

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 MAY 15 PM 1:34

<p>STUDENT¹, by and through parent, Petitioner, us. District of Columbia Public Schools, Respondent.</p>	<p><u>HEARING OFFICER'S DETERMINATION</u></p> <p>Counsel for Petitioner/Parent: Fatmata Barrie, Esq.</p> <p>Asst. Attorney General for DCPS: Nia M. Fripp, 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

The Student was suspended from school for 25 schooldays on January 27, 2009. On March 31, 2009, Counsel for the Parent filed the herein Complaint with the District of Columbia Office of the State Superintendent of Education (OSSE), Student Hearing Office (SHO), complaining the District of Columbia Public Schools (DCPS) denied the student a Free Appropriate Public Education (FAPE). Specifically, Counsel for the Parent complained DCPS failed to convene a manifestation determination review, failed provide a current IEP, failed to appropriately disability code the Student and failed to provide appropriate IEPs for two years. For relief, independent evaluations and placement at the _____ of Washington, D.C. was requested.

The parties waived the Resolution Session.

A Pre-hearing Order was issued in this matter on April 23, 2009. The Order determined the issues as setout below.

The Student Hearing Office, OSSE, scheduled a hearing in this matter for 9:00 A.M., Tuesday, May 5, 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.

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. Did DCPS fail to convene a manifestation determination review(MDR) after initiating the January 27, 2009 suspension?**
 - 2. Did DCPS fully assess the Student for the Other Health Impaired (OHI) and Emotional Disturbance (ED) disability codings?**
 - 3. Does the Student have a current IEP?**
 - 4. Were the IEPs over the past two years appropriate?**

FINDINGS of FACT

By facsimile dated April 28, 2009, the parent disclosed 8 witnesses and 14 documents.

By facsimile dated April 28, 2009, DCPS disclosed 5 witnesses and 5 documents. DCPS Document No 2 was a copy of the DCPS offer to settle under regulation 34 CFR 300.517(2)(i). The hearing officer struck the document from the disclosure with the instruction to DCPS to file a post-HOD motion, if in their opinion the finding in this HOD was not more favorable to the Petitioner than their offer to settle under the said regulation.

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

DCPS stipulated that the evaluations of the Student were not current.

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

1. By facsimiles dated February 2, 2009 and February 4, 2009, Counsel for the Parent requested DCPS to provide, respectively, an MDR² and a disciplinary hearing.³ DCPS did not respond to the request for an MDR; whether the disciplinary hearing convened was not established.

2. Prescribing "Adderall for ADHD", a prescription was written for the Student on October 29, 2008.⁴

3. The Present Educational Performance Levels on the April 4, 2007 IEP⁵ are dated March 30, 2006 and are exactly the same Present Educational Performance Levels on March 10, 2008 IEP⁶ the but are dated February 29, 2008. In response to Counsel for the Parent's February 2, 2009 request for education records⁷, DCPS did not forward copies of any evaluations of the Student.⁸

4. The incident/suspension date for the February 10, 2009 MDR was January 26, 2009; the February 10, 2009 MDR team was not an appropriately composed MDT/IEP – a special education teacher, a general

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² Parent Document No 10

³ Par. Doc. No 9

⁴ Par. Doc. o 11

⁵ Par. Doc. No 5

⁶ Par. Doc. No 3

⁷ Par. Doc. No 10

⁸ Par. Doc. No 13, DCPS External Record Request Checklist

education teacher and the Parent were not members – and convened on the 11th school day, one day late.⁹ No services were provided to the Student during the suspension.

5. The Student was a truant.¹⁰ DCPS did not file a Truancy Report with D.C. Child and Family Services Agency (CFSA).

6. The Parent testified that the Student did not make progress at the present educational placement and that she had not received any Invitation to Meeting notices, neither for the February 17, 2009 IEP meeting nor for any MDR. The Parent gave a copy of the Student's October 29, 2008 prescription for Adderall to the special education coordinator at the educational placement in January 2009. The Parent saw the Student's current February 17, 2009 IEP for the first time during the herein hearing. The Parent knew the Student was not attending school regularly and thought the non-attendance was the result of the Student not understanding the class work.¹¹

7. At the present educational placement, the Student started the school day with one special education class and for the remainder of the school day attended all general education classes with one teacher; no assistance was provided to the Student in the general education classes. The Student did not attend school because she did not understand the class work and did not receive help in the general education classes.¹²

8. The Student's current February 17, 2009 IEP¹³ indicated only the Out of General Education Setting for the Student, and in the record, there was nothing to the effect the Student's current placement could implement the IEP.

