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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Confidential

STUDENT[1], Petitioner, v. District of Columbia Public Schools Respondent.	HEARING OFFICER'S DETERMINATION February 27, 2009 Representatives: Counsel for Petitioners: Domiento Hill, Esq. Counsel for DCPS: Harsharen Bhuller, Esq. Hearing Officer: Kimm H. Massey, Esq.

[1] Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

Case #

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (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.").

II. PROCEDURAL BACKGROUND

On December 15, 2008, counsel for Parent and Student ("Petitioner's counsel") filed a Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS"), alleging that DCPS denied Student a free appropriate public education ("FAPE") by (1) failing to review Student's outstanding psychoeducational evaluation, (2) failing to convene an IEP team meeting upon request, and (3) failing to provide an IEP that is reasonably calculated to provide a FAPE. Petitioner also alleged (4) that Student is entitled to compensatory education as a result of the alleged denials of FAPE.

DCPS failed to file a Response to the Complaint.

The Student Hearing Office ("SHO") set January 15, 2008 as the prehearing conference date and provisionally scheduled the due process hearing for February 17, 2009 at 9:00 a.m. However, after consultation with the parties, the hearing officer rescheduled the prehearing conference for January 26, 2009.

The hearing officer attempted to convene the prehearing conference on January 26, 2009, as scheduled, but was unable to reach either of the party representatives. On January 27, 2009, the hearing officer issued a Pre-Hearing Order that combined Petitioner's first three issues into the following issue: an alleged failure to convene an IEP meeting upon request to review Student's outstanding evaluation and revise Student's IEP. The Pre-Hearing Order also set forth the relief requested, the five-day disclosure deadline and the date and time of the due process hearing.

By letter dated January 30, 2009, DCPS disclosed two potential witnesses and four documents labeled DCPS-1 through DCPS-4.

By letter dated February 9, 2009, Petitioner disclosed thirteen potential witnesses and fourteen documents (hereinafter referred to as Petitioner's Exhibits 1 through 14).

The hearing officer convened the due process hearing on February 17, 2009, as scheduled, and the parties' respective documents were admitted into the record without objection. Petitioner presented the testimony of two witnesses. As DCPS had also disclosed one of the witnesses, the head of Student's current school, as its own witness, the hearing officer instructed DCPS to conduct a combined direct/cross-examination of that witness. Thereafter, DCPS chose not to present additional witness testimony. Before the hearing officer brought the hearing to a close, Petitioner voluntarily withdrew its claim for compensatory education.

III. ISSUE(S)

1. Did DCPS fail to convene an IEP meeting upon request to review Student's outstanding psychoeducational evaluation and revise Student's IEP?

IV. FINDINGS OF FACT

1. Student currently attends a private school for children with specific learning disabilities. He has been attending the school since September 2008, and he was placed at the school by Parent pursuant to a Settlement Agreement with DCPS.[2]

2. Student was initially determined eligible for special education and related services at a January 7, 2008 Eligibility Meeting. At the meeting, it was determined that Student had the following multiple disabilities: emotional disturbance ("ED") and other health impairment ("OHI"). Based on comments made by an occupational therapist, who evaluated Student prior to the meeting, the Team determined that Student was ineligible for occupational therapy ("OT") services.[3]

3. Student's initial IEP, which is still current, is dated April 1, 2008. The IEP and Meeting Notes submitted by the parties for inclusion in the administrative record are practically illegible. Nevertheless, it appears that the IEP classifies Student as ED and OHI and requires Student to receive 31 hours of specialized instruction and 1 hour of psychological services, for a total of 32 hours of special education and related services per week. The IEP also contains goals in the academic areas of math, reading, and written expression, as well as two pages of social emotional behavioral goals. It also appears that at the MDT meeting held on April 1, 2008, the Team reviewed Student's February 25, 2008 independent OT report and determined that OT services were not warranted at that time.[4]

4. On July 17, 2008, Student received an independent psychoeducational evalution. Student's performance on the Wechsler Intelligence Scale for Children – Fourth Edition resulted in a Full Scale IQ score of 76, and scores in the Low Average range on the Verbal Comprehension Index and Processing Speed Index, in the Average range on the Working Memory Index, and in the Extremely Low range on the Perceptual (nonverbal) Reasoning Index.

   On the Wechsler Individual Achievement Test-2nd Edition, Student received scores in the Average range in the areas of Pseudoword Decoding, Written Expression and Word Reading, but Math Reasoning and Numerical Operations were areas of notable weakness for Student. The evaluator noted that Student's Reading Composite, Oral Language Composite, and Written Language Composite scores were "much higher than

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[2] Testimony of Head of School.

[3] Petitioner's Exhibit 12.

[4] Petitioners' Exhibit 11; DCPS-03.

anticipated for a young man with his general cognitive ability," while his Math composite score was "much lower" than expected.

Student's performance on the Developmental Test of Visual-Motor Integration-Fifth Edition was average and suggested that he is well able to perform the visual and motor requirements of reading and writing tasks.

