

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

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STUDENT HEARING OFFICE
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In Re the Matter of:	*	
	*	CASE NO.
Parent on behalf of Student *	*	
	*	
Petitioner,	*	Complaint Date: 02/10/09
	*	Hearing Dates: 03/16/09, 03/31/09
vs.	*	
	*	Hearing Site:
	*	Van Ness Elementary School
The District of Columbia Public Schools	*	1150 5th Street, S.E., 1st Floor
	*	Washington, D.C. 20003
Respondent.	*	
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HEARING OFFICER DETERMINATION

Petitioner's Attorney:	Roberta Gambale, Esq. James E. Brown & Associates, PLLC 1220 L Street, N.W., Suite 700 Washington, D.C. 20005
Respondent's Attorney:	Daniel Kim, Esq. Assistant Attorney General Office of the Attorney General as Counsel for D.C. Public Schools 825 North Capitol Street, N.E., 9 th 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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conclude due to an insufficient amount of time allocated for the hearing. The due process hearing resumed and concluded on 03/31/09.

Petitioner was represented by Roberta Gambale, Esq. ("Petitioner's Attorney") and DCPS was represented by Daniel McCall, Esq. ("DCPS' Attorney"). Petitioner attended the due process hearing.

DCPS was not amenable to settlement discussions.

Stipulation:

#1 - Student attends

Disclosures:

Petitioner's Five-Day Disclosure letter dated 03/05/09, contained Exhibits #1-16. Petitioner's Exhibits #1-16 were admitted into evidence without objection. Petitioner's Supplemental Disclosures letter dated 03/09/09, contained Exhibits #17-22. Petitioner's Exhibits #17-22 were admitted into evidence without objection.

DCPS' Disclosure Statement dated 03/06/09, contained Exhibits #1-4. Exhibits #1-4 were admitted into evidence without objection. At the due process hearing, DCPS offered two supplemental exhibits for inclusion in the record. DCPS' Exhibit #5, DCPS Confirmation of Meeting Notice dated 11/08/07, was admitted into evidence without objection. DCPS' Exhibit #6, Multidisciplinary Team ("MDT") Meeting Notes dated 11/08/07, was admitted into evidence without objection.

Relief Requested by Petitioner:

- (1) A finding of a denial of a FAPE on Issues #1-#3;
- (2) DCPS to provide Student with a specific schedule for Student to utilize the services of a counselor for 1 hour/week, at a time agreed upon between Student and provider; and
- (3) DCPS to provide Student with compensatory education in the form of one on one tutoring for not less than 3 hours/week and independent counseling of not less than 1 hour/week, to continue until Student graduates from high school; exclusive of services provided by Student's IEP.

Witnesses:

For Petitioner:

(1) Petitioner.

For DCPS:

None.

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FINDINGS OF FACT

#1. Student is _____ years old, attends _____ has a disability classification of Other Health Impaired ("OHI"), and is scheduled to graduate in June 2009. (*Stipulation #1; Petitioner's Exhibit #5, IEP dated 04/28/08; Testimony of Petitioner*).

#2. Student's 08/07/06 IEP mandated 1 hour/week of specialized instruction in a general education setting and 4.5 hours/week of specialized instruction in a special education setting, and the IEP contained specific cognitive and social emotional goals. (*Petitioner's Exhibit #13, IEP dated 08/07/06*).

#3. Student's 08/01/07 IEP did not specify the number of hours/week that Student was to receive specialized instruction and psychological services, although the MDT Meeting Notes dated 08/01/07 stated that Student would receive 2.5 ninety minute sessions/week of specialized instruction and .5 hours/week of counseling. The 08/01/07 IEP did not contain any social emotional goals and objectives even though the IEP indicated that Social Emotional was an area requiring related services. (*Petitioner's Exhibit #9, IEP and MDT Meeting Notes dated 08/01/07*).

