

DC Office of the State Superintendent of Education  
Office of Compliance and Review  
Student Hearing Office

1150 5th Street, SE  
Washington, DC 20003  
Tel: 202-698-3819  
Fax: 202-698-3825

**Confidential**

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STUDENT HEARING OFFICE  
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<p>STUDENT<sup>1</sup>, by and through Parent Petitioners,  v.  District of Columbia Public Schools  Respondent.</p>	<p><b>HEARING OFFICER'S DETERMINATION</b></p> <p>Date: July 4, 2009</p> <p><b><u>Hearing Officer: Wanda I. Resto, Esquire</u></b></p>
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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. PROCEDURAL BACKGROUND

On April 27, 2009, parent's counsel filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to allow participation of the Petitioner in the Individualized Education Plan ("IEP") team meeting convened December 12, 2009; failing to perform a Vineland Evaluation; failing to provide speech and language services during the 2008-2009 school year; failing to revise the Student's IEP and failing to comply with a September 16, 2008, Hearing Officer Determination.

The Petitioner requests the Respondent conduct a Vineland and a Speech/Language Assessment; convene the IEP team for the purpose of reviewing the Student's IEP, and to include the appropriate level of services. Additionally, the Petitioner requests that the Multidisciplinary Team ("MDT") determine at the meeting a compensatory education plan for the Student.

On May 12, 2009, the District of Columbia Public Schools filed a Motion pursuant to 34 C.F.R. §300.510 agreeing to waive the resolution session and requesting that the case proceed to a due process hearing on the merits.

On May 13, 2009, the DCPS filed a Response to the Parent's Administrative Due Process Complaint. The Respondent denied that it failed to include the Petitioner in a December 23, 2008 meeting and asserted that it attempted to draft an IEP on that date, however because the independent evaluations had not been completed nor provided to the Respondent; and therefore an IEP meeting was premature.

The Respondent asserted it agreed on May 7, 2009 to conduct the Vineland and Speech/Language assessments for the Student. The Respondent alleged it was not aware that the Student required Speech and Language services, when the Student transferred; however, the Student has been receiving services since January 2009.

The Respondent disputed that it failed to review the Student's IEP at the January 2009 meeting, and asserted it has not received the Student's independent evaluations. The Respondent asserted the Student's IEP is valid and the Student is receiving educational benefit at Anacostia Senior High School.

The Respondent argued that it has not violated the September 16, 2008 HOD and it attempted to schedule IEP meetings. The Respondent claims that the independent psychological evaluation provided was incomplete, and prevented the MDT team from properly reviewing the evaluation. The Respondent further argued that the cognitive analysis is questionable, because the independent evaluation was conducted by an employee of the James E. Brown- Law Firm representing the Petitioner. Additionally, the Respondent asserted that Counsel for the Petitioner informed the DCPS Special Education Coordinator that "her team would have the psychological completed by May 8, 2009", however as to date, the Respondent is still not in receipt of said evaluations. The Respondent stated that once in receipt of the Student's independent evaluations the Respondent will convene an IEP meeting.

The Petitioner requested a continuance of the hearing claiming an emergency in the family, and indicated availability for June 26, 2009. The Petitioner waived her right to a final determination within 45 days of filing the Complaint as required by the IDEIA.

The Hearing Officer held a pre-hearing conference call with Counsel for both parties on May 29, 2009. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. The Respondent affirmed its position.

A June 2, 2009 Order required the Petitioner to prepare for a hearing on June 15, 2009 to show why the Petitioner's evaluations should be accepted, what speech and language services were not provided, why the Student's IEP needs to be revised, and how did the Respondent fail to comply with the September 16, 2008, HOD. The Petitioner also had to demonstrate how the Student or Petitioner have been harmed by the alleged failures of the Respondent. The Respondent was required to explain at the hearing why it did not file a Complaint to challenge the evaluation provided by the Petitioner, that it has not failed to evaluate and that it acted appropriately when it decided not to hold an IEP meeting to revise the Student's IEP. The Respondent was also to present evidence that FAPE has been provided to the Student.

