

DISTRICT OF COLUMBIA
Office of the State Superintendent of Education
Office of Review & Compliance

Student Hearing Office

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Confidential

OSSE
STUDENT HEARING OFFICE
2009 AUG 21 PM 2:28

<p>STUDENT¹, by and through guardian, Petitioner, us. Respondent.</p>	<p><u>HEARING OFFICER'S DETERMINATION</u></p> <p>Counsel for Petitioner/Guardian: Roberta Gambale, Esq.</p> <p>Counsel for Tiffany R. Winters, Esq.</p> <p><u>Impartial Hearing Officer</u> H. St. Clair, Esq.</p>
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¹ Identifying personal information is attached to this decision as Appendix A and must be detached prior to public distribution.

BACKGROUND

A Hearing Officer's Determination/Decision (HOD) was issued in this matter April 9, 2009 wherein

was ordered to complete a clinical psychological evaluation and occupational therapy assessment of the student; further, was ordered to convene an MDT/IEP/Placement meeting for the student within 15 school/business days of completion of the said evaluation and assessment. The required meeting convened on April 28, 2009; the MDT reviewed the completed evaluation and assessment and ratified the March 18, 2009 IEP. The Guardian disagreed with the April 28, 2009 MDT decisions.

On May 19, 2009, Counsel for the Guardian filed the herein Complaint with the District of Columbia Office of the State Superintendent of Education (OSSE), Student Hearing Office (SHO), complaining its own LEA, denied the student a Free Appropriate Public Education (FAPE). Specifically, Counsel for the Guardian complained failed to provide an appropriate IEP and educational placement for the student. For relief, a private placement at the was requested.

A Pre-hearing Conference Order was issued in this matter on June 22, 2009. The Order determined the ISSUES as setout below.

A hearing in this matter was scheduled for 9:00 A.M., Thursday, July 23, 2009 at the Student Hearing Office, OSSE, 1150 Fifth Street, SE - First Floor, Hearing Room 4B, Washington, D.C. 20003. The hearing convened as scheduled but could not conclude in the time requested by Counsel for the Guardian. The hearing was continued to 9:00 A.M., Wednesday, August 12, 2009 Hearing Room 4B. The continuance was attributed to the Guardian.

While DCPS was not named as a Respondent in this matter, the first relief demanded in the herein Complaint was against DCPS. DCPS appeared and requested a Dismissal as to DCPS. Without objection, DCPS was dismissed as a party.

JURISDICTION

The hearing convened under Public Law 108-446, The Individuals with Disabilities Education Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300, and Title V of the District of Columbia Municipal Regulations.

- ISSUES:**
- 1. Were the March 18th and/or April 28, 2009 IEPs inappropriate because they did not disability code the student Emotionally Disturbed (ED)?**
 - 2. Were the March 18th and/or April 28, 2009 IEPs inappropriate because they did not indicate counseling services for the student?**

3. Were the March 18th and/or April 28, 2009 IEPs inappropriate because they did not indicate ESY Services for the student?
4. Was _____ an appropriate educational placement for the student?

FINDINGS of FACT

By facsimile dated July 16, 2009, the Guardian disclosed 6 witnesses and 32 documents.

By facsimile dated July 15, 2009, _____ disclosed 6 witnesses and 16 documents.

Counsel for _____ objected to Guardian Document No 29, an un-redacted email between counsel that mentioned the names of other disabled student; Guardian Document No 29 was struck from the record.

Counsel for _____ also objected to Guardian Documents Nos 5, 6, 13, 14, 15, 18, 19, 20, 21, 22, 23, 24 & 25, each a document considered by the March 18, 2009 MDT and relating to a matter before the April 28, 2009 MDT/IEP/Placement meeting arguing collateral estoppel; that issues litigated between the parties and disposed in the April 9, 2009 HOD should not again be litigated. Counsel for _____ stated the April 9, 2009 HOD disposed of issues up to and surrounding the March 18, 2009 IEP. The hearing officer OVERRULED the objection to Guardian Documents Nos 18, 19 & 20 current evaluations of the student. The objection was SUSTAINED to Guardian Documents Nos 5, 6, 13, 14, 15, 21, 22, 23, 24 & 25. Counsel for the Guardian cited error.

