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 Dates: April 8, 2009 April 17, 2009 Representatives: Counsel for Petitioners: Domiento Hill, Esq. 1220 L Street NW Suite 700 Washington, DC 20005 Counsel for DCPS: Daniel Kim, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

[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 pre-hearing conference was conducted in this matter on March 17, 2009, and a pre-hearing order was issued April 7, 2009. During the pre-hearing conference the issues to be adjudicated were clarified and some of the claims alleged in the complaint were withdrawn. The remaining issues are stated below.

The Due Process Hearing was convened April 8, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was conducted 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. The hearing was continued and resumed and was concluded on April 17, 2009.

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 -32 and DCPS Exhibit 1) 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 comply with the November 9, 2008, order of the impartial due process hearing officer?

Did DCPS fail to provide the student with a free and appropriate public education by failing to provide an IEP reasonably calculated to provide calculated to provide a FAPE? [3]

Is the student entitled to compensatory education as a result of the alleged violation?

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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 pre-hearing conference and at the start of the due process 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] Petitioner acknowledged that the student's IEP was reviewed and revised at the March 27, 2009, IEP meeting; however, Petitioner maintained this claim because Petitioner had yet to received a copy of the IEP as amended at that meeting.

FINDINGS OF FACT [4]:

1. The student is years old, currently attends School A and resides in the District of Columbia with her parents. The student is classified as Emotionally Disturbed (ED) and Mentally Retarded (MR). The student currently attends the School A, a private full time special education school where she was placed and funded by DCPS for the 2008-09 school year pursuant to a previous Hearing Officer Determination (HOD) issued May 23, 2008. (Petitioner's Exhibits 6 & 30).

2. Several independent evaluations were conducted of the student between June and September 2008 pursuant to a Hearing Officer's Order. (Petitioner's Exhibits 5, 23, 24, 25, 26, 27& 28)

3. An educational evaluation was conducted on the student on or about July 9, 2008, and a report prepared July 11, 2008. The student, according to the educational evaluation, the student, according to the evaluation, despite being almost 17 years of age and in the tenth grade, achieved the following scores:

Testing Area	Grade Equivalent	Age Equivalent
Broad Reading	3.9	9 years, 3 months
Letter-Word Identification	7.1	12 years, 9 months
Reading Fluency	3.7	9 years, 1 month
Passage Comprehension	2.0	7 years, 4 months
Oral Language	2.2	7 years, 9 months
Story Recall	5.5	10 years, 9 months
Understanding Directions	1.4	7 years, 2 months
Broad Math	2.4	7 years, 10 months
Calculation	1.6	7 years
Math Fluency	4.1	9 years, 4 months
Applied Problems	2.8	8 years, 4 months
Math Calculations Skills	2.1	7 years, 5 months

[4] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding.

Broad Written Language	4.6	9 years, 9 months
Spelling	6.2	11 years, 10 months
Writing Fluency	4.6	10 years
Writing Samples	2.1	7 years, 8 months
Written Expression	3.7	7 years, 8 months
Academic Skills Cluster	4.2	9 years, 6 months
Academic Fluency Cluster	4.0	9 years, 5 months
Academic Applications	2.3	7 years, 9 months
Total Achievement Cluster	3.5	8 years, 11 months

(Petitioner's Exhibit 25)

4. The educational evaluation recommended that the student receive, among other things, contact with technology that "should include at least a computer, appropriate software, appropriate manipulatives as well as motivating activities which will assist in maintaining her attention throughout the lesson." (Petitioner's Exhibit 25)

5. In October 2008, Petitioner filed a due process complaint. A hearing on the complaint was held November 6, 2008, which resulted in a HOD dated November 9, 2008. The HOD directed DCPS to fund an independent speech/language evaluation and an independent assistive technology evaluation and convene a MDT/IEP meeting within ten (10) school days of the receipt of the independent evaluations. The HOD also directed the MDT to "determine the type and amount of compensatory education to be provide the student a result of the denial of FAPE by LEA."[5] (Petitioner's Exhibit 4)

6. A MDT/IEP meeting was convened for the student a day prior to the November 6, 2008, due process hearing. The Hearing Officer in the November 6, 2008, hearing was made aware at that hearing of the matters discussed at the November 5, 2008 MDT meeting. The student's IEP was reviewed and revised. At the MDT meeting, DCPS was unable to review the student's speech and language evaluation. Speech language services were apparently not added to the student's IEP. The MDT also discussed and the student's right to receive compensatory education. [6] (Petitioner's Exhibit 30, Representations of Petitioner's counsel)

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[5] The Hearing Officer acknowledged the Reid standard but nonetheless delegated this duty to the MDT because no evidence was presented at the hearing as to compensatory education.