#4. A 11/02/07 HOD ordered DCPS to convene a MDT meeting within 30 calendar days to (1) revise Student's 2007 IEP to reflect the amount of special education and related services Student is entitled to receive and the social-emotional goals and objectives to be accomplished through the counseling services Student will receive; and (2) determine the form, amount and delivery of compensatory education required to redress DCPS' denial of a FAPE to Student. The HOD contained a Finding of Fact that Student never received counseling during the 2006-2007 school year, but did receive counseling beginning in September 2007 for the 2007-2008 school year. The HOD also contained a Conclusion of Law that Student's 08/01/07 IEP was inappropriate because it did not include any social-emotional goals to be accomplished through counseling services even though the IEP required the provision of psychological services to Student; however, that procedural inadequacy did not rise to the level of a denial of a FAPE because the MDT had agreed to carry over to Student's 08/01/07 IEP the social emotional goals contained in the 08/07/06 IEP. The HOD also required that all communications and scheduling be accomplished through Petitioner's Counsel. (*Petitioner's Exhibit #3, HOD dated 11/2/07*).

#5. DCPS issued a Confirmation of Meeting Notice to Petitioner on 11/08/07. The Confirmation of Meeting Notice indicated that the purpose of the meeting was to discuss Personal Health Information. (*DCPS' Exhibit #5, Confirmation of Meeting Notice dated 11/08/07*). On 11/08/07, DCPS convened a MDT meeting to discuss and determine a plan of action for Student. Petitioner was present at the meeting, but the meeting did not go forward because Petitioner's educational advocate failed to appear. The MDT intended to reconvene. (*DCPS' Exhibit #6, MDT Meeting Notes dated 11/08/07*).

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#6. Student has a history of fear of discrimination and dislike for being a special education student. Student does not like being singled out as a special education student and shuts down when singled out. (*Petitioner's Exhibit #9, MDT Notes dated 08/01/07; Petitioner's Exhibit #5, MDT Notes dated 04/28/08; Testimony of Petitioner*). Student wants to be in the general education population. (*Testimony of Petitioner*).

#7. An IEP was developed on 04/28/08 that required 1 hour/week of specialized instruction with a special education teacher in a general education setting and .5 hours/week of psychological services with a social worker in a special education setting. Specialized instruction consisted of 1 hour of consultation where Student remained in the general education setting. Organizational skills was a service area to be addressed, and services were to be provided by the special education teacher/resource room teacher. The IEP indicated that in the area of social emotional behavior, Student would self-advocate by asking for assistance from the teacher or therapist when needed and Student would increase self-advocacy skills by initiating weekly status report meetings with teachers. Additional social emotional goals contained in Student's 08/07/06 IEP were carried over verbatim to Student's 04/28/08 IEP. Both Petitioner and Student participated in the MDT meeting. (*Petitioner's Exhibit #5, IEP and MDT Meeting Notes dated 04/28/08; Petitioner's Exhibit #13, IEP dated 08/07/06*).

#8. On 04/28/08, the MDT assured Petitioner that the school would set up special education services for Student; however, Student insisted that Student could set up counseling and remedial instruction unassisted, and Petitioner relied on Student's representations. Therefore, at the MDT meeting on 04/28/08, it was determined that Student would decide the order and the length of the weekly meeting, and Petitioner was in full support of this. Petitioner relied on Student taking the initiative to meet with the resource person. (*Testimony of Petitioner; Petitioner's Exhibit #5, MDT Meeting Notes dated 04/28/08*).

#9. On 04/28/08, the MDT determined that Student would access the general education curriculum in a general education setting with non-disabled peers, and the MDT provided Petitioner with notice that DCPS was changing the level of services to be provided to Student. (*Petitioner's Exhibit #4, DCPS Prior to Action Notice dated 04/29/08*). At that time, Student was consistently participating in counseling, and was making adequate progress in understanding the emotional and educational effect of Student's disability. The MDT determined that compensatory education was not warranted. (*Petitioner's Exhibit #5, MDT Meeting Notes dated 04/28/08*).

#10. The 04/28/08 IEP included a transition services plan that indicated Student's goal of attending college with an interest in business management and information technology. The transition services plan listed transition activities as (1) attending college fairs and touring college campuses, and the service providers for these activities were listed as the DCCAP and school counselor; and (2) developing a resume, and the service provider for this activity was listed as the general education teacher or school counselor. (*Petitioner's Exhibit #5, DCPS Transition Services Plan dated 04/28/08*).