Referred to the April 9, 2009 HOD,² the hearing officer noted that the complaint in that proceeding was filed January 13, 2009; that the issues in the previous complaint, the January 13, 2009 complaint, were "1, did _____ fail to make FAPE available to the student timely and 2, did _____ inappropriately fail to complete a timely clinical [psychological] evaluation of the student?" The original hearing on the January 13, 2009 Complaint was set for March 16, 2009 but, on the joint motion of the parties, was continued to March 30, 2009; the March 18, 2009 IEP was completed in the interim and, though not raised in the January 13, 2009 Complaint, was litigated at the March 30, 2009 hearing.

Findings of Fact Nos 4, 5, 6 & 7 in the April 9, 2009 HOD read:

"4. At the MDT meeting for the student on February 19, 2009, the MDT reviewed the December 23, 2008 Psycho-educational Evaluation, the January 12, 2009 Speech/ Language Evaluation and the January 22, 2009

² Guardian Document No 26

Social History and determined the student eligible for special education services as Learning Disabled; during the meeting, the student was referred for a clinical psychological evaluation and an occupational therapy assessment. At the conclusion of February 19, 200[9] MDT meeting and on the same day, attempted to convene an IEP meeting to complete an IEP for the student but the Guardian requested time to consider the events to date; the IEP meeting was postponed.

5. On the day of the hearing, neither the clinical psychological evaluation nor the occupational therapy assessment had been completed.

6. On March 18, 2008, reconvened the MDT and completed an IEP that disability coded the student Learning Disabled with 18 hours of special education services in a 40% Out of General Education Setting. As the evaluation had not been completed, the IEP was inappropriate.”

7. The Guardian . . . was concerned about the student’s social/emotional being and thought it was [a]ffecting the student’s academic performance and in-school behavior. During the February 19, 2009 MDT meeting, the Guardian requested time to consider matters before completion of an IEP for the student; she attended the March 18, 2009 MDT/IEP meeting and signed approval of the March 18, 2009 IEP.

In the April 9, 2009 HOD, the March 18, 2009 IEP was determined inappropriate because it was completed prior to the completion of the evaluation of the student for special education services; no other inappropriateness in the IEP was established.

The central issue herein was whether the March 18, 2009 IEP remained appropriate in light of the March 25, 2009 Clinical Evaluation and the March 9, 2009 Occupational Therapy Evaluation.

The remaining documents were admitted into the record and are referenced/footnoted herein where relevant.

In consideration of the testimony, documents and arguments herein, the hearing officer found the following facts:

1. convened the MDT on April 28, 2009 and reviewed the March 25, 2009 Clinical Evaluation³ and the March 9, 2009 Occupational Therapy Evaluation.⁴ The MDT determined the evaluations did not warrant a change in the March 18, 2009 IEP; the Educational Advocate and Guardian attended the April 28, 2009 meeting and disagreed with the MDT. No IEP for the student was completed on April 28, 2009.

2. The Educational Advocate attended the February 19, 2009 eligibility

³ Doc. No 4

⁴ Doc. No 5

meeting and the March 18, 2009 and April 28, 2009 MDT/IEP meetings and, at the April 28, 2009 MDT/IEP meeting, requested that the student be disability coded Emotionally Disturbed (ED) in addition to Learning Disabled; that the proposed ED coding was supported by the Anxiety Mental Disorder the student was diagnosed with in the March 25, 2009 Clinical Evaluation and supported by the student's in school behavior and academic performance. The Advocate agreed with the diagnosis in the evaluation but disagreed with the recommendations in the evaluation. The Advocate thought the student was too anxious to please her teachers, too anxious to perform well academically and too anxious about the fact that she was assigned class work different from that assigned to her classmates. While the student received counseling outside the school environment, the Advocate thought, based on information provided by the Guardian, that should provide school based counseling in addition. During the April 28, 2009 MDT/IEP meeting, the Advocate requested a full-time program because of the student's then academic failure. The Advocate referred to the April 28, 2009 MDT meeting notes⁵ where the student's progress was noted; that it was not enough to merit promotion to the 5th grade at the end of the 2008-09 School Year. The Advocate opined that progress should mean promotion to the next grade.⁶

