

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

AUG 05 2010

Parent or Guardian, on behalf of
Student, ¹

Petitioner,

Date Issued: August 5, 2010

Hearing Officer: Jane Dolkart

V

Case No:

The District of Columbia
Public Schools

Hearing Date: July 27, 2010

Room: 4B

Respondent.

HEARING OFFICER DECISION

Counsel for Petitioner:

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¹ Personal identification information is provided in Appendix A.

III. ISSUES

Has DCPS denied the student FAPE by

1. failing timely to review the comprehensive psychological evaluation and to make appropriate education decisions, including revision of the student's IEP, to reflect the recommendations in the evaluation, in particular the recommendation that the student would benefit from Lindamood-Bell programming and that he be classified as multiply disabled (MD) with a learning disability (LD) as well as S/L impaired?
2. failing to revise the student's IEP to reflect the recommendations in the comprehensive psychological evaluation, in particular the recommendation that the student would benefit from _____ programming and that he be classified as multiply disabled (MD) with a learning disability (LD) as well as S/L impaired ?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated July 20, 2010, containing a list of witnesses with attachments P 1-22. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's mother and the student's educational advocate..

DCPS submitted a five day disclosure letter dated July 20, 2010, containing a list of witnesses with attachments R 1-4. The disclosure was admitted in its entirety. DCPS called as a witness the student's special education teacher,

V. FINDINGS OF FACT

1. This is a _____ year old student presently attending _____ at DCPS expense (he will be attending _____ in the fall). The student is presently eligible for special education and is classified as Speech and Language Impaired (S/L). _____ is a full time, private, special education school. The student's most recent IEP, dated May 28, 2010, provides for 24 hours of specialized instruction, 1.5 hours of behavioral services, 1 hour of S/L, and 1 hour of Occupational Therapy (OT), per week. (P 10)
2. The parties stipulate to the following facts.
 - a. The student's independent psychological evaluation was sent to DCPS on October 1, 2009.
 - b. An MDT meeting was held on July 29, 2009, at which time the student's psychological evaluation had not been completed.

c. An MDT meeting was held on May 28, 2010, at which the student's psychological evaluation was not reviewed because neither DCPS nor had a copy of the evaluation.

d. A resolution/IEP meeting was scheduled for July 22, 2010. Petitioner showed up for the meeting. The meeting did not occur.

e. DCPS admits that the student's evaluation has not been reviewed and does need to be reviewed.

f. The student's current IEP is dated May 28, 2010.

3. The student began attending some time during the 2008-2009sy as a result of a settlement of a due process complaint. (P 5, representation of Petitioner's counsel, Testimony of student's teacher)

4. On April 7, 2009, a Student Evaluation Plan was prepared for the student in which Petitioner was authorized to obtain independently a comprehensive psychological evaluation, a S/L evaluation, and an OT evaluation. (P 3)

5. The OT evaluation was completed on May 21, 2009, and the S/L evaluation was completed on June 23, 2009. The S/L evaluation was reviewed on July 29, 2009, and the OT evaluation was reviewed on May 28, 2010. (P 4, 6, 7, 11)

7. Following the May 28, 2010 MDT meeting at which neither DCPS nor was prepared to review the student's psychological evaluation, a new meeting was scheduled for June 15, 2010, in order to review the evaluation. Petitioner's educational advocate arrived at the June 15, 2010, meeting and found that the meeting had not been calendared and no one from DCPS or was prepared to hold the meeting. (P 12, 14, Testimony of educational advocate)

8. The psychological evaluation was conducted by Margaret Mallory, PhD & Associates. The evaluation was requested to assess the student's present level of cognitive, academic, and social-emotional functioning. It was a thorough evaluation making use of numerous data sources and with a 19 page report. The Hearing Officer finds the evaluation very credible and has given great weight to its findings and recommendations.