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#11. Petitioner met with school staff, received information regarding financial assistance for college, and followed through with applications on behalf of Student. Petitioner investigated colleges suitable for students with learning disabilities and submitted applications on behalf of Student. Student has been accepted at 4 colleges and Student has a clear idea of what Student wants to study in college. (*Testimony of Petitioner*).

#12. Prior to January 2009, Student wasn't attending tutoring because Student thought that Student could grasp the work unassisted. Since January 2009, Student has been attending after school tutoring for pre-calculus every day for one hour. Saturday tutoring is also available through _____ but Student won't participate in it. (*Testimony of Petitioner*).

#13. For the 2007-2008 school year, when Student was in the 11th grade, Student received the following final grades: "D" in English III and general music; "B+" in World Geography; "B" in U.S. History/Geography and developmental reading; "C" in Spanish III, Geometry, and Programming for Multimedia; and "D+" in Algebra II & Trigonometry, and Chemistry. (*Petitioner's Exhibit #22, Transcript dated 03/06/09*).

#14. For the 2008-2009 school year, Student's grades are as follows for the 1st, 2nd, and 3rd advisory respectively unless otherwise specified:

(1) English: C+, C+, C+; (2) Pre-Calculus: D, D, F; (3) Anatomy and Physiology: D, C+, B-; (4) Physical Education: F, B+, with a final grade of D; (5) Principles of U.S. Government: F, C+, with a final grade of D; (6) SAT Verbal Preparation: C+, B-, with a final grade of B-; (7) Interactive Media I: B, B, with a final grade of B; (8) Office Assistant I: A, A, with a final grade of A; (9) Health Education: F (3rd advisory); (9) Interactive Media II: A- (3rd advisory); (10) Economics: B (3rd Advisory); and (11) Web Page Design: A (3rd Advisory). (*Petitioner's Exhibit #18, Report to Parents on Student Progress dated 01/21/09; Petitioner's Exhibit #19, Report to Parents on Student Progress dated 03/20/09*).

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)*.

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

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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).

Issue #1 – Whether DCPS failed to comply with a HOD, thereby denying Student a FAPE?

Petitioner alleges that DCPS failed to comply with a 11/02/07 HOD by (1) failing to schedule a meeting within 30 days to revise Student's IEP, and (2) failing to determine a compensatory education plan by failing to determine the form, amount and delivery of compensatory education required to redress DCPS' denial of a FAPE as a result of missed counseling services. Petitioner alleges that Student has been harmed because Student, who is in the _____ grade, has not had the benefit of compensatory education and is behind academically, and may not be able to graduate high school on time.

The purpose of the 11/02/07 HOD requirement to revise Student's IEP at a MDT meeting that was to occur within 30 days, was to make the IEP consistent with the 08/01/07 MDT Meeting Notes that quantified specific services for Student, and to incorporate into the IEP the social emotional goals carried over from Student's 08/07/06 IEP. (*Finding of Fact #2, #3, #4*). The 11/02/07 HOD concluded that the defects on the face of the IEP did not rise to the level of a denial of a FAPE. (*Finding of Fact #4*). It is evident that the MDT meeting that was to occur within 30 days of the HOD would not have resulted in any change of services for Student; the meeting was simply to create a complete and correct educational instrument through which already specified special education services would be delivered.

The 11/02/07 HOD specified that all scheduling and communications were to be accomplished through Petitioner's Attorney. (*Finding of Fact #4*). The record showed that the MDT issued a notice of the meeting on the same day the meeting was to take place. (*Finding of Fact #5*). The record is not clear whether or not Petitioner's Attorney had been informed of the 11/08/07 MDT meeting; however, Petitioner attended the MDT meeting but did not want to go forward because Petitioner's educational advocate failed to appear. The stated purpose of the meeting was to map out a plan of action for Student. (*Finding of Fact #5*). There is no evidence in the record that DCPS attempted to reconvene the meeting within 30 days as required by the 11/02/07 HOD. The evidence in the record indicates that the next time the MDT met was on 04/28/08 when a new IEP was developed. On 04/28/08, the MDT in consort with Petitioner, reduced the number of hours of special education and related services and determined that specialized instruction was to be provided in a general education setting. (*Finding of Fact #7, #9*).