3. The Advocate pointed out that while the April 28, 2009 MDT/IEP meeting predicted the student's retention, the team did not determine the student's eligibility for ESY Services.⁷ did provided ESY Services to the student for the summer of 2009, though not as a result of a decision by the MDT.

4. The student's End of Year Report Card showed that she failed the 4th Grade, but not as severely as she was failing at mid-year. While the student failed the 3rd quarter in Math Procedures by 75%, she failed the 4th quarter by 67% and the subject by 60%. The same pattern of achievement was shown for Reading and Math Problem Solving; the student passed Writing. The student made meaningful progress during the 4th grade though not enough to pass to the 5th grade.⁸

5. While ESY Services for the student were not discussed at the April 28, 2009 MDT/IEP meeting, the copy of the March 18, 2009 IEP that the Guardian signed indicated ESY services.⁹ The Guardian signed

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⁵ APAPCS Doc. No 8

⁶ -testimony of the Educational Advocate

⁷ *ibid*

⁸ Doc. No 16

⁹ Doc. No 10

the IEP Attachment-D, ESY Services on June 25, 2009.¹⁰ While there may have been procedural shortcomings in the scheduling of ESY Services, no deprivation of educational benefit was established.

6. The Guardian who was also the student's great grandmother, described the emotional turmoil between the student and student's mother and father and how she thought it affected the student's in school performance; that because the student was failing subjects and did not want to attend APAPCS, she had problems persuading the student to attend school every day. The Guardian thought _____ did not adequately meet the student's needs; that _____ placed the student to the 4th grade in August 2008 although the student was not then performing at the 4th grade level. The Guardian said that _____ informed her that the student would be at the 5th grade level at the end of the 2008-09 School Year. The Guardian described how student's frustration and anxiety with school work manifested itself at home and thought the student should be placed in a full-time program; the Guardian thought the student should be in a school where all the students were on the same level. The Guardian could not recall at which meeting but did recall discussing ESY Services for the student; that she was against ESY Services . . . "because it was not going to do anything for [the student]." The Guardian acknowledged her signature on June 25, 2009 IEP Attachment-D, ESY Services form and said that the student was attending 2009 ESY Services though not regularly. The student received 1 hour per month of counseling from a private psychiatrist; the Guardian thought the outside counseling would address the home situation and that counseling in the school would address the in-school situation. The Guardian observed the student at _____ once and could not remember when; the Guardian's information came from the student.¹¹

7. The Head of School, _____ testified that she was familiar with the student and attended the April 28, 2009 MDT/IEP meeting; that the meeting was first scheduled for and assembled at 11:00 A.M., April 10, 2009 only to learn at 11:30 A.M. that the Guardian could not attend. The April 28, 2009 MDT/IEP meeting reviewed the March 25, 2009 Clinical Evaluation and the March 9, 2009 Occupational Therapy Evaluation and concluded the evaluations did not warrant a change in the special education services indicated on the student's March 18, 2009 IEP; that she taught the student and did not see any manifestation of anxiety by the student at school. The student did very well in the academy's good behavior or "Dream Dollars" program; the

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¹⁰ APAPCS Doc. No 12; the form indicated that ESY Services were to begin July 13, 2009.