Background information for the evaluation was obtained from a variety of sources including two S/L evaluations conducted in April 2009, a clinical update conducted by a social worker at in April 2009, an October 2008, Wide Range Achievement Test, Fourth Edition (WRAT-4), and a January 2007, neuropsychological evaluation which incorporated a psycho-educational evaluation performed in 2006. (P 9)

The actual evaluation included a review of the student's records, a clinical interview with the student, the Kaufman Assessment Battery for Children – Second Edition (KABC-II), the Comprehensive Test of Nonverbal Intelligence (C-TONI), the Woodcock-Johnson

Tests of Achievement (WJ-III), Reynolds Child Depression Scale (RCDS), and the Behavior Assessment System for Children, Second Edition (BASC-2) which includes a parent rating scale completed by the student's mother and a teacher rating scale completed by the student's current teacher and by his former teacher. (P9)

9. The January 2007, neuropsychological evaluation referenced a psycho-educational evaluation performed in 2006 by a Dr. Augustin in which the student's performance on the Wechsler Intelligence Scale for Children (WISC-IV) revealed general cognitive ability in the Low Extreme range (FSIQ=60). Dr. Augustin also reportedly completed the WJ-III Tests of Achievement in which the student's performance in all academic areas assessed ranged from Borderline to Extremely Low. The record does not contain any cognitive testing after 2006 until Dr. Mallory's 2009 evaluation. (P 9)

10. To test the student's cognitive processes, Dr. Mallory administered the Kaufman Assessment Battery for Children – Second Edition (KABC-II). This is a somewhat different test from the WISC-IV in that it focuses on the processes needed for problem-solving rather than on their content. In using this test, measures of verbal ability and factual knowledge are eliminated from the global cognitive score. It is, in this sense, a good test to measure pure cognitive ability in children with learning disabilities. The KABC-II provides scores in five different indexes plus the Mental Processing Index which integrates the other indexes. On the Sequential Index, the student's performance fell in the below average range. On the Simultaneous Index, the student performed in the average range on two subtests and the below average range on one subtest. On the Learning Index, the student performed in the average range. On the Planning Index, the student performed in the average range on one subtest, the upper limit of the below average range in one subtest, and the below average range in the third subtest. On the Knowledge Index, which measures content more than process, the student performed in the lower extreme range on all three subtests. On the Mental Processing index the student scored toward the upper limit of the below average range. The report notes that this score should not be interpreted as an accurate summary of the student's general cognitive ability due to the significant discrepancy between his Index scores. (P 9).

11. Dr. Mallory also administered the C-TONI to measure the student's nonverbal intelligence. The C-TONI is a battery of six subtests that measure different, interrelated abilities that measure nonverbal intelligence. On the Pictorial Analogies and Geometric Analogies subtests the student received scores in the below average range on both subtests. On the Pictorial Categories and Geometric Categories subtests, the student received scores in the above average range and the upper limit of the average range. In the Pictorial Sequences and Geometric Sequences subtests, the student received a score in the below average range and a score in the average range. On the Pictorial Nonverbal Intelligence Quotient (PNIQ), the student's score fell in the average range. On the Geometric Nonverbal Intelligence Quotient (GNIQ), the student received a score in the average range. On the Nonverbal Intelligence Quotient (NIQ) the student's score fell in the average range. (P 9)

12. The student's cognitive abilities as measured by Dr. Mallory are strikingly higher than his cognitive abilities as measured by Dr. Augustin in 2006, when the student was found to have cognitive abilities in the low extreme range. (P 9)

13. The student's achievement was determined by administering the WJ-III. The results are in sharp contrast to the student's cognitive abilities. The student's score on the Broad Reading cluster was in the exceptionally low range at the ≤ 0.1 percentile. His Broad Written Language score fell at the lower limit of the Very Low Range, at the 0.2 percentile. His Broad Math score fell towards the upper limit of the Very Low range at the 1.0 percentile.