Student also received the Behavior Assessment System for Children-Second Edition ("BASC-2") Self Report of Personality form. Based on Student's ratings of himself, the evaluator found that "[t]here were no scaled scores in the clinically significant range, suggesting that there are no problems severe enough to require formal treatment." However, Parent reported that Student seems to have attention problems and may be suffering from depression from being retained several times.

Overall, the evaluator concluded that Student's "significant perceptual reasoning deficits" appear to significantly impact his academic performance, and that in light of "reports of issues pertaining to organization and attention, as well as self-esteem and social problem-solving," his profile is "typical of a youngster with learning disabilities." The evaluator opined that if Student's educational program addresses his learning disabilities appropriately, emotional concerns will be concomitantly reduced. The evaluator recommended that Student continue to receive specialized instruction for LD students. The evaluator also recommended that Student receive counseling services to address self-esteem and to promote appropriate decision making, and an OT evaluation to assess the degree of perceptual motor deficits Student is experiencing.[5]

5. By letter dated November 26, 2008, Petitioner's counsel, on Parent's behalf, forwarded Student's independent psychoeducational evaluation to DCPS's Placement Specialist and requested a review of the evaluation, a copy of the review, and a letter of invitation for an MDT meeting. Counsel also requested an OT evaluation.[6]

6. On December 15, 2008, approximately 2 ½ weeks later, Petitioner filed the instant Complaint, alleging that DCPS never responded to the November 26, 2008 letter.

7. On December 22, 2008, exactly one week after the Complaint was filed, DCPS issued a letter authorizing Petitioner's counsel to obtain an independent OT evaluation and an independent vocational assessment at the expense of DCPS. In the letter, DCPS also asked Petitioner's counsel to have the evaluations completed within 45 days and to forward copies of the evaluation reports to the OSE Resolution Team in DCPS's Office of Special Education ("OSE").[7]

8. On January 26, 2009, DCPS issued a Letter of Invitation for an MDT meeting for Student on February 17, 18, or 19, 2009 to review evaluation or reevaluation information. The Invitation was addressed to Parent and indicated that the meeting would be held at Student's current private school. However, the dates offered were not convenient for Parent and Parent's attorney, so the meeting was scheduled for the week following the

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[5] Petitioner's Exhibit 6.

[6] Petitioners' Exhibit 4.

[7] DCPS-02.

February 17, 2009 due process hearing in this case.[8]

9. By cover letter dated February 7, 2009, Petitioner's counsel forwarded Student's newly completed OT evaluation report to DCPS's OSE, and noted that (1) the evaluation needed to be reviewed at an MDT meeting and (2) the OT evaluator recommended OT services and an opthamological evaluation for Student.[9]

10. Student's current educational advocate had only been working with Student for two weeks at the time of the due process hearing in this case, so he had no direct knowledge of the events that may or may not have taken place in this case.[10]

11. Student has been receiving the 32 hours of special education and related services required by his current IEP since he began attending his current private school. Student has made some progress since he began attending the private school in terms of speaking up in class and getting more involved in the academic process. The progress has been slow, but he is making progress.[11]

12. Student's current private school received Students' July 2008 independent psychoeducational evaluation report in November or December 2008. The private school's internal team has reviewed the evaluation report, and as a result of said review, Student's psychological services provider at the private school has been making adjustments to the counseling services provided to Student. Student's services in terms of specialized instruction have not been changed because he is already receiving services. However, a change in classification to LD for Student may affect his educational programming, and based on the psychoeducational evaluation report, it is possible that Student would be provided with more help in reading and math.

    The private school received Student's independent OT report approximately two weeks before the due process hearing. Student is not currently receiving OT services at the school, although that is one of the concerns about Student.[12]

V. CONCLUSIONS OF LAW

At issue in this case is whether DCPS denied Student a FAPE by failing to convene an IEP meeting upon request to review Student's independent psychoeducational evaluation and revise his IEP. See 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

Under IDEIA, DCPS must ensure that a disabled child's IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are

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[8] DCPS-01; Testimony of Head of School.
[9] Petitioner's Exhibit 5.
[10] Testimony of Advocate.
[11] Testimony of Head of School.
[12] Testimony of Head of School.

being achieved; and revises the IEP, as appropriate, to address, *inter alia*, the results of any reevaluation conducted under § 300.303. 34 C.F.R. § 300.324(b)(1). IDEIA also provides that if a parent obtains an independent educational evaluation at public expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. 34 C.F.R. § 300.502(c)(1). However, in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

The evidence in this case demonstrates that Student's initial and current IEP was developed on April 1, 2008. In July of 2008, Parent obtained an independent psychoeducational evaluation at DCPS's expense. In the evaluation report, the evaluator concluded that Student is LD and his ED concerns will recede with proper educational programming for LD. In September of 2008, Parent placed Student at his current private school at DCPS's expense. The school serves students with specific learning disabilities, and Student has been receiving full-time special education services at the school since he began attending there.

