

District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
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STUDENT HEARING OFFICE
700 OCT 21 PM 3:50

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 Dates: October 18, 2010</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Domiento C.R. Hill 1220 L Street, NW Suite 105 Washington, DC 20015</p> <p>Counsel for DCPS: Blair Matsumoto, 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." or "IDEA"), 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 comply with a Hearing Officer's Determination ("HOD") by failing to timely convene the student's individualized educational program ("IEP") meeting to review the student's most recent evaluations.

Petitioner filed an unopposed continuance motion to allow for a resolution session and multidisciplinary team ("MDT") meeting to be convened where the issues in the complaint would be discussed and perhaps resolved. The motion for continuance was granted.

A resolution meeting was held September 16, 2010, and the matter was not resolved. The pre-hearing conference was conducted between counsel for Petitioner and DCPS on September 17, 2010, and resulted in a pre-hearing order issued on September 22, 2010.

The Due Process Hearing was convened October 18, 2010, at the OSSE Student Hearing Office 810 First Street, NW, Washington, DC 20003, in hearing room 2006. Petitioner seeks: (1) a finding that DCPS denied the student a FAPE, (2) DCPS funding of an independent psychiatric assessment, (3) a MDT meeting to review the independent assessment, and (4) DCPS funding of a compensatory education plan.

DCPS is of the position that the HOD was not violated, the meeting ordered by the HOD was eventually convened, the evaluations were reviewed and the student's educational services were unchanged; thus, the student suffered no harm, there was no denial of FAPE and no right to compensatory education.

ISSUE(S): ²

The issues adjudicated are: (1) Whether DCPS denied the student a FAPE by failing to comply with the June 28, 2010, HOD by failing to timely convene the student's MDT/IEP meeting, and (2) If Petitioner meets the burden of proving a denial of FAPE whether Petitioner presented sufficient evidence of compensatory that meets the standards of *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

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 witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-24 and DCPS Exhibits 1-9) all of 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"). (DCPS Exhibit 6)
2. The student is eligible as a child with a disability pursuant to IDEA in need of special education services. (DCPS Exhibits 6&8)
3. The District of Columbia Public Schools ("DCPS") is the local education agency responsible for ensuring that the special education needs of the student are met. The student currently attends School A with DCPS funding. (DCPS Exhibit 6)
4. On January 27, 2010, the IEP team convened. The parent and the rest of the IEP team discussed and reviewed the student's educational and emotional progress. testimony, DCPS Exhibit 8)
5. The parent, after receiving comments from the school staff regarding an increase in the student's problematic behaviors made a request that the student be reevaluated with comprehensive psychological and speech and language assessments. The parent executed a form consenting to the reevaluations. The team also agreed that once the evaluations were conducted the team would discuss whether a psychiatric evaluation would be conducted. (Petitioner's Exhibits 13&14)
6. On March 22, 2010, the parent, by and through counsel, filed a due process complaint alleging DCPS failed to conduct the evaluations as agreed at the January 27, 2010, MDT meeting. (Petitioner's Exhibit 3 &15)
7. On several dates in April 2010, assessments⁴ were conducted of the student for the comprehensive psychological evaluation ordered in the January 27, 2010, IEP meeting. The evaluation report was apparently prepared on or about April 27, 2010. The evaluator concluded the student's cognitive abilities were in the extremely low range with a full

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 evaluator conducted the following assessments of the student: Beery-Buktenica Developmental Test of Visual-Motor Integration 5th Edition, Behavior Assessment System for Children, (BASC-2) Parent and Teacher Forms, Behavior Rating Inventory of Executive Function (BROEF) Parent and Teacher Forms, Clinical Interview with Student, Gray Oral Reading Tests (GoORT-4), Incomplete Sentences, Interview with Maternal grandmother, interview with teacher, Vineland Adaptive Behavior Scales (Vineland-II) Wechsler Intelligence Scale (WISC-IV, Woodcock Johnson Tests of Academic Achievement (WJ-III).