9. The Washington, D.C. was a private special education day-school that served student's with Learning Disabilities and other disabilities; specialized instruction was delivered in classrooms with a low teacher-student ratio. A reading specialist could complete a reading program specially designed for the student. The academy could deliver speech/language and counseling services. The academy could provide educational benefit to the Student.¹⁴

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⁹ DCPS Doc. No 5

¹⁰ DCPS Doc. No 3

¹¹ -testimony of the Parent

¹² -testimony of student

¹³ DCPS Doc. No 4 (the fax generated date on the IEP was April 7, 2009

¹⁴ -testimony of the Admissions Director, Washington, D.C.

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 fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 21, determine eligibility for special education services and, if eligible, provide same through an appropriate IEP and Placement.

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

The February 10, 2009 MDR was inappropriate.

The Student was suspended for 25 schooldays on January 26, 2009; an MDR was mandated under regulation 34 CFR 300.530(e) and was convened on February 10, 2009, one school day late. More importantly, the MDR was inappropriately constituted: the regulation requires the make-up of the MDR to be, . . . “ the LEA, the parent, and relevant members of the [student’s] IEP team (as determined by the parent and LEA) . . .” From the record, the Parent was not notified of the MDR. See the make-up of the IEP team at regulation 34 CFR 300.321(a).

TWO

DCPS failed to assess the student for the Other Health Impairment disability coding.

The Parent delivered the Student’s October 29, 2008 prescription for “Adderall for ADHD” to the special education coordinator in January 2009. The Student should have been suspected of being Other Health Impaired (OHI) and evaluated accordingly by DCPS; he was not. *See* 34 CFR 300.304(c)(4).

THREE

The February 17, 2009 IEP was not based on current evaluations and, as such, was inappropriate.

An appropriate IEP must be derived from current evaluations of the student.

See 34 CFR 300.324(a)(1). During the hearing, it was suggested that the student's truancy prevented a reevaluation. Truancy cannot be accepted as justification for not delivering special education services. *See* Letter to Borucki, 16 IDELR 884 (April 11, 1990) and the District of Columbia Compulsory School Attendance law, D.C. Code 38-202.

Lastly under the this CONCLUSION of LAW, the IEP indicated Out of General Education for the student, and in the record, there was nothing to establish the ability of the current educational placement to implement the IEP.

FOUR

The record did not establish the inappropriateness of either the March 10, 2008 IEP or the April 4, 2007 IEP.

The witnesses for the Parent were herself and the Student, neither competent to establish the inappropriateness of either of the two IEPs.

SUMMARY of the DECISION

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

ORDER

1. On an interim basis for the 2008-09 and 2009-10 School Years and with transportation, DCPS will place and fund the student at the Washington, D.C.
2. According to Superintendent's Directive 530.6, DCPS will fund an independent comprehensive psychological evaluation and an independent psychiatric evaluation. Within 15 schooldays of receipt of the last evaluation report, DCPS will convene an MDT/IEP/Placement meeting at during which evaluations will be reviewed, the IEP reviewed and revised as appropriate and placement discussed and determined. If a DCPS placement is recommended, a Notice of Placement will be issued within 5 schooldays of the said meeting; if a non-public placement is recommended, a Notice of Placement will be issued within 30 days of the said meeting.

2. For the said MD/IEP/Placement meeting, scheduling is to be through and notices are to be sent to Counsel for the Parent except that, for everyday of unavailability of parent/educational advocate/ Counsel for the Parent, the deadline herein will be extended one day. In the event of independent evaluation(s) sent to DCPS, Counsel for the Parent will verify by telephone the receipt of the evaluation report copy(ies) by the DCPS person addressee. For disputes under this paragraph, documentation of the parties will be relied upon to determine the good faith of each party.

Dated this 15th day of May, 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.