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District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office
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Confidential

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>“DCPS”</p> <p>Respondent.</p> <p>Case</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: September 10, 2010</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Roberta Gambale 1220 L Street NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Tanya Chor, Esq. Assistant Attorney General District of Columbia DC Public Schools 1200 First Street, NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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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.

BACKGROUND:

Student or "the student" is age and attends a private full time special education school, hereinafter "School A". Petitioner alleges in the complaint that DCPS failed to timely review a clinical psychological evaluation of the student and thus failed to timely amend the student's IEP based on the evaluation. DCPS denies the student suffered any harm and/or was denied a FAPE.

A resolution meeting was held May 25, 2010, between Petitioner and DCPS and the matter was not resolved. The pre-hearing conference conducted between Petitioner and DCPS on August 5, 2010, resulted in a pre-hearing order issued on August 10, 2010. Petitioner's counsel filed a motion to continue which was granted by an order dated August 30, 2010.

The Due Process Hearing was convened September 10, 2010, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003, in Hearing Room 1. The hearing was held pursuant to the due process complaint submitted by counsel for the parent and student filed on June 28, 2010, alleging the issue(s) outlined below against DCPS. Petitioner asserts that as remedy for the alleged denials of a FAPE the student is due compensatory education specifically, DCPS funding of 20 hours of independent tutoring and DCPS funding of a week at a sports camp at cost of \$250.00.

ISSUE(S): ²

The issues adjudicated are: (1) Whether DCPS denied the student a FAPE by failing to timely provide a copy of the student's clinical psychological evaluation to the parent and/or failing to timely convene a meeting to review the clinical evaluation and amend the student's IEP as appropriate? (2) Whether DPCS denied the student a FAPE by failing to allow the multidisciplinary team ("MDT") that convened on June 9, 2010, to review the clinical evaluation? (3) If a denial of FAPE is found what compensatory education if any is the student due?

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.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 & 17 and DCPS Exhibits 1-22) which were admitted into the record.

FINDINGS OF FACT ³:

1. The student is _____ years old and resides in the District of Columbia with his parent(s), (hereinafter "Petitioner" or "Parent"). The student had been determined to be a child with a disability pursuant to IDEA and in need of special education and related services. The student currently attends School A, a private full time special education school. DCPS funds the student's attendance at School A. (Petitioner's Exhibit 1)
2. On May 18, 2009, a multidisciplinary team (MDT) meeting was held for the student at School A. The parent did not attend the meeting but was represented at the meeting by her educational advocate. The MDT concluded that the student's then current comprehensive psychological evaluation did not include measures to assess emotional functioning. The MDT prepared a student evaluation plan ("SEP") and agreed to conduct a clinical psychological evaluation to include projective measures. (DCPS Exhibit 17)
3. On July 22, 2009, the clinical psychological evaluation was conducted and the report prepared on July 29, 2009.⁴ School A contracted an independent evaluator to conduct the evaluation. The evaluator noted that the evaluation was requested because of the student's history of behavioral issues and social emotional concerns. The evaluation diagnosed the student with the following conditions: ADHD, Oppositional Defiant Disorder, Conduct Disorder, with Childhood Onset. (DCPS Exhibit 9 & 12)
4. The evaluator concluded the student appears to be a student who qualifies for continued special education services as a multiply disabled learning Disabled /other health Impaired student. The evaluator recommended the student continue school-based counseling and that the MDT discuss and consider the appropriateness of alternative expressive therapies such as art therapy due to the student's expressive language limitations. Targeted social skills training may also prove beneficial for him particularly those which focus on improving communication and peer interactions. The evaluator also recommended an occupational therapy conducted to evaluate/address the student's "unusual pencil grip."

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer may only one party's exhibit.

⁴ The evaluation included the following assessments: BASC 2 TRS-C) Behavioral Observations Bender Gestalt II, Corp Subtest, Children's; Depression Inventory Children's Sentence Completion Test, Clinical Interview, Interview with student's then current teacher, on 7/22/09, Piers Harris Self Concept Scale, Second Edition, Review of Records Rorschach Inkblot Technique, Telephone interview with guardian/maternal great-grandmother on July 8, 2009, Thematic Apperception Test, Three Wishes.

Psychopharmacological treatment should be continued to address the student's ADHD symptoms. (DCPS Exhibits 9)

5. On June 9, 2010, a MDT meeting was convened at School A to review the student's individualized educational program ("IEP"). At this meeting the July 2009 clinical evaluation was provided to the parent for the first time. A psychologist from School A was present and willing to review the evaluation for the team members. However, because DCPS also had just received the evaluation from School A the DCPS representative insisted that review of the evaluation be delayed so that a DCPS psychologist could first review the evaluation and participate in the IEP meeting. testimony, DCPS Exhibit 12)
6. The student's IEP meeting was reconvened on July 7, 2010. There was DCPS psychologist present and the team reviewed the clinical psychological evaluation as well as the student's comprehensive psychological evaluation from May 30, 2008. The parent participated in the meeting by telephone and her educational advocate was present. DCPS psychologist, Dr. Sonia Pilot attended including the student's co teacher, the DCPS representative and the School A psychologist. testimony, Petitioner's Exhibit 4, DCPS Exhibit 10)
7. As a result of the assessments and recommendations in the clinical psychological evaluation the team at the July 7, 2010, meeting amended the student's IEP to change his disability classification to include the additional classification of Other Health Impairment ("OHI") for the student's condition of Attention Deficit Hyperactivity Disorder ("ADHD"). There was also a change in the student's counseling to incorporate art therapy and a recommended and updated behavior plan. An occupational therapy ("OT") evaluation was also recommended by the clinical psychological evaluation and the team agreed to conduct the OT evaluation. testimony, Petitioner's Exhibit 4, DCPS Exhibit 10)
8. During the July 7, 2010, meeting the team discussed the student's behavioral difficulties including aggression and physical harm to other students and the fact that the student had 26 absences and had been sent to the school Behavioral Crisis Center ("BCC") 127 BCC times during the school year. testimony, DCPS Exhibit 10)
9. The DCPS representative requested that the educational advocate present DCPS with a compensatory education proposal for the evaluation review delay. The educational advocate prepared a compensatory education plan and presented it at the hearing. The advocate proposed DCPS fund a one week basketball camp to further assist the student to in taking ownership of consequences for his behaviors that might have been better addressed had his behavior plan been modified earlier as a result of an earlier review of the clinical evaluation. Similarly, the advocate requested the student be awarded twenty (20) hours of independent tutoring for the time the student missed from academic instruction because of his behavioral difficulties and being sent so frequently to the BCC. The advocate reasoned that had the modification in the student's services been made earlier with an earlier review of the clinical evaluation the student would have not missed that level of instruction. testimony, Petitioner's Exhibit 16)