¹¹ -testimony of the Guardian

student had not been disciplined by APAPCS. During classes, the student received “differentiated instruction” meaning that instruction and class work given to the student was different from that given to classmates but was according to the student’s IEP; that the student entered the 4th grade for the 2008-09 School Year, then performing at the 2nd grade level. The student made good progress during school year but was retained because 4th grade material had not been sufficiently mastered; other students at APAPCS were retained for the same reason. The Head of School testified that the Guardian never informed her of the student’s anxiety at home about school. The Head of School thought the student’s March 18, 2009 IEP was appropriate and that APAPCS could implement the IEP; that APAPCS was an appropriate educational placement for the student.¹²

8. The Director of Academic Achievement, APAPCS, testified via telephone that she was familiar with the student and that the student was enrolled in ESY Services after discussion with and the approval of the Guardian; the MDT was not consulted. The shortcomings in the arrangement of ESY Services for the student did not result in a deprivation of educational benefit nor did they substantially impede the Guardian’s opportunity to participate in FAPE decision-making.¹³

9. The Clinical Psychologist that completed the March 25, 2009 Clinical Evaluation testified via telephone that she also completed the December 5, 2008 Psycho-educational Evaluation¹⁴ and attended the March 18, 2009 MDT/IEP meeting during which the March 18, 2009 IEP was completed; that she participated in the April 28, 2009 MDT/IEP meeting via telephone. For the evaluation, the Psychologist interviewed the student, APAPCS staff and reviewed notes from the interview with the Guardian for the December 5, 2008 Psycho-educational Evaluation; that she diagnosed the student with Anxiety, NOS, but did not observe or note clinically significant manifestations of the anxiety in the school setting or impact on academic performance. The student was anxious about her parents and her home life but did not exhibit the symptoms set out in the definition of Emotional Disturbance. The Psychologist testified that the student had a Learning Disability and did not recommend school based counseling because she did not note any impact of the student’s anxiety on her school performance.¹⁵

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¹² -testimony of Head of School-testimony of the Psychologist.

¹³ -testimony of the Director of Academic Achievement, APAPCS

¹⁴ Guardian Doc. No 18

¹⁵ -testimony of the Clinical Psychologist

10. The Educational Director for the proposed private placement testified via telephone; the testimony is not recounted here.

CONCLUSIONS of LAW

DCPS is required to make FAPE available to all children with disabilities within the jurisdiction of the District of Columbia. *IDEIA 2004* requires DCPS to locate, identify, evaluate and determine eligibility for special education services every child in the District of Columbia, ages 3 thru 21, who maybe in need of special education services, and for every child of a District of Columbia resident or resident child who is eligible for special education services, DCPS must make FAPE available.

The hearing in this matter was convened under *IDEIA 2004* implementing regulation 34 CFR 300.507(a).

District of Columbia Municipal Regulation 5 DCMR 3030.3 placed the burden of proof upon the petitioner/parent in this matter, and that burden was by preponderance.

ONE & TWO

The April 28, 2009 MDT decision not to disability code the student ED was not a Denial of FAPE, nor was the decision not to recommend counseling.

As ordered in the April 9, 2009 HOD, APAPCS completed the March 25, 2009 Clinical Evaluation and the March 9, 2009 Occupational Therapy Evaluation and reconvened the MDT/IEP to review them on April 28, 2009. After the review, the MDT decided the March 18, 2009 IEP was appropriate as written on March 18, 2009 and did not alter the IEP. The Guardian and her Advocate who attended the April 28, 2009 meeting thought the clinical evaluation and the student's in school performance supported both the ED disability coding and in school counseling. The hearing officer was not persuaded.

Regulation 34CFR 300.321(a)(5) requires an IEP team member "... who can interpret the instructional implications of evaluation results" The evaluating Psychologist diagnosed the student with Anxiety but stated in the evaluation that the student's anxiety had no impact on the student's in school performance; the Psychologist also participated via telephone in the April 28, 2009 MDT/IEP meeting. At the hearing, the Psychologist testified that the student showed none of the characteristics of the ED disability coding listed at 34 CFR 300.8(c)(4)(i); that the student coped with her anxiety while at school. It is mentioned at this point that many students who want to be good students are somewhat anxious about school. The Guardian testified that the student was very much affected by her anxiety about school while at home, but the Guardian only visited the student at school once and could not remember when. The Head of School testified that the Guardian never mentioned the student's behavior about school while at home.