On the Academic Skills Cluster, the student's score fell in the Very Low range, at the 0.2 percentile. His score on the Academic Fluency Cluster fell at the lower limit of the Very Low range, at the 0.3 percentile. His score on the Academic Applications Cluster fell in the Very Low range, at the 0.3 percentile.

All of the student's achievement scores fell between the 6.1 – 7.9 age equivalents, except his reading fluency score which fell at the ≤ 5.10 age equivalent. All of these scores are well below age expected levels and well below expectation given the student's cognitive ability. Dr. Mallory concluded that "...there is a profound disconnect between his ability to make sense of and learn information and his ability to apply the information."

(P 9)

14. Dr. Mallory used several tests to determine the student's social-emotional functioning. Her summary stated that

[the student] is a personable youngster who appears to have made considerable strides in terms of his level of attention and distractibility in the classroom. It appears that he is generally more focused and can be more easily redirected when off-task. While [the student's] self-confidence and level of sociability with peers and adults has improved...it appears that issues with self-control and weak social problem solving continue to compromise his interpersonal relations.

(P 9)

15. Dr. Mallory diagnosed the student with Mixed Receptive-Expressive Language Disorder, ADHD, Combined Type, Reading Disorder, Mathematics Disorder, and Disorder of Written Expression. The report noted that given the interconnectedness of the student's language and learning issues, he is most appropriately classified as a student with Multiple Disabilities (MD), including S/L impaired and a learning disability. (P 9)

16. The report's primary programming recommendation was that "To assist [the student] with language processing and reading comprehension, [the student] might benefit from programming. (P 9)

17. Additionally, the report lists a number of general instructional strategies to use with the student. No evidence was presented suggesting that these strategies are not being used in teaching the student. Further, Petitioner does not challenge the IEP's provisions for specialized services in S/L, OT, or behavioral management. (P 9)

18. The student has made some academic progress during the period from October 2008 to May 2010. The student's July 29, 2009, IEP states that the student's present level of performance in calculation based on an October 2008, WRAT-4 was at the 1.7 grade equivalent (GE). His performance in reading was at the K.2 level, and his level of performance in written expression was stated to be "at a low level of written expression. [The student] can create simple sentences with minor misspellings. (P 5, R 2, 3)

On the student's May 28, 2010, IEP it is noted that according to his May 2010, Key Math Assessment, the student's math functioning is well below average with a GE of 2.5. The student's performance on the Woodcock Reading Mastery Tests, taken in May 2010, places his reading functioning at the mid-first grade level. The comment concerning the student's present level of performance in written expression is identical to the comment in the July 2009, IEP. (P 10)

The student's 2009-2010sy teacher confirmed that the student functions at a very low level. She was a credible witness who is very familiar with the student's capabilities, and her testimony was consistent with the written documentation. She placed the student's math functioning at the mid-second grade level and his reading at the mid-first grade level, consistent with the levels reported on his May 2010 IEP. She indicated that the student's phonics is very low, his spelling is very low, and his comprehension is weak, even if he is listening to someone else read. At the beginning of the school year, his teacher noted that the student was not able to take a three letter word and isolate sounds and blend them together. He could do this at the end of the school year, although haltingly. (Testimony of student's teacher)

Thus, the student has possibly progressed as much as 10 months in math and as much as 1.3 years in reading over the past 1.8 years.² He does not appear to have progressed in written expression.

19. had a reading specialist for the first time during the 2009-2010 school year. However, her primary job has been to implement a school-wide reading program. She has seen the student 1 time per month to assess his progress. (Testimony of educational advocate)

VI. DISCUSSION AND CONCLUSIONS OF LAW

² Different tests were administered to the student in 2008 and 2010. Therefore it is impossible to make a direct comparison in terms of months of progress. However, it can be stated that in general the student has progressed.

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees “all children with disabilities” “a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

Special education and related services that – (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the State educational agency..., (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEAs guarantee of FAPE “is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a “basic floor of opportunity” for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10 (3rd Cir. 1988).