Therefore, DCPS did fail to comply with the 11/02/07 HOD, and even though under *Blackman/Jones* a rebuttable presumption of harm attaches, the fact that (1) the meeting to revise the IEP was simply to synchronize the IEP with services specified in the MDT notes, (2) there was no evidence in the record that Student did not receive the services contained within the four corners of the 08/01/07 IEP until a new IEP was developed on 04/28/08, and (3) the 04/28/08 IEP not only contained a reduction in the level of services, it left the implementation of services to the discretion of Student

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(*Finding of Fact #7, #8*), all leads this Hearing Officer to conclude that there was not a denial of a FAPE resulting from DCPS' failure to schedule a MDT meeting within 30 days of the 11/02/07 HOD for the purpose of revising Student's IEP. See *Mikeisha Blackman, et al., Plaintiffs, v. District of Columbia, et al., Defendants, Civil Action No. 97-1629 (PLF) Consolidated with Civil Action No. 97-2402 (PLF) Consent Decree dated June 30, 2006 (rebuttable presumption of harm)*.

With respect to Petitioner's allegation that DCPS failed to determine a compensatory education plan by failing to determine the form, amount and delivery of compensatory education required to redress DCPS' denial of a FAPE as a result of missed counseling services, this Hearing Officer concludes that the 11/02/07 HOD directed the MDT to "determine the appropriate form, amount and delivery of compensatory education," based on the denial of a FAPE for missed counseling services during the 2006-2007 school year (*Finding of Fact #4*). The record shows that Student received and participated consistently in counseling during the 2007-2008 school year, so when the MDT met on 04/28/08, it determined that counseling of .5 hours/week was sufficient, that counseling services would be initiated by Student (*Finding of Fact #7, #8*), and that no compensatory education services were necessary or warranted (*Finding of Fact #9*). And, Petitioner agreed with this assessment of services. (*Finding of Fact #7, #8, #9*). Therefore, this Hearing Officer concludes that DCPS determined that the amount of compensatory education due was zero, and this determination was supported by the facts of the case and was well within the boundaries of the MDT's discretion pursuant to the 11/02/07 HOD Order.

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

Issue #2 – Whether DCPS failed to develop an appropriate Individualized Education Program ("IEP"), thereby denying Student a FAPE?

Petitioner alleges that the 04/28/08 IEP was deficient because it (1) did not contain the level of services that Student needed to provide Student with adequate instructional support to enable Student to meaningfully attain academic goals and objectives, including going to college, and (2) the IEP should have contained more specialized instruction and counseling than 1 hour/week of specialized instruction and .5 hours/week of counselor services.

The amount of services in Student's 04/28/08 IEP was reduced by consensus of the MDT (*Finding of Fact #3, #7, #9*) of which Petitioner was a part, and at the urging of Petitioner and Student because Student did not like being singled out as a special education student (*Finding of Fact #6*), and because Student assured Petitioner that Student would seek remedial instruction and counseling on Student's own initiative. (*Finding of Fact #7, #8*). At the end of the 2008 school year, Student achieved passing grades in all subjects and was promoted to the 12th grade. (*Finding of Fact #13*). For the current 2008-2009 school year, Student has received passing grades in all subjects except Pre-Calculus and Health Education. (*Finding of Fact #14*). Prior to January 2009, Student opted not to take advantage of tutoring on the premise that Student could achieve

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good grades without remedial assistance. However, since January 2009, Student has been attending school sponsored tutoring on a daily basis for pre-calculus and has the option of attending additional tutoring on Saturdays. (*Finding of Fact #12*). There is no evidence in the record that Student's failing grade in Health Education or Pre-Calculus is tied to Student's disability. This Hearing Officer concludes that the school offered sufficient academic support services that Student could and did access through the general education curriculum. Student's 04/28/08 IEP indicates that Student's needs may be met in the general education curriculum, and there is no evidence otherwise. (*Finding of Fact #7, #9*). Student's 04/28/08 IEP specifically allowed Student to be a part of the general education curriculum with access to specialized instruction and counseling at the discretion of Student. (*Finding of Fact #7, #8*). If Student did not access specialized instruction support that was available to Student, it was because Student did not like being singled out in class as a special education student (*Finding of Fact #6*). Interestingly enough, Student is taking advantage of after school tutoring that is available through the general education curriculum (*Finding of Fact #12*), and that places Student exactly where Student wants to be, right along side the other general education students. Moreover, Student has been accepted at four colleges. (*Finding of Fact #11*).