scale IQ below the first percentile. The student's academic performance was at approximately the first percentile with an age equivalency in the 7 to 8 year old range. The student demonstrated "At Risk" or "Clinically Significant" ratings for hyperactivity, aggression, conduct problems and attention problems. The evaluator recommended the student continue to receive academic supports in all areas and related services: occupational therapy, counseling and speech and language therapy. The evaluator also recommended some strategies to address the student's attention issues and distractibility. (DPCS Exhibit 6)

8. An administrative due process hearing was held June 22, 2010, which resulted in the issuance of a HOD dated June 28, 2010, which directed DCPS to convene a MDT/IEP meeting on July 7, 2010, at School A to review the student's recent evaluations. (Petitioner's Exhibit 3)
9. On July 7, 2010, the parent and the student's educational advocate arrived at School A for the MDT/IEP meeting. The parent and educational advocate were then advised by DCPS that the meeting could not take place as DCPS had no one present to review the evaluations thereby preventing timely compliance of the HOD. Because Petitioner was concerned with a recommendation in a DCPS evaluation that speech and language services be discontinued Petitioner expressed a desire for the meeting to be reconvened once the independent speech and language evaluation was completed. testimony, Petitioner's Exhibit 16)
10. On August 9, 2010, Petitioner's counsel presented DCPS with a copy of an independent speech and language evaluation that was conducted on July 23, 2010. (DCPS Exhibit 7)
11. On September 7, 2010, DCPS confirmed the MDT meeting to be held to comply with the HOD and review the student's evaluations. (DCPS Exhibit 4)
12. On September 28, 2010, the MDT/IEP was held for the student at School A. The MDT reviewed the student's comprehensive psychological evaluation and speech and language evaluation. The MDT concluded the student would continue to receive direct speech and language services. The MDT agreed to continue the student's disability classification of mild mental retardation. There was much discussion in the meeting regarding the student's hyperactivity and impulsive behaviors. The student's teacher and staff at School A expressed their concern with the student's increased distractibility and maladaptive behavior. The MDT made no changes to the student's educational and/or related services as a result of the review of evaluations. testimony, DCPS Exhibit 5)
13. At the September 28, 2010, MDT/IEP meeting the school staff recommended that the parent seek outside services to address the student's disruptive behaviors. There was a discussion of whether the student had been previously diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). However, there was no documentation that the student had ever been diagnosed with that condition. The student's social worker stated during the meeting that because of the student's conduct problems she was going to monitor the student's behavior and prepare a behavior modification plan. testimony, DCPS Exhibit 5)

14. The parent's education advocate provided DCPS a compensatory education plan for the student which was designed to compensate the student for the delay in the review of the student's evaluations by a team as directed by the June 28, 2010, HOD. The plan requested DCPS provide the student with grief counseling one hour per week for 16 weeks and male mentoring one hour per week for 16 weeks. The advocate considered that four months following the January 2010 meeting in which the evaluations were ordered the evaluations should have been completed and reviewed. Thus, he used four months (from the time the evaluations should have been conducted and reviewed until September 28, 2010) as the period of delay in the IEP/MDT meeting being convened. He also reasoned that the grief counseling and male mentoring were appropriate remedies for the behaviors the student had been demonstrating during the period of delay in reviewing the evaluations and because these behaviors were not addressed more promptly.
testimony, Petitioner's Exhibit 23)

15. The student's daily point sheet that is sent home to the parent routinely reflects the student's disruptive behaviors and that he is routinely taken out of class. Because of his behaviors the student was recently suspended from school. The student has never been diagnosed with ADHD. The parent recently took the student to a psychiatrist to address his behavior difficulties. However, the student has not yet engaged in any outside therapy. The parent is reluctant to put the student on medication if he is ultimately diagnosed with ADHD but she is willing to try other alternatives to address the student's inattention and distractibility. The student usually shows no inattention when he works with his tutor one-on-one. The student seems to be having difficulties as a result of his mother's death two years ago. (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.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.

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.

