DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE 2nd Floor,
Washington, DC 20002

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STUDENT HEARING OFFICE
2010 DEC 22 PM 3:03

STUDENT,[1]
through the Parent

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: December 22, 2010

Hearing Officer: James Gerl

# HEARING OFFICER DETERMINATION

## BACKGROUND

The due process complaint was filed on October 27, 2010. The matter was assigned to this hearing officer on November 1, 2010. A resolution session was convened on November 9, 2010. A prehearing conference was convened on November 23, 2010. The due process hearing was convened at the Student Hearing Office

The hearing officer decision is due on or before December 24, 2010. The hearing was closed to the public. The student's parent

[1] Personal identification information is provided in Appendix A.

attended the hearing and the student attended the hearing. Two witnesses testified on behalf of the petitioner and zero witnesses testified on behalf of the Respondent. Petitioner's Exhibits Nos. 1-26 were admitted into evidence at the hearing. Respondent's Exhibits 1-9 were admitted into evidence at the hearing.

## JURISDICTION

This proceeding was invoked pursuant to the provisions of the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400 et seq., Title 34 of the Code of Federal Regulations, Title 5-E of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"); and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

## PRELIMINARY MATTERS

All proposed exhibits and testimony received into evidence and all supporting arguments submitted by the parties have been considered. To the extent that the evidence and arguments advanced by the parties are in accordance with the findings, conclusions and views stated

herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

Prior to the hearing, respondent filed a motion to amend the prehearing Order herein. Argument concerning the motion was heard at the hearing. Because compensatory education had been requested as relief, said order directed both parties to provide evidence pertaining to whether any violation of the law caused educational harm to the student and what services might correct such harm. The prehearing Order made it clear that if respondent provided such evidence, it would not be construed as an admission of a violation by Respondent. Because the burden of persuasion is upon Petitioner, however, the motion was granted, and the prehearing Order was amended to provide that the above-referenced provisions do not require Respondent to offer any such evidence.

## ISSUES

The following three issues were presented:

Issue No. 1: Did Respondent fail to comply with the November 16, 2008 Hearing Officer Determination?

Issue No. 2: Did Respondent violate IDEA by failing to find the student eligible for special education and related services?

Issue No. 3: Did Respondent violate IDEA by failing to convene a meeting to review the three independent evaluations after receiving them from Petitioner?

## FINDINGS OF FACT

After considering all the evidence, as well as the arguments of counsel, I find the following facts:

1.

(References to exhibits shall hereafter be designated to as "P-1," etc. for the petitioner's exhibits, "R-1," etc. for the respondent's exhibits and "HO-1," etc. for the hearing officer

exhibits; references to testimony at the hearing is hereafter designated as "T".)

2. Pursuant to a previous due process complaint, a Hearing Officer Determination was issued concerning this student on September 11, 2008. Said Hearing Officer Determination required Respondent to convene an eligibility meeting for the student and take various other actions. (P-1)

3. Pursuant to another due process complaint, a Hearing Officer Decision was issued with regard to this student on November 16, 2008. Said Hearing Officer Decision required Respondent to conduct an eligibility meeting within ten days of the decision with further instructions concerning the development of an IEP and a placement decision, as well as requiring the funding of three independent evaluations, a functional behavioral analysis; a psychiatric evaluation; a comprehensive diagnostic evaluation by Lindamood-Bell Learning Processes. In addition, said Hearing Officer Decision required Petitioner to notify any noncompliance with the decision to the special education coordinator at the

student's school, as well as to Respondent's Office of Mediation and Compliance prior to the filing of any additional complaints. In addition, said Hearing Officer Determination required that any delay in meeting the deadlines in order because of the absences of Petitioner or Petitioner's failure to respond promptly to scheduling requests would extend the deadlines by the same number of days attributable to the delay created by Petitioner or Petitioner's representatives. (P-2)

4. The evaluation for the Lindamood-Bell testing was conducted on or about November 16, 2009. Said evaluation concluded that the student would benefit from three specific Lindamood-Bell programs and that such programs would help increase his language and literacy skills to a level commensurate with his potential. (P-3)

5. The psychiatric evaluation of the student was completed on December 23, 2009. The psychiatric report finds that the student has attention deficit disorder, primarily inattentive type, as well as a reading disorder pursuant to the history

recounted to the psychiatrist. The psychiatrist recommends that the student maintain his current school placement and that to decrease his inattentive symptoms, he should be placed on psychostimulant medication on a trial basis. (P-5)

6. The report of the independent functional behavior assessment for the student was prepared on October 4, 2010. The report of the evaluation notes that the student has problems with attendance, tardiness, verbal outbursts and completion of class assignments. The report suggests that the student would respond positively to rewards and reinforcements for positive behavior and daily attendance. (P-4)

7. On November 26, 2008, Respondent convened a meeting of the student's MDT team. Present at the meeting were a 9th grade administrator, a 9th grade teacher, a speech therapist, Respondent's school psychologist, Respondent's special education coordinator, a social worker, a psychological advocate and a speech pathologist. The parent participated in the meeting by telephone. The committee reviewed a

previous psychologist's report and a report by a social worker and a speech pathologist's report, as well as other information about the student. Based upon the student's severe attendance problems, as well as the information contained in the evaluations available to Respondent at that date, the MDT committee came to the conclusion that the student is not eligible for special education and related services. The committee did recommend that despite the student's lack of eligibility for special education, that he be referred to the wraparound services personnel for counseling, tutoring and mentoring and that recommendations concerning various accommodations in his classroom be considered. (R-3)

