

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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<p>STUDENT¹, by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date: March 2, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Joy Freeman-Coulbary</p> <p>Counsel for Respondent: Candace Sandifer</p> <p><u>Hearing Officer: Wanda I. Resto, Esquire</u></p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

On January 23, 2009, parent's counsel filed a Due Process Hearing Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to timely identify, evaluate and determine the Student's eligibility for special education services, develop an appropriate Individualized Education Program ("IEP"), begin the Student Support Team ("SST") process and provide the Student with special education and related service. The Petitioner requests the Respondent be deemed to have denied the Student a FAPE and as a relief ordered to fund comprehensive psychological, social history, speech and language, and vocational evaluations. Once all evaluations are completed to convene an eligibility meeting within five days of receiving evaluations to develop an appropriate IEP and provide a compensatory education plan.

The Hearing Officer held a pre-hearing conference call with Counsel for both parties on February 18, 2009 at 4:30 PM. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. The Petitioner offered four witnesses: the Mother to testify about the efforts made to get the Student evaluated. The Student to testify about her experiences at school. The Psychologist to speak about the Student needs. The Educational Advocate to provide testimony on the classroom observation and meetings.

The Respondent asserts the Student has been truant, which has impacted her academic performance. The Respondent also asserts that it was not on notice that the Student should have been evaluated for special education services and a SST was not necessary. The Respondent offered two witnesses: the special education coordinator who will testify the Respondent's efforts to meet the needs of the Student and the Assistant Principal who will testify about the Student's suspensions.

A Pre-hearing Order issued on February 19, 2009, *inter alia* it ordered the Petitioner to be prepared to present evidence for purposes of establishing whether compensatory education is warranted, and if so, what type and amount of compensatory education is most appropriate. The Petitioner is required to demonstrate what a services the Student needs to elevate her to the position she would have occupied absent the Respondent's failures.²

The DCPS' Response to Parent's Administrative Due Process Complaint Notice was filed on February 6, 2009. The Respondent asserts that upon the best information available the Student is truant, which is indicated on her report cards, and that has impacted her performance in the classroom. The Respondent asserts further that the failure to convene a Student Support Team ("SST") meeting is not an actionable claim under the IDEIA, considering that a SST works within the realm of general education students. The Respondent alleges that the special education coordinator had not received any referrals for the Student to be evaluated for special education and related services from the teacher or a parent. The Respondent contends that it has not denied the Student a FAPE.

A hearing was held on February 20, 2009, at 9:30 AM. The Petitioner presented a disclosure letter dated February 13, 2009 to which nine documents were attached, labeled P-1 through 9 and which listed four witnesses. One witness testified—the grandmother. The Respondent presented a disclosure

² Reid v. District of Columbia, 401 F.3d 516 (2005)

letter dated February 13, 2009 identifying ten witnesses and to which one document was attached, labeled DCPS 1. No witness testified. The documents were admitted without objections.

The hearing was conducted in accordance with the rights established under the Individuals with Disabilities Education Act of 2004 ("IDEA"), 20 U.S.C. § 1400 et seq. and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

II. ISSUE(S)

Did the Respondent fail to identify and evaluate the Student's eligibility for special education and its related services?

Has the Respondent failed to develop an IEP and to begin the SST process for the Student?

Has the Student been denied a FAPE?

Is the Student entitled to a compensatory award?

III. FINDINGS OF FACT

1. The Student, currently is in high school, has been retained more than once. She has been suspended numerous times this year and the year before, and has experienced failing and below average grades. The guardian requested from the school personnel during 2007-2008 school year, and at the beginning of this school year, that the Student be evaluated because of her behavior problems and failing grades to no avail. ³
2. Counsel for the Respondent acknowledged at the hearing that the Respondent had indeed received the guardian's request for the Student to be identified and evaluated in September 2008 and the documents were lost. To date, Respondent has not evaluated the Student's special needs.
3. In July 2008, the Student was hospitalized for psychiatric problems and diagnosed as having bipolar disorder and Antisocial behavior. The parent provided the district with information about the hospitalization. ⁴
4. The Student ran away from home on various occasions and missed many days during the school year. From September 18, 2008 through February 6, 2009 the Student has approximately 99 unexcused absences, with only 78.5 days of school attendance. ⁵
5. While the guardian did not receive a truancy letter, she did receive a few calls and voice messages were left indicating when the Student was not in class. The School informed the Child

³ Testimony of the guardian.

⁴ P#6 Psychiatric evaluation dated 7/23/08 and testimony of the guardian.

⁵ P#9 Summary of the Student's class absences and testimony of the guardian.

Protective Services Program. Most of the Student's absences were during the times the Student ran away from home.⁶

6. The January 2009 Progress Report reflects Student's grades ranging from C+ in English, F in History and Science, and a D in keyboarding.⁷

IV. CONCLUSIONS OF LAW

FAPE Determination

The DCPS is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The IDEA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living. *See id.* § 1400(d)(1)(A). The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

In *Bd. of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 73 L. Ed. 2d 690 (1982), the Supreme Court defined FAPE: The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Burden of Proof

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that 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 a FAPE.

The DCPS met its legal obligation under the IDEA. Here is why.

⁶ Testimony of the guardian.

⁷ 1st Advisory Report 2008/2009

The only evidence existing in the record is the testimony of the guardian asserting she requested evaluations. There is not a scintilla of evidence in the record of educational harm to the Student or the guardian's rights as a result of the Respondent's failure.

