school. DCPS convened the eligibility meeting on the agreed upon date, determined the student eligible and prescribed special education services. The student acknowledged during the due process hearing that he often does not attend school due to his parenting responsibilities and other reasons. He acknowledged that he desires to continue in school and avail himself of the services that can be provided to him by DCPS.

The Hearing Officer concludes based on the evidence presented, including the student's testimony regarding his significant absence from school, that DCPS did not deny the student a FAPE. The student's absence from school is a justifiable reason for the remaining evaluations not being conducted by DCPS. The Hearing Officer also notes that the student's independent evaluation was also not completed by the time of the due process hearing.

ORDER:

1. Petitioner's counsel shall provide to DCPS the student's independent occupational therapy as soon as practicable.
2. The student shall attend School A regularly and make himself available to the special education services provided him at School A and make himself available for any remaining evaluations that are to be conducted pursuant to his October 2008 student evaluation plan.
3. DCPS shall ensure the student is provided transportation assistance that is required pursuant to his IEP to assist in his school attendance.

⁵ Under the D.C. Code, 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." (D.C. Code § 38-2501(a)) Pursuant to D.C. MUN. REGS. Tit. 30, § 3005.7, DCPS shall ensure that "the child is assessed 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 [and] in evaluating each child with a disability...the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs..."

4. DCPS shall, if it has not already done so by the date of this Order, conduct the vocational assessment and complete the speech and language evaluation and within thirty calendar days of the issuance of this Order, convene a multidisciplinary team (MDT) meeting. The MDT when it meets shall review the student's school attendance and educational progress, review the student's remaining evaluations and review and revise the student's IEP as appropriate.
5. The MDT meeting shall be scheduled through counsel for the student and parent.
6. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

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. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: March 21, 2009