The hearing was scheduled for June 15, 2009, on the morning of the hearing the Petitioner had an emergency and requested a continuance of the hearing. The parties agreed on June 26, 2009 as an agreeable date to reschedule the hearing.

A hearing was held on June 26, 2009. The Petitioner presented a disclosure letter dated June 8, 2009 to which thirty six documents were attached, labeled P-1 through 36 and which listed ten witnesses. The Petitioner offered a supplemental June 18, 2009 letter to which four documents were attached, labeled P- 37 through 40. Two witnesses testified –the Mother and a Psychologist. The Respondent presented a June 8, 2009 disclosure letter identifying seven witnesses and to which fourteen documents were attached, labeled DCPS 1 through 14. The Respondent offered a supplemental June 18, 2009 disclosure letter attaching an additional document, labeled DCPS 15. No witness testified. All documents were admitted as evidence.

The Petitioner withdrew her request for the Respondent to fund the private placement and requested that the compensatory education be deferred until the completion of requested evaluations.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

## **II. ISSUE(S)**

1. Was the Respondent obligated to perform a Vineland Evaluation?
2. Whether the Respondent failed to provide speech and language services during the 2008-2009 school year?
3. Was the Respondent obligated to accept the Petitioner's independent evaluation report?

4. Did the Respondent fail to revise the Student's individualized education plan ("IEP")?
5. Did the Respondent fail to comply with a September 16, 2008, Hearing Officer Determination?
6. Was the Student denied a FAPE?

### III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student is enrolled at the \_\_\_\_\_ for the 2009-2009 school year.<sup>2</sup>
2. The Student is a student with disabilities under the IDEIA. The Student's most recent IEP, is dated May 21, 2008 and provides 23 hours of specialized instruction and 1 hour of speech language pathology weekly. The Student's disability classification is mental retardation.<sup>3</sup>
3. On September 16, 2008 an HOD was issued which determined that the Student was not appropriately placed and that DCPS had not conducted triennial evaluations. DCPS was ordered to fund an independent psycho-educational evaluation and social history and reconvene to revise the IEP and address placement. The HOD ordered the Respondent to coordinate with Petitioner's Counsel dates to convene a meeting to discuss evaluations and update the IEP.<sup>4</sup>
4. The psycho-educational evaluation and social history were completed and/or provided to Respondent on or about November 20, 2008.<sup>5</sup>
5. The parties stipulated that the Student did not receive speech and language services from the beginning of the school year 2008 through January 2009.
6. On or about January 9, 2009 the parent participated in a MDT meeting at Anacostia Senior High School at which time the school acknowledge the Student had not been provided with speech and language services through January 19, 2009.<sup>6</sup>
7. The Student is currently failing academically and the Petitioner has noticed that he is frustrated over his lack of academic progress, in addition, he is experiencing stress related to social problems at school. He doesn't get a chance to really participate in his classes because the work is too difficult and he's struggling. The Student's confidence and self esteem has been impacted negatively. The Petitioner has also had difficulties in identifying an appropriate school for the Student because of the current a disability classification. The

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<sup>2</sup> P# 2 Complaint filed April 27, 2009.

<sup>3</sup> DCPS-3 May 21, 2008 -IEP.

<sup>4</sup> P-39 Hearing Officer's Determination September 16, 2008

<sup>5</sup> P# 13 Correspondence to Special Education Coordinator

<sup>6</sup> P#21 January 9, 2009 - MDT meeting Notes

Petitioner was told by the Speech by Pathologist in March 2009 that the Student was still not receiving speech and language services.<sup>7</sup>

