

DC Office of the State Superintendent of Education

Office of Compliance & Review

State Enforcement & Investigation Division

STUDENT HEARING OFFICE

Van Ness Elementary School

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Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

CONFIDENTIAL

In Re the Matter of:

Parent on behalf of Student *

Petitioner,

vs.

The District of Columbia Public Schools

Respondent.

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CASE NO.

Complaint Date: 02/26/09

Hearing Date: 04/02/09

Hearing Site:

Van Ness Elementary School

1150 5th Street, S.E., 1st Floor

Washington, D.C. 20003

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

Petitioner's Attorney:

Christopher West, Esq.
James E. Brown & Associates, PLLC
1220 L Street, N.W., Suite 700
Washington, D.C. 20005

Respondent's Attorney:

Tiffany Puckett, Esq.
Assistant Attorney General
Office of the Attorney General as Counsel
for D.C. Public Schools
825 North Capitol Street, N.E., 9th Floor
Washington, D.C. 20002

*Personally identifiable information is attached as an Index to this decision and must be removed prior to public distribution.

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JURISDICTION

The Due Process Hearing was convened and this Hearing Officer Determination (“HOD”) and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 C.F.R. Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations (D.C.M.R.).

INTRODUCTION

On 02/26/09, a Due Process Complaint Notice (“Complaint”) was filed by the parent (“Parent” or “Petitioner”) on behalf of the year old student (“Student”) alleging that the District of Columbia Public Schools (“DCPS”) denied Student a Free Appropriate Public Education (“FAPE”) in violation of IDEIA when DCPS failed to provide Student with an appropriate educational placement, when DCPS failed to include Petitioner in an Individualized Education Program (“IEP”) Team meeting, when DCPS failed to develop an appropriate IEP, when DCPS suspended Student for more than 10 days, when DCPS failed to convene a manifestation determination review (“MDR”), and when DCPS failed to conduct a triennial evaluation. Petitioner alleges that the denials of a FAPE entitle Student to compensatory education.

The parties did not engage in mediation or the resolution process prior to the due process hearing.

THE DUE PROCESS HEARING

The due process hearing convened on 04/02/09 at the Van Ness Elementary School located at 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003.

Petitioner was represented by Christopher West, Esq. (“Petitioner’s Attorney”) and DCPS was represented by Harsharen Bhuller, Esq. (“DCPS’ Attorney”). Petitioner attended the due process hearing.

DCPS was not amenable to settlement discussions.

Disclosures:

Petitioner’s Five-Day Disclosure letter dated 03/26/09, containing Exhibits #1-11, was admitted into evidence without objection. Petitioner’s Supplemental Disclosure letter dated 04/02/09, containing Petitioner’s Supplemental Exhibit #12 was admitted into evidence without objection.

DCPS’ Disclosure Statement and Motion to Compel dated 03/26/09, contained no exhibits, and was admitted into evidence without objection.

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Witnesses:

Witnesses for Petitioner included: (1) Petitioner, (2) Carolyn Miskel, educational advocate (via telephone), and (3) School Director (via telephone).

Witnesses for DCPS included: (1) Special Education Coordinator ("SEC") at Education Center (via telephone).

Relief requested:

Petitioner's requested relief was a finding of a denial of a FAPE, an Order for DCPS to place and fund Student at School, an Order for DCPS to conduct a clinical psychological evaluation, and an Order for DCPS to convene within 15 school schools to review evaluations and determine compensatory education services.

Stipulation #1 – Student's 11/20/08 IEP prescribes 26.5 hours/week of specialized instruction and 1 hour/week of behavioral support services in an outside of general education setting.

FINDINGS OF FACT

#1. Student is years old, has a disability classification of Emotional Disturbance ("ED"), has been attending an ED cluster program at since September 2008, and receives 26.5 hours/week of specialized instruction and 1 hour/week of behavioral support services in an outside of general education setting pursuant to a 11/20/08 IEP. (*Petitioner's Exhibit #7, IEP dated 11/20/08; Stipulation #1; Testimony of SEC at* Student attends gym, music and art classes with general education students. (*Testimony of Carolyn Miskel, educational advocate; Testimony of SEC at* Student's 11/20/08 IEP is being implemented in a full time special education program at (*Testimony of SEC at*

#2. Student's 11/20/08 IEP states that Student exhibits frequent defiant and disruptive behavior in the classroom, frequently uses profanity towards adults and peers, exhibits frequent outbursts against peers and staff, and exhibits frequent defiant and disruptive behavior in response to authority figures. (*Petitioner's Exhibit #7, IEP dated 11/20/08*). Student also exhibits behaviors of walking or running out of class and roaming the halls. (*Testimony of Carolyn Miskel, educational advocate*).

currently has support and strategies in place to deal with Student's behaviors. The school is in the process of documenting interventions to determine whether a more restrictive school environment is needed. (*Testimony of SEC at*

#3. In September 2007, a Functional Behavioral Assessment ("FBA") was developed that described Student's behavior as oppositional/defiant behavior with

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teachers/staff, aggressive physical and verbal arguments with peers, and cursing, with these behaviors occurring on a daily basis with high intensity; and it was determined that Student's disability encouraged these negative behaviors. (*Petitioner's Exhibit #9, FBA dated 09/27/07*).

