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], by and through his Parent Petitioners, v. DCPS Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Date: April 7, 2009 <u>Representatives:</u> Counsel for Petitioners: John Straus, Esq. 1220 L Street NW Suite 700 Washington, DC 20005 Counsel for DCPS: Tanya Chor, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002 <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

[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 April 7, 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 March 4, 2009, alleging the issues outlined below. Petitioner was given until Friday, April 10, 2009, to present his closing brief on the issue of the reasonableness of time in the evaluation being conducted and the harm if any to the student for any delay in the evaluation being completed and reviewed by a MDT. DCPS counsel was given until Monday,April 13, 2009, to file a response brief and closing argument. Those closing briefs were submitted to the Hearing Officer timely and were considered.

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- 23 and DCPS Exhibits 1-7) which were admitted into the record.

ISSUE(S): [2]

1. Did DCPS fail to provide the student with a free and appropriate public education (FAPE) by failing to evaluate the student in all areas of suspected disability to determine the student's special education and related services needs? Specifically, Petitioner alleges DCPS did not conduct a clinical psychological evaluation.

2. Did DCPS fail to provide the student with a FAPE by failing to reconvene the IEP team to review the findings and recommendations of the assessments, review and revise the student's IEP and determine a placement where the IEP may be implemented?

3. Did DCPS failings entitle the student to compensatory education?

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[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.

FINDINGS OF FACT [3]:

1. The student is [redacted] years old, currently attends School A and resides in the District of Columbia with his parent(s). (Petitioner's Exhibit 23)

2. The student has been identified as child with a disability under I.D.E.I.A. His disability classification is other health impaired (OHI) and the student's individualized educational program (IEP) prescribes the following weekly services: 28.5 hours of specialized instruction, 1 hour of behavioral support services and 30 minutes of occupational therapy. (Petitioner's Exhibit 23)

3. On March 19, 2008, the student received a neuropsychological assessment. The assessment report states the student is a student with attention deficit hyperactivity disorder. The evaluator recommended the student be considered to be a student with an other health impairment under I.D.E.I.A. The evaluator also recommended the student received a clinical psychological assessment "to determine the presence of specific mood related difficulties." (Petitioner's Exhibit 18)

4. The student began attending School A on October 9, 2008, as a result of prior Hearing Officer's Determination (HOD) issued September 25, 2008. The HOD also required that a multidisciplinary team (MDT) meeting be convened after the student's enrollment at School A to review all the student's current evaluations and review and revise the student's IEP as appropriate. (DCPS Exhibit 4)

5. School A is private full time special education school for students with disabilities including the disability classification of emotional disturbance. The student's attendance at School A is funded by DCPS. (Ms. Tate's testimony)

6. On December 17, 2008, convened the MDT pursuant to the September 25, 2008 HOD. The team noted the student could operate at grade level and had "great academic abilities," however, his behavior difficulties interfered with his ability to participate in academic instruction. The team noted: "His behavior impacts everything – doesn't complete assignments... emotional issues strongly affect academics." The MDT determined that a better behavior plan would need to be developed for the student. (Petitioner's Exhibit 23)

7. The student's therapist at School A stated at the December 17, 2009, MDT meeting that additional assessments were necessary to better define the student's therapy goals. As a result the MDT agreed a clinical psychological evaluation would be conducted to "evaluate the student's emotional functioning – mood ..., impulse control, depression/anxiety/anger, etc." The parent, who attended the meeting, consented to the evaluation. (Ms. Tate's testimony, Petitioner's Exhibit 23)

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[3] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The parties in some instances may have submitted some of the same documents in each of their disclosures. If so, the Hearing Officer may have only cited one party's exhibit rather than both simply out of administrative efficiency.