School districts must develop comprehensive plans for meeting the special education needs of disabled students. *See*, 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include “a statement of the child’s present levels of educational performance, ... a statement of measurable annual goals, [and] a statement of the special education and related services ... to be provided to the child....” 20 U.S.C. ¶ 1414(d)(1)(A).

Pursuant to IDEA § 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).

A. Failure Timely to Review the Comprehensive Psychological Evaluation

The evidence is clear that DCPS failed to review the comprehensive psychological evaluation within a reasonable time. The evaluation was provided to DCPS on October 1, 2009.³ It still has not been reviewed, 10 months and an entire school year later. DCPS scheduled three different meetings to attempt to review the evaluation. Petitioner timely appeared at all three meetings. DCPS was unprepared at the first meeting and failed to show up or to have necessary personnel at the other two meetings. The evaluation should have been reviewed before the winter/Christmas break. The fault for failing to review the evaluation falls squarely on DCPS.

³ Authorization to conduct the evaluation was provided to Petitioner in April 2009. Petitioner did not provide the evaluation to DCPS until six months later.

However, not every failure to meet the deadline for review of evaluations constitutes harm and a denial of FAPE. The failure timely to review the evaluation is a procedural violation. D.C. law has clearly held that a procedural violation of the IDEA is not a per se denial of FAPE. In *Lesesne v. District of Columbia*, 447 F.3d 828 (D.C. Cir. 2006), the court held that a delay in creating an IEP for a student was a procedural violation. The Court further held that an IDEA claim 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.”); *M.M. ex rel. D.M. v. Sch. Dist.*, 303 F.3d 523, 533-34 (4th Cir.2002) (“If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations.”); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir.1990) (en banc) (“[P]rocedural flaws do not automatically render an IEP legally defective. Before an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of education benefits.” (citations omitted)). *Id.* at 834.

No court has provided a bright line between what is a procedural violation and what is a substantive violation. There likely is no such bright line. Most IDEA claims involve both a failure timely to do something required under the IDEA, as well as a delay in making substantive determinations about the child's educational program. A Trier of fact must look at the totality of circumstances in determining if a timeliness violation rises to the level of a substantive violation. Common sense suggests that completing an evaluation five days late is a procedural violation. Likewise, failing to update a student's IEP for three years undoubtedly rises to the level of a substantive violation. Thus, the legal and factual inquiry must focus on whether 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. IDEA § 1415 (f)(3)(E)(ii). The burden of proof to show that the student has been harmed rests with Petitioner. *Schaffer et al. v. Weast*, 546 U.S. 49 (2005).

B. Has the Procedural Violation impeded the child's right to FAPE or caused the child a deprivation of educational benefits?

DCPS' response to this due process complaint has been that, even though an evaluation review meeting was not held, the information and recommendations in the evaluation were incorporated into the student's IEP. In substantial ways this assertion appears to be true. However, there are two crucial aspects of the evaluation that were not considered in developing the student's May 2010, IEP.

First, there is a vast difference between the student's believed cognitive abilities based on the 2006 and 2010 psychological evaluations. The conclusion concerning the student's cognitive abilities in 2006 was that they were in the lower extreme range. The cognitive abilities were consistent with the student's academic achievement. Thus, expectations for the student's academic performance were undoubtedly low. In the 2010 evaluation, the student's cognitive abilities were found to be in the below average – to average range, a considerably higher cognitive level. The student's academic achievement scores continued to fall in the very low range. As Dr. Mallory concluded in her report "...there is a profound disconnect between his ability to make sense of and learn information and his ability to apply the information." It becomes clear in the 2010 evaluation that the student's low achievement is based on his learning and speech/language disabilities, not on a low cognitive ability to learn.

Second, the May 2010 IEP did not consider providing educational programming. The company is a nationally recognized leader in providing intensive reading and math programming for students with learning based disabilities. conducts evaluations to determine the appropriate programming for the student. It then provides 1:1 intensive 4 hour per day individual teaching. It also trains other teachers to use some of its techniques and programs in a school-based environment.