#4. Student's 12/17/07 IEP, with a disability classification of ED/LD, prescribed 26.5 hours/week of specialized instruction and 1 hour/week of counseling services. The IEP states that Student had a difficult time containing impulses and behaviors. (*Petitioner's Exhibit #8, IEP dated 12/17/07*).

#5. Student's 2008-2009 1st advisory grade average was "C," and the 2nd advisory grade average was "D." Grade report comments included, "does not complete class assignments, poor behavior, cuts class, and possibility of failing." (*Petitioner's Exhibit #5, Report to Parent on Student's Progress dated 01/16/08*).

#6. Petitioner attends all meetings at school regarding Student that Petitioner is informed about. (*Testimony of Petitioner*). Petitioner attended the 12/17/07 IEP Team meeting and signed the IEP indicating agreement with services. (*Petitioner's Exhibit #8, IEP dated 12/17/07*). Petitioner was not informed of the 11/20/08 IEP Team meeting, did not attend the meeting in person or by telephone, and did not participate in the development of the IEP. Petitioner wanted to participate in order to provide input regarding Student's behaviors and behavior patterns. (*Testimony of Petitioner*).

#7. During the 2008-2009 school year, Student's attendance summary reflected nine school days when Student was suspended (*Petitioner's Exhibit #12, Attendance Summary dated 03/31/09*); however, on all days when Student was marked absent, with the exception of once for a medical appointment and once for a death in the family, Petitioner was told by the principal to keep Student at home due to Student's behavior problems. (*Testimony of Petitioner*). Student's 2008-2009 school year attendance summary reflected 54 authorized absences, 92 excused absences, and 6 unexcused absences, for a total of 152 absences. (*Petitioner's Exhibit #12, Attendance Summary dated 03/31/09*).

#8. On 09/03/08, 10/8/08, 10/17/08, and 10/20/08-10/23/08, Petitioner never received any written notice of suspensions. In February 2009, Student was suspended for more than 10 days. (*Testimony of Petitioner*).

#9. A manifestation determination review meeting to determine whether Student's suspensions were related to Student's disability never occurred. (*Testimony of Petitioner*).

#10. Student's last psychological evaluation was conducted on 09/28/04. (*Petitioner's Exhibit #8, IEP dated 12/17/07*). Since 12/17/07, DCPS has not contacted Petitioner regarding an updated psychological evaluation. (*Testimony of Petitioner*).

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DISCUSSION AND CONCLUSIONS OF LAW

“The burden of proof shall be the responsibility of the party seeking relief. Based solely upon 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 a FAPE.” 5 D.C.M.R. 3030.3. “The burden of proof in an administrative hearing... is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 44 IDELR 150 (2005).

(1) Whether DCPS failed to provide Student with an appropriate educational placement, thereby denying Student a FAPE?

Petitioner alleges that Student was not provided with the full services prescribed in Student’s 12/17/07 IEP and 11/20/08 IEP since Student began attending in September 2008.

Petitioner offered no proof on this allegation. DCPS’ evidence was to the contrary; i.e., that Student’s 11/20/08 IEP was being implemented. (*Finding of Fact #1*). The 11/20/08 IEP prescribed 26.5 hours/week of specialized instruction and 1 hour/week of counseling, and these services were identical to those prescribed in the 12/17/07 IEP. (*Finding of Fact #4*). The ED cluster at _____ the program that Student is participating in, is a full time out of general education program. (*Finding of Fact #1*). Therefore, the Hearing Officer concludes that Student’s 12/17/07 IEP and Student’s 11/20/08 IEP were being implemented at _____ Pursuant to 34 C.F.R. 300.17, Student is being provided with a FAPE since Student’s IEP is being implemented.

Petitioner failed to meet its burden of proof on Issue #1.

(2) Whether DCPS failed to include parent in an IEP Team meeting, thereby denying Student a FAPE?

Petitioner alleges that DCPS failed to notify Petitioner of a 11/20/08 IEP Team meeting, and as a result, Petitioner was denied participation in the decision making process that resulted in Student’s current IEP.