8. The Respondent receive consent to perform Vineland and Speech/language assessments in May 2009.<sup>8</sup>
9. The Respondent sent letters January 31, 2009 and May 27, 2009 to the Counsel for the Petitioner requesting a copy of the psycho-educational assessment which was to be conducted by independent sources.<sup>9</sup>
10. The Respondent sent a letter to Petitioner's Counsel requesting the results of a psychological educational evaluation and inviting to schedule a MDT meeting. The Respondent sent a copy to the Petitioner and included a certification from the U.S. postal service of delivery to the address of the Petitioner.<sup>10</sup>
11. In the January 9, 2009 meeting speech and language services and were discuss and compensatory education would be discussed in future meeting after receiving the independent psychological evaluation.<sup>11</sup>
12. The Clinical Therapist recommended that the Student receive a Vineland evaluation because the Student IQ score is he borderline at 70. The Vineland will provide important information to determine whether the Student is MR or rather a slow learner. The evaluation will guide the proper approach to address the Student's educational needs. It may be that the Student requires only tutoring services.
13. The Respondent did not file a Complaint to challenge the Petitioner's evaluation.
14. The Respondent did not present witnesses.

#### IV. CONCLUSIONS OF LAW

##### **FAPE Determination**

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

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<sup>7</sup> Testimony of the Mother

<sup>8</sup> DCPS 11

<sup>9</sup> DCPS 12 and 13 January 31, 2009 and May 27, 2009, Letters to Counsel for Petitioner.

<sup>10</sup> DCPS 12 January 31, 2009

<sup>11</sup> DCPS 7 MDT Meeting Notes January 9, 2009

## **Burden of Proof**

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that 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 a FAPE.

The Respondent did not meet its legal obligation under the IDEIA. Here is why.

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the Respondent to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living.

The Petitioner alleged she had no participation in the ("IEP") December 23, 2008 team meeting.

The IDEIA<sup>12</sup> and its regulations at § 300.501 require the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child.

The parent is a necessary participant in every MDT and or IEP team that convenes on behalf of a student. Pursuant to 34 C.F.R. §.321 "The public agency must ensure that the IEP team for each child with a disability includes (1) the parent" In order to ensure that the parent is able to participate on the IEP team the school is required to provide timely notice and schedule meetings at mutually agreeable time and location In the event the parent is unable to attend, "the public agency must use other methods to ensure parent participation consistent with 300.328 and may only proceed without the parent where there are records of attempts to schedule the meeting at a mutually agreeable time and place such as detailed phone records, correspondence and, detailed records of home visits.<sup>13</sup>

The uncontroverted testimony in the present hearing, is the parent did not participated in the December 2008 MDT meeting that created the December 23, 2008 IEP.

The evidence indicates that the public agency hindered the parent's ability to participate in the special education process for the Student by failing to include her on the IEP team that convened and crafted an IEP and then it requested the parent to sign off on the IEP.

## **Evaluations**

An adaptive assessment such as a Vineland addressed adaptive measures. The Petitioner has concerns that the Student's mental retardation diagnosis is not accurate, an adaptive

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<sup>12</sup>Sec: 20 U.S.C. 1414(e), 1415(b)(1)

<sup>13</sup> See: 34 C.F.R. Section 300.322

assessment should have been ordered. Although the Petitioner alleged the claim is for an initial evaluation. The Petitioner request is for a re-evaluation and as such will be addressed.

A Vineland assessment was recommended in November 2008. A re-evaluation is required to be conducted if conditions warrant, if the child's parent or teacher requests, but at least once every three years (34CFR 300.303).

The IDEIA at 20 U.S.C. § 1414 (2) point out that the local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections B and C (ii) if the child's parent or the teacher requests a reevaluation... not more than once a year; and at least every three years, unless agreed otherwise.

Likewise 34 C.F.R. § 300.304(c) provides that the student is to be assessed in all areas of suspected disability, that the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, and that the public agency use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child.

In the present case, the evidence is that, the Petitioner and others have concerns about the Student's disability classification. The mother explained the purpose of the request for an evaluation, was because she believed the Student classification may be wrong and that the Student is not receiving the appropriate educational program for his needs.

The Petitioner provided reports of psycho-educational evaluation and social history assessment to Respondent on or about November 20, 2008.