It is highly likely that the student would benefit from the program. The question is whether the student has made sufficient progress without to constitute the provision of FAPE. The IDEA does not require that the public school provide the best education possible, However, Congress did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall v. Vance County Board of Education*, 774 F.2d 629, 636 (4th Cir. 1985). There is no bright line test for determining what constitutes *sufficient special education* or *meaningful progress*. The IDEA requires an IEP to confer a "meaningful educational benefit" gauged in relation to the potential of the child at issue. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004) (citing *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999)). The educational benefit must be more than *de minimis* or trivial educational benefit. *Deal*, 392 F.3d at 862 (citing *Polk*, 853 F.2d at 179-82 when stating, "Congress must have contemplated 'significant learning' in special education classrooms."). The determination of "meaningful benefit" requires "a student-by-student analysis that carefully considers the student's individual abilities." *Ridgewood*, 172 F.3d at 248. A court must "analyze the type and amount of learning of which a student is capable in order to determine how much of an educational benefit must be provided." *Kingwood*, 205 F.3d at 577-78 (quoting *Ridgewood*, 172 F.3d at 248). "Only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement. In conducting this inquiry, courts should heed the congressional admonishment not to set

unduly low expectations for disabled children.” *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 863 (6th Cir. 2004).

The student in this case is functionally illiterate as he enters the _____ grade. It is urgent that the student learn to read, write, and do math if he is to be a functioning member of his community. Time is extremely limited for the student to reach this goal. He arrived at _____ as a _____ year old who read at the K.2 level. In approximately 1.5 years, the student has progressed to the 1.5 GE level in reading. This is definite progress, but it is slow progress. The student continues to be at a very low level of literacy. If the student had the cognitive abilities suggested in his 2006 psychological evaluation, he might be considered to have made sufficient progress. However, new information obtained in October 2009, indicates that the student’s cognitive abilities are much stronger than previously believed. Given the student’s cognitive potential versus his low level of academic achievement, an intensive reading program is a necessary part of the student’s programming.. The student will continue to fall further and further behind in all of his other courses if he cannot learn to read.

DCPS failed to provide sufficient educational benefit to the student and has denied his parent from participating in the formulation of the student’s IEP. Had the student’s evaluation been timely reviewed his IEP should have contained a reading program similar to the _____ program for at least the second half of the 2009-2010 school year. Therefore, the student was denied a FAPE for the second half of the 2009-10 school year, and continuing. His May 2010 IEP should be revised to include an evaluation and appropriate programming at _____. The parties did not present any evidence from _____. Therefore, it is impossible for this Hearing Officer to determine what programming would be effective for this student. When a _____ Assessment has been completed and programming recommendations have been made, an MDT meeting is to be convened to determine what services will be provided to the student. The student could spend half his school day at _____ while he _____ completes the necessary program, or he could go to _____ on weekends or _____ after school, or a reading teacher trained in the _____ program can come to the student’s school to deliver services. This will be left up to the parties to determine.

VII. SUMMARY OF RULING

DCPS has denied the student FAPE by failing to review a comprehensive psychological evaluation sent to DCPS in October 2009. The October 2009 evaluation showed the student’s cognitive abilities to be far higher than determined in a 2006 evaluation. Further, the evaluation recommended that the student would benefit from Lindamood-Bell programming.

VIII. ORDER

It is hereby **ORDERED** that

1. The student shall obtain an assessment of the his reading, writing, and math abilities, along with recommendations concerning programming from _____ no later than 30 days from the issuance of this decision. The assessment shall be paid for by DCPS.

2. No later than 15 days following the delivery of the assessment to DCPS, DCPS shall convene an MDT meeting to review the student's comprehensive psychological evaluation and the _____ assessment, and to make decisions concerning the timing, place, and amount of _____ programming the student shall receive.

3. Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: August 5, 2010