There was contradictory evidence on this issue. The 11/20/08 IEP indicated that Petitioner participated in the 11/20/08 IEP Team meeting by telephone and the SEC at _____ testified to the same. However, Petitioner testified credibly that Petitioner was contacted several days after the IEP Team meeting took place and was advised of the contents of the meeting by telephone. Petitioner also testified credibly that Petitioner had attended all previous meetings at the school of which Petitioner had knowledge, including the previous year IEP Team meeting. (*Finding of Fact #6*). The record revealed that Petitioner’s signature was absent from the 11/20/08 IEP, and although the SEC mailed a copy of the IEP to Petitioner, the SEC made no effort to

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secure obtain Petitioner's signature indicating agreement with the IEP and provision of services. Petitioner wanted to participate in the IEP Team meeting in order to provide the team with information regarding Student's behavior problems and patterns. (*Finding of Fact #6*). This type of information would have been extremely relevant and critical to the development of an appropriate IEP in light of Student's severe and chronic behavior problems that have resulted in missed days of school due to suspensions. (*Finding of Fact #2, #3, #7*).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The Hearing Officer found the testimony of Petitioner credible and concludes that Petitioner was denied the opportunity to participate in the IEP Team meeting in contravention of 34 C.F.R. 300.322, and this resulted in the denial of a FAPE. Petitioner's input could easily have influenced the IEP team to consider more psychological services, an updated evaluation, or any number of options that might result in better academic performance for Student as well as less suspensions. At a minimum, Petitioner could have signed consent for a psychological triennial evaluation if Petitioner had been present at the MDT meeting.

Petitioner met its burden of proof on this issue.

(3) Whether DCPS failed to develop an appropriate IEP, thereby denying Student a FAPE?

Petitioner alleges that on 11/20/08, an IEP was developed at that did not contain current assessments and was not developed using current levels of academic and social/emotional functioning.

The 11/20/08 IEP that prescribed 1 hour/week of psychological services was based on a 09/28/04 psychological assessment. (*Finding of Fact #10*). Pursuant to 34 C.F.R. 300.303(b), a triennial evaluation is required unless the parent and education agency agree otherwise. And, pursuant to 34 C.F.R. 300.305(a), the IEP must be based on current assessments in order to determine exactly what services are needed by Student. In this case, there was no evidence demonstrating a waiver of the requirement of a triennial psychological evaluation. The 11/20/08 IEP was based on a 09/28/04 psychological evaluation (*Finding of Fact #10*), and therefore the Hearing Officer concludes that this failure to base the IEP on current assessments was a procedural violation of IDEIA. Does this violation rise to the level of a denial of a FAPE?

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer

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may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). Courts have held that "an IDEA claim is viable only if...procedural violations affected the student's substantive rights." *Lesesne ex re. F.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006).

In this case, Student received psychological services as part of Student's special education services (*Finding of Fact #1*), Student had documented behavior problems for which behavior interventions and strategies had been developed (*Finding of Fact #2*), and Student's academic performance deteriorated from the 1st to the 2nd advisory for the 2008-2009 school year (*Finding of Fact #5*), and all of this occurred prior to and after the 11/20/08 IEP was developed. A triennial psychological evaluation is almost 2 years overdue, and it has been almost 5 years since Student, who exhibits chronic behaviors such as disrespecting staff and students, running out of the class, defiance on a daily basis, and has incurred multiple suspensions, has been evaluated. Moreover, there is no evidence in the record that a psychological evaluation had even been considered by DCPS. This Hearing Officer concludes, based on the evidence presented, that Student's substantive right to have an IEP based on current assessments was denied by DCPS' failure to conduct a triennial psychological evaluation no later than 09/28/07. A current psychological assessment would have no doubt shed light on Student's acting out behaviors and poor academic performance, and offered concrete recommendations for the MDT's consideration in developing an appropriate educational program for Student. Student's current behavior is being documented to determine whether a more restrictive educational setting is necessary (*Finding of Fact #3*). In this case, the lack of an updated psychological evaluation impeded Student's right to a FAPE.

Petitioner met its burden of proof on Issue #3.

(4) Whether DCPS denied Student a FAPE when DCPS suspended Student for more than 10 days?

Petitioner alleges that Student was suspended for more than 10 school days during the 2008-2009 school year even though Student has a disability, and that Parent was not provided with suspension notices or written documentation detailing the alleged incidents that resulted in suspension.

