

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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STUDENT HEARING OFFICE
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STUDENT ¹ , by and through his Parent Petitioners, v. DCPS Respondent. Case #	HEARING OFFICER'S DETERMINATION Hearing Date: March 19, 2009 <u>Representatives:</u> Counsel for Petitioners: Roberta Gambale, Esq. 1220 L Street NW Suite 700 Washington, DC 20002 Counsel for DCPS: Daniel Kim, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002 <u>Hearing Officer:</u> Coles B. Ruff, Esq.
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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.

PROCEDURAL BACKGROUND:

A Due Process Hearing was originally scheduled for March 20, 2009, and was convened a day earlier, March 19, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on February 19, 2009, alleging the issues outlined below.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-17 and DCPS Exhibits 1-4) which were admitted into the record.

ISSUE(S): ²

1. Did DCPS fail to provide the student with a free and appropriate public education (FAPE) by failing to provide the student an appropriate individualized educational program (IEP) on January 9, 2009?
2. Did DCPS fail to provide the student a FAPE by failing to ensure that a complete IEP team was convened on January 9, 2009?
3. Did DCPS fail to provide the student a FAPE by failing to ensure that the MDT was reconvened to address unresolved issues for the student in a timely matter?

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.

FINDINGS OF FACT ³:

1. The student is _____ years old, currently attends School A and resides in the District of Columbia. School A is a private full time special education school and the student's placement there is funded by DCPS. (Petitioner's Exhibits 4 & 13)
2. On September 25, 2008, a Hearing Officer's Determination (HOD) was issued regarding the student in which the Hearing Officer placed the student at School A and found that a psychiatric evaluation was conducted of the student on or about April 9, 2008, diagnosing the student with Mood Disorder in addition to a Learning Disorder. The psychiatric evaluation had not been reviewed by a multidisciplinary team (MDT) by the date the HOD was issued. The HOD provided for an independent vocational evaluation to be conducted and transition goals developed for the student when the MDT reconvened. (Petitioner's Exhibits 8 & 13)
3. The April 2008 psychiatric evaluation noted the student was experiencing distress in his home environment and was struggling from the recent death of his mother. The evaluation recommended the student be in a therapeutic setting and have individualized counseling twice per week to address grief/loss and appropriate coping skills. (Petitioner's Exhibit 8)
4. A vocational evaluation was conducted of the student on December 3, 2008. DCPS convened a MDT meeting for the student on January 9, 2009, at School A. The MDT was being convened in order to review the vocational evaluation and the psychiatric evaluation conducted in April 2008. The student's educational advocate was in attendance. The DCPS placement specialist participated by telephone. The vocational evaluation was reviewed and the MDT developed transition goals. However, there was no psychologist present at the meeting to review the psychiatric evaluation. The MDT acknowledged it would need to reconvene to review that evaluation. (Petitioner's Exhibit 10, DCPS Exhibit 2)
5. The student has had attendance problems since he was placed at School A. The student has shown little academic progress since attending School A and "his interest in learning appears vacant." The student, however, has not displayed behavior difficulties. (DCPS Exhibits 3 & 4)
6. The student's current individualized educational program (IEP) classifies the student as learning disabled (LD) only. The IEP prescribes 90 minutes of counseling per week. The IEP, however, does not include any counseling goals. (DCPS Exhibit 1)
7. On February 19, 2009, Petitioner filed the current due process complaint. As of the date of the due process hearing the MDT had not been reconvened to review the psychiatric evaluation. (Petitioner's Exhibit 2)

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding.

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. ⁴ In this case the student/Petitioner 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.

Did DCPS fail to provide the student with a free and appropriate public education (FAPE) by failing to provide the student an appropriate individualized educational program (IEP) on January 9, 2009? Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. Sec. 300.305 provides:

(a) Review of existing evaluation data. As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must-- (1) Review existing evaluation data on the child, including- (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--(i)(A) Whether the child is a child with a disability, as defined in Sec. 300.8, and the educational needs of the child; or

(B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;(ii) The present levels of academic achievement and related developmental needs of the child;(iii)(A) Whether the child needs special education and related services; or (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

⁴ 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.

In this case the student has had a psychiatric evaluation that was conducted in April 2008 which has yet to be reviewed by a MDT/IEP team. The evaluation has diagnosed the student with a Mood Disorder and recommended the student receive specific counseling related to grieve and loss. Since attending School A the student has shown little interest in learning and although the student has evidently received counseling services, there are not counseling goals in the student's IEP. 34 C.F.R. Sec. 300.320 requires that a student's IEP contain a statement of measurable annual goals, including academic and functional goals designed to-- (A) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (B) meet each of the child's other educational needs that result from the child's disability.

The Hearing Officer concludes that DCPS's failure to review the psychiatric evaluation in nearly a year, given the grave assessments in the evaluation and the student's lack of educational progress based on his performance review since attending School A sufficiently demonstrates harm to the student and a denial of a FAPE.

2. Did DCPS fail to provide the student a FAPE by failing to ensure that a complete IEP team was convened on January 9, 2009? Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. Sec. 300.321 provides:

(a) General. The public agency must ensure that the IEP Team for each child with a disability includes-- (1) The parents of the child; (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child; (4) A representative of the public agency who-- (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) Is knowledgeable about the general education curriculum; and (iii) Is knowledgeable about the availability of resources of the public agency. (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section.

The MDT was convened on January 9, 2009, to among other things review the student's psychiatric evaluation. There was no psychologist present at the meeting or anyone else who could interpret the instruction implications of evaluation results. Presumably because there was no one present to review the evaluations results the student's IEP still does not contain counseling goals. The Hearing Officer concludes that DCPS' failure to have a person present at the meeting to review the evaluation 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.

3. Did DCPS fail to provide the student a FAPE by failing to ensure that the MDT was reconvened to address unresolved issues for the student in a timely matter? Conclusion: Petitioner's counsel did not sustain the burden of proof.

There was no evidence and/or authority presented, given the MDT had concluded it needed to reconvene, from which the Hearing Officer could reasonably conclude there was additional element of a denial of a FAPE to the student because the MDT was not reconvened prior to the complaint being filed on February 19, 2009. Although there was correspondence presented by Petitioner from the educational advocate regarding the MDT being reconvened, this was insufficient to sustain the burden of proof on this issue or to prove the delay in the meeting being convened was unreasonable. Therefore, the Hearing Officer concludes there is not an additional denial of FAPE to the student in this regard.

ORDER:

1. DCPS shall, within fifteen (15) school days of the issuance of this Order, convene a multidisciplinary team (MDT) meeting to review the student's outstanding evaluation(s), review and revise the student's IEP as appropriate. DCPS shall ensure the required MDT members are present to appropriately review the evaluation(s) and that the assigned DCPS Placement Specialist is also in attendance to address any of the student's services that require DCPS approval.
2. The MDT meeting shall be scheduled through counsel for the student and parent.
3. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

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: March 30, 2009