10. DCPS is responsible for conducting evaluations of its students who attend School A. The evaluations are provided to a School A staff member when they are completed. The DCPS representatives assigned to School A have complete access to the student's records maintained by the school including evaluations. (testimony)
11. The DCPS psychologist participated in the student's July 7, 2010, meeting and reviewed for the team the student's 2009 clinical psychological evaluation. The student had been diagnosed with ADHD prior to the 2009 clinical psychological evaluation. However, the student's IEP social and emotional goals and therapy were amended as a result of the review of his evaluations at both the June 9, 2010, and the July 7, 2010, IEP meeting. The student had apparently made some academic progress in the past year because the student had spent so much time out of the classroom due to his behavior that modifications in his program were necessary. (Dr. Pilot'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.⁵ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). 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.

Issue 1: Whether DCPS denied the student a FAPE by failing to timely provide a copy of the student's clinical psychological evaluation to the parent and/or failing to timely convene a meeting to review the clinical evaluation and amend the student's IEP as appropriate?

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. 300.324 requires that in the development of a student's IEP the team must consider the results of the initial or most recent evaluation and reevaluations of the student and in the case of a student whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

⁵ 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.

The evidence presented including credible testimony and the changes made the student's IEP and program as a result of the July 7, 2010, review of the 2009 clinical psychological evaluation that the student was harmed by the changes to his program not having been effectuated by a more timely review of the evaluation. Although there was no explanation presented as to why the evaluation was not reviewed for a year after it was conducted, DCPS is responsible for ensuring the student's services are promptly updated pursuant to the requirements of IDEA. IDEA requires that a student's IEP team consider the current reevaluations of the student. The Hearing Officer concludes that the delay in reviewing the evaluation resulted in a delay in critical change of services for the student and the student's was harmed thereby and thus denied a FAPE. Specifically, the student did not benefit from the timely change in the behavioral services and as the student missed significant academic instruction due to the frequent sends to the BCC. Although, the DCPS witness who participated in the student's IEP meeting testified that the student had been diagnosed with ADHD prior to the 2009 clinical psychological evaluation the witness also noted that the student's IEP goals and therapy were amended as a result of the review of his evaluations at the July 7, 2010, IEP meeting. The Hearing Officer did not find the statement credible by this witness that the evaluations, specifically the clinical psychological evaluation, had nothing to do with the changes in the student's program that were made.

Issue 2: Whether DPCS denied the student a FAPE by failing to allow the multidisciplinary team ("MDT") that convened on June 9, 2010, to review the clinical evaluation? Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

The evidence demonstrates that DCPS requested that review of the student's clinical psychological evaluation be delayed so that a DCPS psychologist could review the evaluation and participated in the student's IEP meeting. The DCPS representative had also just received the evaluation at the June 2010 meeting. It does not seem to have been an unreasonable request by DCPS. The additional delay of less than 30 days to reconvene the meeting and review the evaluation does not rise to the level of an additional of a FAPE.

Issue: (3) If a denial of FAPE is found what compensatory education if any is the student due? Conclusion: The Hearing Officer concludes based on the evidence presented that Petitioner is due a compensatory education award in the amount of services awarded in the Order below.

In *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the Court stated, "courts and hearing officers may award 'educational services . . . to be provided prospectively to compensate for a past deficient program.'" Id. citing *G. ex. Rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 309 (4th Cir. 2003). Compensatory education is an equitable remedy crafted to remedy educational deficit created by "an educational agency's failure over a given period of time to provide FAPE to a student" Id. "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." Id.

In *Mary McLeod Bethune Day Academy Public Charter School v. Bland*, Civil Action No. 07-1223, the U.S. District Court for the District of Columbia found that, "if a parent presents evidence that her child has been denied FAPE, she has met her burden of proving that he is entitled to compensatory education."

The Petitioner seeks twenty (20) hours of individualized tutoring and DCPS funding of a sports camp as compensation for the delay in the change in behavioral services and the missed instruction as result of the student frequent absence from class due to his behavior. The Hearing Officer concludes that the compensatory plan presented by Petitioner is a reasonable and equitable remedy to provide the educational benefits that likely would have accrued to the student had the student's clinical psychological evaluation been timely reviewed and his IEP amended to reflect changes in his services and program as a result of the evaluation.

ORDER:

As compensatory education for DCPS' failure to timely review the student's clinical psychological evaluation and update his IEP based on the evaluation DCPS shall fund for this student twenty (20) hours of independent tutoring at the DCPS approved rates and DCPS shall reimburse the parent for a sports camp program for the student in an amount not to exceed \$250.00 upon presentation by the parent to DCPS of adequate documentation of payment and participation in such a program by 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: September 20, 2010