[6] Petitioner's counsel represented that the MDT agreed that the student, for compensatory education, should receive, to address a two year gap in the denial of services, a laptop computer, and educational

7. The student's independent assistive technology evaluation conducted pursuant to the November 9, 2008, HOD was provided by Petitioner to DCPS on January 15, 2009. (Petitioner's Exhibit 7)

8. On March 4, 2009, Petitioner filed the current due process complaint alleging, inter alia, DCPS had failed to convene a MDT meeting ordered by the November 9, 2008, HOD to review the student's outstanding evaluation. (Petitioner's Exhibit 2)

9. The parties convened a MDT meeting prior to the due process hearing on the March 4, 2009, complaint. The MDT meeting occurred March 27, 2009. At the meeting the MDT developed the student's speech language goals and reviewed the assistive technology evaluation and discussed a compensatory education plan proposed by the student's educational advocate. The advocate was to present DCPS with details of the plan and another discussion was to take place April 1, 2009. The student's IEP was not amended a result of the March 27, 2009, MDT meeting. (DCPS Exhibit 1, Petitioner's Exhibit 9 & 30)

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. [7] 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 comply with the November 9, 2008 Order of the Impartial Due Process Hearing Officer? Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

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software, an esteem enhancing activity such as a Tae Kwon Do class), and assistive technology equipment, in addition to 100 hours of individualized tutoring in the areas reading and written expression.

[7] 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.

DCPS, according to the terms of the Order, was to reconvene the student's MDT meeting within ten (10) school days upon receipt of the last of the evaluations. The last evaluation was provided to DCPS on or about January 15, 2009. The student's speech and language evaluation was already provided to DCPS on September 9, 2008. Although DCPS convened the MDT meeting on March 27, 2009, after the complaint was filed. There is a presumption of a denial of a free and appropriate public education under the *Blackman/Jones* Consent Decree where DCPS has failed to comply with hearing officer determinations. DCPS presented no evidence as to why there was an inordinate delay in convening the MDT meeting following its receipt of the independent assistive technology evaluation on January 15, 2009.

2. Did DCPS fail to provide the student with a free and appropriate public education by failing to provide an IEP that is reasonably calculated to provide a FAPE?

The Individuals with Disabilities Education Improvement Act ("IDEIA") of 2004 requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

> [S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..."

20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1. The FAPE requirement is satisfied when the State provides personalized instruction that is reasonable calculated to permit the child to benefit educationally. *See* Hendrick Hudson Board of Education v. Rowley, 458 U.S. 176, 203-204 (1982).

34 C.F.R. § 300.323(c) states that each public agency must ensure that, "a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(a) provides that a child's IEP must be in effect at the beginning of each school year.

In this case the student's IEP was not amended despite the evaluations being reviewed at the March 27, 2009, MDT meeting. The only IEP that appears in the record is the IEP developed November 5, 2008. The Hearing Officer concludes the failure review and revise the student's IEP as directed to do by the November 9, 2009, HOD. The failure to update the student's IEP in light of the reviewed evaluations is a denial of FAPE.

3. Did DCPS failures entitle the student compensatory education services?

Petitioner alleges DCPS' failure to ensure that the student had received a free and appropriate public education resulted in the student's entitlement to compensatory education services. Failures such as DCPS' failure to provide the student an appropriate placement, failure to timely evaluate, and failure to comply with hearing officer determinations.

Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005) the Court stated that "courts and hearing officers may award 'educational services . . . to be provided prospectively to compensate for a past deficient program.'" "Appropriate compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place."

The November 9, 2008, HOD directed the issue of compensatory education to be discussed by the MDT. At the March 27, 2009, MDT meeting the parties discussed the student's compensatory education plan. At that meeting there seemed to have been some agreement and some disagreement as to what elements would be provided the student as compensatory education. At this hearing Petitioner alleged the student was entitled to compensatory education for a denial and/or missed services for as much as two years prior. However, there was insufficient evidence in the record for this Hearing Officer to determine the basis of the loss that the compensatory education was designed to cure. Consequently, this Hearing Officer is unable to make a compensatory education award in this decision and order. As such the Hearing Officer suggests that the parties discuss the matter and determine if an agreement regarding compensatory education can be reached at the MDT meeting directed to be held in the Order below. If no agreement is reached Petitioner may file a complaint specifically on the compensatory education claim to this Hearing Officer so that the full evidence of the student's allege loss and the proposed compensation can be fully adjudicated.

ORDER:

1. DCPS shall, within fifteen (15) business days of the issuance of this Order, convene a multidisciplinary team (MDT) meeting to review and revise the student's IEP to include the services and goals and objective the MDT determines are appropriate based on the student's most recent speech and language evaluation and assistive technology evaluation. [8]

2. The MDT meeting shall be scheduled through counsel for the student and parent.

3. 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).

[8] The parties may also determine if an agreement can be reached regarding compensatory education to the student.

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 27, 2009