Petitioner testified credibly that Student was sent home from school for more than 10 days during the 2008-2009, explaining that the absences recorded on Student's attendance record reflected days that Student was suspended from school (*Finding of Fact #7*). Petitioner also testified credibly that although Student missed many days of school due to suspensions, Petitioner never received any written notices of suspension (*Finding of Fact #8*). The negative impact was that Student missed many days of school (*Finding of Fact #7*), and Student's grades are on the brink of failure. (*Finding of Fact*

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#5). This violation of IDEIA caused educational harm to Student. DCPS offered no evidence on this issue.

Petitioner met its burden of proof that Student, a student with a disability, was wrongfully suspended for more than 10 days in contravention of 34 C.F.R. 300.530(b)(1).

(5) Whether DCPS failed to convene a manifestation determination review (“MDR”), thereby denying Student a FAPE?

Petitioner alleges that Student was suspended for more than 10 days and DCPS did not convene a MDR meeting pursuant to 34 C.F.R. 300.530(e).

Petitioner testified credibly that Student had multiple suspensions from school, exceeding 10 days. Petitioner also testified credibly that Petitioner had no knowledge of and never participated in a MDR meeting. (*Finding of Fact #9*). DCPS offered no evidence to the contrary. Petitioner proved by a preponderance of the evidence that Student was suspended for more than 10 days and a MDR was not convened to determine whether the behaviors that led to the suspensions were a manifestation of Student’s disability. Student had chronic and severe behavior problems, and Student was absent from school almost 150 days during the 2008-2009 school year due to suspensions. (*Finding of Fact #7*). Student’s grades plummeted. (*Finding of Fact #5*). Student was denied educational benefit as a result of DCPS’ failure to convene a MDR meeting to determine whether Student’s suspensions were due to Student’s disability. Student was denied a FAPE.

Petitioner met its burden of proof on Issue #5.

(6) Whether DCPS failed to conduct triennial evaluations, thereby denying Student a FAPE?

Petitioner alleges that when the IEP Team met on 11/20/08 and developed an IEP, the IEP was based on a clinical psychological evaluation dated 09/28/04, and to date, a current clinical psychological triennial evaluation has not been completed. 34 C.F.R. 300.303(b) requires triennial updates of evaluations.

As previously discussed under Issue #3, Student exhibited many behavior problems over time that interfered with academic performance. (*Finding of Fact #2, #3, #4, #5, #7*). A FBA was conducted in September 2007, right around the time an updated psychological assessment should have been completed, and the FBA indicated that Student had daily occurrences of high intensity oppositional/defiant behavior with teachers/staff and physical and verbal arguments with peers (*Finding of Fact #3*). In December 2007, Student still had a difficult time containing impulses and behaviors (*Finding of Fact #4*). And in November 2008, Student experienced frequent and disruptive behavior in the classroom, frequently used profanity towards adults and peers, and had frequent displays of defiant and disruptive behavior in response to authority figures (*Finding of Fact #2*). It could not be clearer that DCPS’ failure to complete a

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triennial psychological evaluation impeded Student's right to a FAPE. An updated psychological evaluation for Student was a necessity in order to determine an appropriate educational program for Student. A psychological evaluation is the very type of evaluation that would shed light on Student's disability of ED and its connection with educational performance. Student was denied a FAPE.

Petitioner met its burden of proof on Issue #6.

(7) Whether Student is entitled to compensatory education for DCPS' failure to provide an appropriate educational placement, an appropriate IEP, and for suspending Student for over 10 days?

"When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place." The qualitative standard for determining compensatory education is that "compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid v. District of Columbia*, 43 IDELR 32 (2005).

Petitioner proved by a preponderance of the evidence that DCPS failed to develop an appropriate IEP and that DCPS suspended Student for more than 10 days in violation of IDEIA. The failure to develop an appropriate IEP arises from DCPS' failure to conduct a current psychological evaluation; however, harm and the appropriate measure of compensatory education cannot be calculated on this set of facts when an updated psychological evaluation is still outstanding. Additionally, Petitioner offered no proof demonstrating what direct harm or negative impact the suspensions caused or what services Student should have received. Again, without reference to a current psychological evaluation, it is impossible to determine what special education services Student missed due to the denials of a FAPE.

Petitioner failed to meet its burden of proof that Student is entitled to compensatory education.

ORDER

WHEREFORE, it is

ORDERED that,

(1) Within 15 business days, DCPS shall provide to Petitioner a letter authorizing funding for an independent clinical psychological evaluation; and

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(2) Within 20 school days of receipt of a completed clinical psychological evaluation, DCPS shall convene a MDT to review the evaluation, review and revise Student's IEP as necessary, and discuss and determine placement, as appropriate.

IT IS SO ORDERED.

This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).

Virginia A. Dietrich /s/

Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

04/11/09

Date

Issued: April 11, 2009