Issue 1: Whether DCPS denied the student a FAPE by failing to comply with the June 28, 2010, Hearing Officer's Determination by failing to timely convene the student's MDT/IEP meeting. Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

Pursuant to the Blackman Jones Consent decree there is a rebuttable presumption of harm when a HOD is violated. In this instance there is no dispute that the IEP meeting prescribed by the HOD was not held timely and as a result the student's recent evaluations were not reviewed timely. The student's behavioral difficulties were not discussed by a team until the meeting was finally held on September 28, 2010. Although, as DCPS counsel pointed out, the student's IEP and services were not amended as result of the meeting when it was convened, there was some action taken with regard to the student's behavior in that the school social worker agreed to monitor the student's behavior and begin working on a behavior modification plan.

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.

DCPS did not present any witnesses to dispute the testimony that student's behavior difficulties have continued unabated, or to rebut the presumption of harm to the student from the HOD not being complied with timely. The HOD clearly directed the meeting be held July 7, 2010, and the only reason the meeting was not held that day was because DCPS did not have evaluators available to review the evaluations; this was the primary reason for the meeting. The Hearing Officer concludes, therefore, that DCPS' delay impeded the student's right to FAPE and significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE.

Issue 2: If Petitioner meets the burden of proving a denial of FAPE whether Petitioner presented sufficient evidence of compensatory that meets the standards of *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). Conclusion: The Hearing Officer is not convinced by testimony that the amount and form of compensatory education proposed in Petitioner's plan has a nexus to the loss the student suffered as result in the delay of the IEP meeting and the services needed to place the student in the position he would have been had the meeting been held at the date prescribed by the HOD.

Although the educational advocate testified that he proposed four months of grief therapy and mentoring to compensate the student for the four-month delay in the student's evaluations being reviewed, the actual delay in the meeting was from the date the HOD prescribed: July 7, 2010, to September 28, 2010. The time the student was in school during that period was from the remainder of July in School A's summer program and from late August 2010 when the new school year started until the date the meeting was finally held.

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.*

A Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides him with “insight about the precise types of education services [the student] needs to progress.” *Branham*, 427 F.3d at 12. Relevant evidence includes “the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment.” *Id.* In *Nesbitt*, the Court found that an “award was not adequately individualized or supported by the record” when the Hearing Officer was not provided with any information about the student’s current grade level of functioning. *Nesbitt*, 532 F.Supp.2d at 124-25. (*Mary McLeod Bethune Day Academy Public Charter School v. Bland*, 534 F. Supp. 2d 109.)

In this instance the denial of FAPE to the student is the delay in convening of the MDT/IEP meeting to review the student’s comprehensive psychological and speech and language evaluations. The MDT at the January 2010 meeting stated that it would consider when it reconvened and reviewed the outstanding evaluations whether there was a need for a psychiatric evaluation to be conducted. At the September 28, 2010, meeting there was extensive discussion of whether the student had been previously diagnosed with ADHD and extensive discussion of the student’s behavioral difficulties and continual need for redirection. However, at the meeting there was no specific discussion or conclusion by the team about conducting the psychiatric evaluation as had been stated at the January 2010 meeting.

It is not clear from the evidence without that evaluation what services would place the student in the position he would have been had the HOD ordered meeting been held earlier. Although it is clear from the evidence the student would benefit from therapy and mentoring as might any student, the Hearing Officer does not find that the compensatory education plan proposed by the educational advocate has the nexus to the delay in the meeting and the remedy for the delay.

The most appropriate remedy in this instance the Hearing Officer believes is to grant Petitioner relief in the form of the independent psychiatric evaluation. If as a result of the evaluation the student’s programming is ultimately changed and different services rendered or other strategies recommended the Petitioner would not be precluded from filing another complaint for any compensation the student might be due for the approximate two-month delay in the MDT/IEP meeting being convened. Consequently, the Hearing Officer grants the relief in the Order below for DCPS’ failure to timely comply with the HOD.

ORDER:

1. DCPS shall fund and the parent shall obtain an independent psychiatric evaluation to determine whether the student has the condition of ADHD and what if any recommendations can be made to address this condition as it interferes with the student ability to attend and benefit fully from his educational programming.
2. DCPS shall within thirty (30) calendar days of its receipt of the independent psychiatric evaluation provided by Petitioner convene a MDT/IEP meeting to review the evaluation and consider modifications to the student's IEP.

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: October 21, 2010