The student's educational performance not being adversely affected to the degree to disability code the student ED, counseling for the diagnosed anxiety was not recommended as a related service.

The evaluating Psychologist and the Educational Advocate looked at the same student, looked at the same evaluation and honestly disagreed. The hearing officer could not find an abuse of discretion on the part of the April 28, 2009 MDT.

THREE

The shortcomings in the delivery of ESY Services to the student did not amount to a Denial of FAPE.

The March 18, 2009 IEP disclosed by the Guardian did not have ESY Services marked; nor did it have the Guardian's signature. The March 18, 2009 IEP disclosed by APAPCS had ESY Services marked for delivery to the student and the Guardian's signature. Moreover, the Guardian remembered discussing ESY Services and did not want the services. True, the MDT did not recommend the ESY services for the student, but the Director of Academic Achievement at APAPCS discussed the services with the Guardian who agreed to ESY Services for the student and signed the form on June 25, 2009 for the delivery of services to start on July 13, 2009. ESY Services for the summer of 2009 were delivered to the student when the student appeared for the services. On this issue, the Guardian did not meet the standard set out at 34 CFR 300.513(a)(2). As a result of the admitted shortcomings, the student suffered no deprivation to education benefit and the Guardian's opportunity to participate in FAPE making decisions was not impeded; nor was the student's right to a FAPE impeded.

FOUR

The inappropriateness of APAPCS was not established.

The Guardian argued that APAPCS was inappropriate for the student because the student did not make progress at APAPCS. Again, the hearing officer was not persuaded.

The Advocate opined that progress meant or should have meant that the student should have been provided the special education services that would have assured the student's promotion to the 5th grade. *IDEIA 2004* does not obligate an LEA to assure that much.

The March 18, 2009 IEP met the *Rowley* standard; it was reasonable and individually calculated to provide educational benefit to the student. *Board of Education of Hendrick Hudson Central School District, West Chester County, et al. vs. Rowley*, 458 U.S. 176 (1982).

When the student enrolled at APAPCS, the parties knew that the student was at least one school year behind academically. The student was identified with a Learning Disability in February 2009, halfway through the school year, and began receiving

special education services in March 2009. In April 2009, the next month, the MDT met to consider the newly completed evaluations and noted that the student was failing; the IEP was not revised. Had this meeting occurred in April 2010, the student's failing grades would have presented a different circumstance for the MDT to review. The student was retained in the 4th grade at the end of the 2008-09 School Year, but did make progress, albeit not as the Advocate expected. True, the student did not pass all the courses but the final report card showed that the student did not fail at the end of the school year as badly as the at mid-year; the rate of failure had been significantly slowed.

The March 18, 2009 IEP was the initial IEP for the student, and on the date hereof was about 5 months old. Although a parent can at any time request an MDT meeting, at regulation 34 CFR 300.324 an LEA is required to review every IEP at least once a year and to revise the IEP "... to address any lack of expected progress toward annual goals . . ." Given the time the March 18, 2009 IEP was implemented, APAPCS did not deny the student FAPE on April 28, 2009 when the IEP was not revised; it was too early to make an assessment of the student's progress.

SUMMARY of the DECISION

The Guardian did not meet her burden in this matter.

In consideration of the foregoing, the hearing officer made the following

ORDER

WITH PREJUDICE, the herein
Complaint is DISMISSED.

Dated this *21th* day of *August*, 2009

H. St. Clair

H. St. Clair, Esq., Hearing Officer

This is THE FINAL ADMINISTRATIVE DECISION. Appeal can be made to a court of competent jurisdiction within ninety (90) days of the issue date of this decision.