Failure to Identify and Evaluate

The Petitioner alleges a violation of the statutory right for initial evaluations to be completed "within 120 days from the date that the Student was referred for an evaluation.

The IDEA at 20 U.S.C. 1412(a)(3), and its regulations at § 300.111, impose a duty on the Respondent, known as the "child find" duty of the, to have in place policies and procedures to ensure that, among other things, all children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated. Pursuant to 20 U.S.C. § 1414(c)(i)(I), the initial evaluation shall be done within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe.

According to D.C. Code § 38-2501, initial evaluations are to be completed "within 120 days from the date that the student was referred for an evaluation." While D.C. Mun. Regs. Tit. 5 § 3004.1 (b) (1) and (c), states that a referral for evaluations can be made by the parent, in writing, to the school principal. See also Kruvant v. District of Columbia, CA No.: 03-1402 (JDB) (D.D.C. 2005)

The Student's guardian requested the Respondent to evaluate the Student's for special education services during September 2008. Accordingly, as soon as D.C. was identified as a potential candidate for special education services, defendant had a duty to locate him and complete the evaluation process. See *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007) (explaining that once a child is identified the local educational agency "is then obligated to move forward with the requirement of [IDEA] § 1414(a)(1) and determine whether the student is in fact a child with a disability"). The DCPS did not present any evidence or argument as to why a delay of more than 4 months between the Petitioner's request and the response was reasonable. The DCPS should have authorized the evaluation or file a complaint to challenge the request without delay. The Hearing Officer determines the DCPS has violated a procedural obligation.

The IDEIA at 20 U.S.C. § 1414 (E) (ii), and as provided in 34 C.F.R. § 300.513(a) regarding hearing officer decisions on procedural issues, "[I]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education [FAPE] only if the procedural inadequacies—

- i. impeded the child's right to a free appropriate public education;
- ii. significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
- iii. caused a deprivation of educational benefits."

As indicated above, the Respondent violated its procedural obligations by failing to timely authorize a reevaluation. However, an IDEA claim based on procedural violations is viable only if those

procedural violations affected the student's *substantive* rights. *See, e.g., Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error"); *C.M. v. Bd. of Educ.*, 128 Fed. Appx. 876, 881 (3d Cir. 2005) (per curiam) ("[O]nly those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable."); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990) (refusing to award compensatory education where procedural faults committed by Board did not cause the child to lose any educational opportunity).

The Petitioner did not provide a connection between the Student running away, behavior problems, poor grades and the failure to get an evaluation. The Petitioner failed to provide any evidence on how the Student was deprived of her educational benefit.

Failure to Develop an Individual Education Plan (IEP) and to Begin the SST Process.

The Petitioner alleges that the DCPS' failure to timely evaluate, as well as to begin the SST process, has led to the Student being denied appropriate special and related services which would have "flowed" from an IEP.

"Student Support Teams (SST) provides assistance to teachers as they work with students who are struggling academically and/or behaviorally. When a teacher refers a student to the SST, team members-guidance counselors, general education teachers, administrators, other support staff, and, sometimes, the parent-use a collaborative process to discuss the student's needs and identify academic and behavioral interventions and supports that the teacher may implement to help the student achieve. The SST process is a general education initiative found in DC schools. Have a research base that demonstrates their effectiveness in helping students achieve. Reduce inappropriate student referrals to special education."⁸

The Petitioner did not provide any information or evidence on the nexus of the SST with the IDEA and this Hearing Officer's authority to consider the obligations of a SST. Therefore the claim on the appropriateness of the SST process is dismissed.

Because the Petitioner did not prove that the Student was eligible for special education, there is no need to discuss if the Student required an IEP.

The Petitioner did not demonstrate that the Student suffered an educational harm or was affected by any procedural violations DCPS committed. Section 300.513(a)(1) and section 615(f)(3)(E) of the Act provide that, in general, a decision made by a hearing officer must be made on substantive grounds based on a determination of whether the child received FAPE. While the Petitioner has established a procedural violation of the IDEA, the Petitioner has not established that that violation caused harm to the Student that the IDEA is intended to address

Is the Student entitled to a compensatory award and can one be granted?

⁸ See: http://www.osse.dc.gov/seo/frames.asp?doc=/seo/lib/seo/information/Teacher_Bro4_Final3.pdf

The Petitioner was not able to provide sufficient evidence to demonstrate that the Respondent has denied the Student FAPE. Therefore there is no need for the Hearing Officer to discuss the appropriateness of a compensatory education award.

V. SUMMARY OF DECISION

The Petitioner established a procedural violation of the IDEA, the Petitioner has not established that that violation caused harm to the Student that the IDEA is intended to address.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the DCPS has not denied the student a FAPE and issues the following:

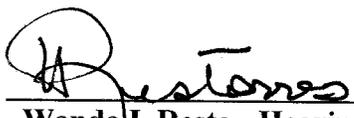
VI. ORDER

ORDERED, the Due Process Complaint filed January 23, 2009 is Dismissed.

This order resolves all issues raised in the Petitioner's January 23, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. Final decisions of special education Hearing Officer may be appealed to a state or federal district court of competent jurisdiction. (20 U.S.C. §1415(i)(2) and 34 C.F.R. §300.516)



Wanda I. Resto - Hearing Officer

Date: March 2009