DCPS' obligation to provide a "free appropriate public education" is satisfied when DCPS provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. If the child is being educated in regular classrooms, as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982). In this case, the evidence is clear and convincing that Student's IEP was being implemented; that Student's IEP contained sufficient support to enable Student to advance from the grade to the grade; and that Student achieved the goal of attending college.

Petitioner did not meet its burden of proof that Student's 04/28/08 IEP did not contain the level of services necessary for Student to achieve academically and achieve a goal of going to college.

Petitioner failed to meet its burden of proof on Issue #2.

Issue #3 – Whether DCPS failed to provide appropriate and/or adequate transition services to assist Student's transition from high school to post secondary education, thereby denying Student a FAPE?

Petitioner alleges that Student's 04/28/08 IEP does not contain an appropriate or adequate transition plan, and services have not been made available to prepare Student for independent living and employment in the future. Petitioner alleges that on Student's 04/28/08 IEP, the only activity related to Student's goal of attending college is for Student to attend a college fair, and that the transition plan should have included more specific information and activities, such as identifying possible colleges, specifying who will assist Student with the college application process and when, and identifying specific

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skills that Student would need to develop to be successful in college, such as organizational skills and study skills.

Although Student's transition plan lacked the specificity that Petitioner was looking for (*Finding of Fact #10*), the lack of specificity did not result in the denial of a FAPE. Student's 04/28/08 IEP contained organizational skills as a service area to be addressed (*Finding of Fact #7*). Petitioner accessed information from the school regarding financial aid and the college application process (*Finding of Fact #11*), and Petitioner attended college fairs and filled out college applications on behalf of Student. Student's transition plan clearly identified Student's interest in attending college and the academic areas Student intended to pursue in college (*Finding of Fact #10*). Moreover, Student has a clear idea of Student wants to study in college. Most cogent is the fact that Student has been accepted into four colleges (*Finding of Fact #11*). Whatever deficits Petitioner alleges the transition plan contained, it obviously did not cause Student to miss the goal of attaining college admission. The transition plan is a guide. Although Petitioner played a large role in securing college admission for Student, the fact remains that Student's goal of going to college was achieved. And, Student is still scheduled to graduate high school in June 2009 (*Finding of Fact #1*). Petitioner did not demonstrate by a preponderance of the evidence that Student was denied a FAPE.

Petitioner did not meet its burden of proof on Issue #3.

Issue #4 – Whether Student is entitled to compensatory education for the denial of a FAPE?

“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.” *Reid v. District of Columbia*, 43 IDELR 32 (2005). Having found no denial of a FAPE on Issues #1, #2 and #3, this Hearing Officer concludes that Student is not entitled to compensatory education.

Petitioner did not meet its burden of proof on Issue #4.

CONCLUSION

Petitioner did not meet its burden of proof on any of the issues contained in the Complaint. Student did not like the stigma of being a special education student and assured Petitioner that Student could achieve academically without mandatory special education support services. On 04/28/08, special education services became optional in the sense that special education services were available to Student, but Student had to elect to receive them. Although the MDT represented that it could put into effect any support services that Student needed, Petitioner opted to let Student take the initiative to seek remedial services. DCPS cannot be held responsible for Student's alleged underachievement because of this. Student did receive academic benefit from the

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04/28/08 IEP, evidenced by Student passing from the grade to the grade and evidenced by Student's admission into college. Nothing more can be expected of DCPS. There has not been a denial of a FAPE for Student.

ORDER

WHEREFORE, this Complaint having been fully litigated and there being no basis in fact to support Petitioner's allegations that Student was denied a FAPE and is therefore entitled to compensatory education, it is

ORDERED that this Complaint be and hereby is **DISMISSED** with prejudice.

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

04/09/09

Date

Issued: April 9, 2009