On November 26, 2008, Petitioner's counsel submitted Student's independent psychoeducational evaluation report to DCPS. Approximately 2 ½ weeks later, on December 15, 2008, Petitioner's counsel filed the instant Complaint, primarily complaining of DCPS's failure to respond to the November 26th letter. On December 22, 2008, a week after the Complaint was filed, DCPS issued a letter authorizing an independent OT evaluation at DCPS's expense for Student. Then DCPS issued a January 26, 2009 letter inviting Parent to an MDT meeting on February 17, 18, or 19, 2009, but those dates were not convenient for Parent and Petitioner's attorney, so the IEP meeting was scheduled to take place during the week following the February 17, 2009 due process hearing.

In the interim, Parent obtained an independent OT evaluation of Student at DCPS's expense, and Petitioner's counsel forwarded the evaluation report to DCPS by letter dated February 7, 2009. Also in the interim, Student's private school received a copy of his psychoeducational evaluation report in November or December 2008, reviewed same, and made modifications to the psychological services Student receives based on the report. The private school did not make any changes to the specialized instruction Student receives based on the evaluation report.

At the due process hearing in this case, Petitioner complained that more than two months had passed since DCPS had been given a copy of Student's independent psychoeducational evaluation report, but DCPS still had not convened an MDT meeting to review the evaluation. Petitioner asserted that DCPS had never responded to the November 26, 2008 letter requesting a meeting to review the evaluation, and Petitioner further asserted that a parent should not have to file a Complaint to obtain a meeting. Finally, Petitioner stated that the Team now needs to review Student's psychoeducational and OT evaluations, and Petitioner requested an Order requiring DCPS to amend Student's IEP to reflect disabilities of LD and OHI, add OT services and change Student's social emotional goals.

DCPS disagreed with Petitioner, pointing out that Student is already attending a school for specific LD, so he's been receiving LD services all along, despite the ED classification on his IEP. To support this point, DCPS noted that Student's psychoeducational evaluator recommended that Student "continue" receiving services for students with LD. DCPS further asserted that as an MDT meeting was going to be held the week after the due process hearing, there was no need for an Order requiring the Team to do what it was planning to do anyway. Finally, DCPS stated that Petitioner's withdrawal of it compensatory education claim was essentially a concession that there has been no harm to Student as a result of the delay in conducting an MDT meeting.

As an initial matter, the hearing officer questions whether DCPS's failure to respond to Petitioner's November 26, 2008 letter requesting an MDT meeting in 2 ½ weeks, when the Complaint was filed, constitutes a violation of IDEIA. In any event, as the evidence in this case is clear that DCPS issued a January 26, 2009 Invitation to Meeting letter, any delay on DCPS's part in responding to Petitioner's November 26th letter was, at best, a procedural violation.[13] Moreover, despite said procedural violation, Student has continued to attend the full-time private placement of Parent's choice, where he has been receiving full-time special education services in the form of specialized instruction for LD students and psychological services. In addition, Student's psychological services provider at the private school has been modifying the counseling services Student receives based on the conclusions and recommendations in the psychoeducational evaluation report, even though the full MDT has not yet reviewed the report, and DCPS has also funded the independent OT evaluation recommended in the psycho-educational evaluation report. Finally, DCPS offered to hold an MDT meeting during the week of February 16, 2009, but agreed to postpone the meeting by a week to accommodate the schedules of Parent and Petitioner's counsel, with the result that the requested meeting will already have been held by the time the instant Hearing Officer Determination issues. Under these circumstances, the hearing officer concludes that any delay on the part of DCPS in responding to Petitioner's November 26, 2008 letter requesting an MDT meeting to review Student's independent psychoeducational evaluation report did not rise to the level of a violation of FAPE under the standard set forth in 34 C.F.R. § 300.513(a)(2).[14]

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[13] At the due process hearing, Petitioner argued that the Letter of Invitation was issued by Student's current private school, not by DCPS. The hearing officer acknowledges that the Letter lists the head of the private school as the contact person. However, a visual inspection of the Letter reveals that it is DCPS's standard Letter of Invitation, which says "District of Columbia Public Schools Special Education" at the top. As a result, the hearing officer is unwilling to conclude that the Letter must be considered something other than a standard DCPS Letter of Invitation to a meeting.

[14] Despite the hearing officer's authority to order DCPS to comply with procedural requirements pursuant to 34 C.F.R. § 300.513(a)(3), the hearing officer declines to issue the requested Order requiring DCPS to amend Student's IEP to reflect disabilities of LD and OHI, add OT services and change Student's social emotional goals because (1) as DCPS points out, those matters likely were addressed at the MDT meeting scheduled to be held subsequent to the due process hearing, and (2) Petitioner failed to present expert testimony tending to prove that the requested changes to Student's IEP are necessary.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner failed to meet its burden of proof in this case.

VII. ORDER

1. Petitioner's December 15, 2008 Complaint is hereby **DISMISSED**, and its request for relief therein is hereby **DENIED**.

/s/ *Kimm H. Massey, Esq.*
Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 27th day of February, 2009.

NOTICE OF APPEAL RIGHTS
This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).