The Respondent alleged in its response to the Complaint that Petitioner's evaluation did not meet their criteria

Pursuant to the IDEIA at 34 C.F.R. § 300.502 (b), Independent Educational Evaluation (IEE), "the parents of a child with a disability have a right ... to obtain an independent evaluation at public expense [inter alia] if the parent disagrees with an evaluation obtained by the public agency responsible for the education of the child in question." This section further provides as follows:

(c) if the parent obtains an independent educational evaluation and shares it with the public agency, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child;

(e) if an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent that those criteria are consistent with the parents right to an independent educational evaluation. Except for the criteria described in (e) 1 the public agency

may not impose conditions or related to obtain an independent educational evaluation at public expense. <sup>14</sup> 20 USC 1415 (b)1 and (d)2(A)

The Respondent was required to explain at the hearing why it did not file a Complaint to challenge the evaluation provided by the Petitioner, the respondent did not. The Respondent failed to challenge the request for an independent evaluation through a DPH in a timely manner.

The Respondent's choice is to without unnecessary delay, either file a due process complaint to request a hearing to show that the evaluation is not appropriate; or ensure there is a clear process delineating the criteria for independent evaluation to be provided at public expense.

### **Speech and language services during the 2008-2009 school year.**

The parties stipulated that speech/language services were not provided through January 19, 2009. The uncontroverted testimony from the Petitioner was that as of the date of the hearing June 26, 2009, the Student was not receiving his speech and language services.

### **Appropriateness of IEP**

According to 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa), (bb), Individualized Education Programs or IEP "means a written statement for each child with a disability that includes a statement of measurable annual goals, including academic and functional goals, designed to—

- aa. 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
- bb. Meet each of the child's other educational needs that results from the child's disability."

The IDEIA at 20 U.S.C. § 1414 (d)(2)(A), further requires that program be in effect, "At the beginning of each school year, each local educational agency ... shall have in effect an IEP as defined by [20 U.S.C. § 1414 (d)] (1)(A)."

The Petitioner alleged, the MDT agreed that changes to the IEP were warranted for the Student but that the Respondent refused to make those changes due to the fact that they disagreed with the independent testing procured by the parent. The Respondent disregarded the Petitioner evaluation and delayed updating the Student's IEP. The Respondent made no attempts to procure their own testing in light of their objections until May 2009, delaying further the provision of appropriate services for the Student.

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<sup>14</sup> 20 USC 1415 (b)1 and (d)2(A)

## **Failure to comply with a September 16, 2008, Hearing Officer Determination**

In the case at hand, the Respondent failed to comply with the HOD issued September 16, 2008 by failing to review evaluations and update the IEP as ordered on page 5 of the HOD.

### **V. SUMMARY OF DECISION**

The Respondent's failure to challenge the evaluation in a timely manner, failure to provide services as required in the current IEP, failure to comply with an HOD all in conjunction amount to a denial of FAPE.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has denied the Student a FAPE and issues the following:

### **VI. ORDER**

**ORDERED**, the Respondent shall conduct a Vineland Assessment for the Student and a Speech and Language Evaluation; and will accept the psycho-education evaluation provided by the Petitioner. The Petitioner must secure the evaluation are perform before August 10, 2009 and provide the Respondent and the SEC at the current school of the Student a copy of the reports of the evaluations by August 17, 2009.

**IT IS FURTHER ORDERED**, that within 15 business days of receipt of above referenced evaluation reports, the Respondent shall reconvene the IEP team for the purpose of reviewing and revising as necessary the Student's IEP.

**IT IS FURTHER ORDERED**, following the MDT/IEP meeting, the Respondent shall have five school days to issue a prior notice of placement to a DCPS shall have five business days to issue a prior notice of placement to a DCPS school, and 20 school days to issue a prior notice of placement to a non public or private school.

**IT IS FURTHER ORDERED**, in the event that the Respondent should fail to comply with the terms herein, and an issue arises out of the noncompliance the Petitioner may file a request for a hearing and the hearing will be scheduled within 20 calendar days.

This order resolves all issues raised in the Petitioner's April 27, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

### **NOTICE OF RIGHT TO APPEAL**

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)

/s/WI Restorres  
Wanda Iris Resto - Hearing Officer

Date: July 4, 2009