8. As of the date of the due process complaint was filed DCPS had not yet completed the clinical psychological evaluation. DCPS complemented the clinical psychological on March 9, 2009, and the report was completed on March 20, 2009. (Ms. Tate's testimony)

9. It is sometimes typical for student to take time to acclimate to a new school environment. The student's therapist has verified that although the student had behavioral difficulties when he first arrived at School A his behavior has now significantly improved. A MDT meeting to review the student's clinical psychological evaluation has been requested and will be convened as soon as School A returns from spring break. (Ms. Tate's testimony)

10. The student started off well when he began attending School A. However, he soon began to be sent to the behavior center in the school due to behavioral difficulties such as outbursts in class and not staying focused. The student has suffered a recent loss of a sibling and has had some emotional difficulties as a result. The parent attended the December 17, 2008, MDT meeting and agreed to the clinical psychological evaluation. The parent believed the evaluation would be completed within a few weeks of the MDT meeting. The parent participated in the assessments for the clinical psychological evaluation when it was ultimately conducted in March 2009. The student has made significant progress in the past two months at School A perhaps as a result of behavior modifications that have been made to assist him at School A since the MDT meeting. (Parent'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/parent 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.

1. 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.

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[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.

Pursuant to 34 C.F.R. § 300.304(c)(4) and (6), DCPS shall ensure the "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.

On December 17, 2008, the IEP team determined the student requires clinical psychological assessment based on the recommendations in the March 19, 2008 neuropsychological assessment and the request of his therapist at School A. Neither I.D.E.I.A. nor the DC Municipal Regulations provide a time frame in which a reevaluation must be conducted. Certainly, evaluations should be conducted within a reasonable time and reasonableness is judged on a case by case basis. In this instance the clinical evaluation was ordered three months prior to the evaluation being completed. And in fact the evaluation was not begun until after the due process complaint was filed. The evaluation was conducted and the evaluation report completed in March 2009. The evaluation was not presented to Petitioner until the due process hearing and has not yet been reviewed by a MDT.

The U.S. Supreme Court in Board of Education of the *Hendrick Hudson Central School District, et al, v. Rowley, et al* (102 S. Ct. 3034) held that an inquiry in determining whether a FAPE is provided is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?

2. Is the IEP reasonably calculated to enable the child to received educational benefits?

United States Court of Appeals for the District of Columbia in *Lesesne v. District of Columbia* (447 F.3d 828 (2006)) held that IDEA procedural violations raise a viable claim only if the procedural violations affect he students substantive rights under the IDEA. Although the student's clinical evaluation was not conducted for three months following the evaluation being ordered by the MDT there was little if any evidence that the student was significantly harmed as result. The parent credibly testified that although the student had some behavioral difficulties during the time of the December 2008 MDT meeting the student's behavior has significantly improved in the past two months. This testimony was also bolstered by Ms. Tate's testimony that the student's therapist had noted to her the student behavior progress. The Hearing Officer concludes, based on this credible testimony of the parent that there was insufficient evident that the evaluation not being conducted sooner 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.

2. Did DCPS fail to provide the student with a free and appropriate public education by failing to reconvene the IEP team to review the findings and recommendations of the assessments, review and revise the student's IEP? Conclusion: Petitioner's counsel did not sustain the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. § 300.324(b)(1), DCPS

> must ensure that...the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals...and in the general education curriculum, if appropriate; the results of any reevaluation conducted ...; information about the child provided to, or by, the parents...; the child's anticipated needs; or other matters.

Although the student's clinical evaluation was not conducted for three months following the evaluation being ordered by the MDT there was little if any evidence that the student was significantly harmed as result. The parent credibly testified that although the student had some behavioral difficulties during the time of the December 2008 MDT meeting the student's behavior has significantly improved in the past two months. The Hearing Officer concludes, based on this credible testimony of the parent that there was insufficient evident that the evaluation not being conducted sooner and reviewed by a MDT sooner 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.

The Hearing Officer strongly urges the parties to immediately convene a MDT meeting to review the student's evaluation if it has not already done so by the time this decision is rendered.

3. Did DCPS failings entitle the student to compensatory education? Conclusion: Petitioner's counsel did not sustain the burden of proof by a preponderance of the evidence.

Pursuant to *Reid v. District of Columbia*, (401 F3d 295) "the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Petitioner has not demonstrated there was a denial of FAPE to the student as a result of the clinical evaluation not being conducted and reviewed by a MDT sooner that it has and presented no evidence as to the compensatory education that would have been appropriate had Petitioner prevailed.

ORDER:

The complaint is this matter is hereby dismissed.

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: April 17, 2009**