8. The student has an extreme attendance problem. The student generally comes to school but often does not attend classes when he elects not to do so. The student's attendance problems are not caused by his disability. (T of student; record evidence as a whole)

9. During the current school year, from August 16, 2010 to December 2, 2010, the student had a total 216 absences, of which 207 were unexcused. In addition, the student was tardy to school during that timeframe on 14 occasions. The student frequently arrives at school on time, but he determines which classes he will attend and which classes he will not attend, picking and choosing the teachers and classes he likes. The student's failure to attend classes at school is worse now than it had been in previous years. (R-8; T of the student; R-7)

10. During the period of time from August 18, 2008 to November 26, 2008, the student was absent a total of 66 times, 34 of which were unexcused. In addition, the student was tardy on five occasions during that period. (R-7)

11. During the period of time from August 24, 2007 to December 18, 2007, the student was absent from class a total of 106 times, 62 of which were unexcused. In addition, the student was tardy on 12 occasions during that timeframe. (R-7)

12. From the period from August 26, 2005 to March 1, 2006, the student was absent from class a total of 77 times, all of which were unexcused. In addition, during that timeframe, the student was tardy to class a total of 15 times. (R-7)

13. This student has a long history of failing to attend his classes at school. A previous psychoeducational evaluation of the student that was completed on April 5, 2006 concluded in the summary portion of the report that it should be noted that the student's academic difficulties would likely improve if he would attend classes on a regular basis and participate in them. In addition, a meeting of the student's MDT team on April 25, 2008 noted that the student attended only 30% of his classes and noted that the student's non-attendance causes problems with regard to his educational performance. (P-10; P-23)

14. The student does not need special education and related services by reason of his disability. The student's disability does not adversely affect his educational performance. (R-7; R-8; T of student; record evidence as a whole.)

15. On January 31, 2009, Respondent notified Petitioner's counsel that Petitioner had failed to submit the three independent evaluation reports that were funded pursuant to the November 16, 2008 Hearing Officer Determination. On March 2, 2009, Respondent sent a notice of case closure to Petitioner's counsel because Petitioner had failed to submit the requested documentation concerning the three independent evaluations authorized by the November 16, 2008 Hearing Officer Determination. Respondent also sent similar notifications to the student's parent at those times. (R-5)

16. The Petitioner failed to have the three independent evaluations authorized by the November 16, 2008 Hearing Officer Determination completed on a timely basis because she could not get the student to cooperate in submitting to said evaluations. (T of student's mother; P-14)

17. On November 13, 2009, counsel for Petitioner sent a letter to the special education coordinator at the student's high school requesting that he be considered for services. (P - 16)

18. On November 17, 2009, the office of Petitioner's counsel faxed a copy of the Lindamood-Bell assessment evaluation to the acting principal at the student's high school. (P-19)

19. On November 17, 2009, counsel for Petitioner faxed a copy of the Lindamood-Bell assessment to Respondent's special education specialist. (P-20)

20. On December 14, 2009, Respondent's program coordinator emailed counsel for Petitioner stating that Respondent had not yet been furnished with the comprehensive evaluation by Lindamood-Bell, the independent functional behavior assessment, or the psychiatric evaluation. (R-6)

21. On January 13, 2010, the office of Petitioner's counsel provided the independent psychiatric evaluation report to Respondent. (R-5)

22. On October 8, 2010, the office of counsel for Petitioner faxed a copy of the independent functional behavioral analysis to Respondent's Office of Special Education, as well as to the special education coordinator at the student's high school. (P-21)

23. At the resolution committee meeting conducted with regard to the instant due process complaint, which was held on November 9, 2010, Respondent agreed to convene an eligibility meeting for the student, but no such eligibility meeting has conducted. (R-9; T of the student's mother)

24. On November 17, 2010, the office of counsel for Petitioner faxed some evaluations to Respondent. The evaluations were not identified. (P-15)

25. Respondent has never convened a meeting to review the reports of the aforesaid three independent evaluations submitted to it by Petitioner. (T of student's mother; record evidence as a whole)

## CONCLUSIONS OF LAW

Based upon the evidence in the record, the arguments of counsel, as well as my own legal research, I have made the following Conclusions of Law:

1. A school district such as Respondent must comply with the orders issued pursuant to a hearing officer decision unless

the order is altered by a reviewing court. IDEA §615(f)(3)(E); 615(i)(A). In the instant case, Respondent has complied with the requirements of the November 16, 2008 Hearing Officer Determination.

2. Under IDEA, a child with a disability is defined as "a child:

> (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbances (referred to in this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
>
> (ii) who by reason thereof needs special education and related services."

IDEA § 603(3).

In order to be eligible for special education and related services pursuant to IDEA, a student must be shown to have one of the enumerated disabilities and by reason thereof that

he needs special education and related services. The student's disability must also have an adverse effect upon his educational performance such that he needs special education and related services in order for him to be eligible for special education and related services. See, *NG v. District of Columbia* 556 F.Supp.2d 11, 50 IDELR 7 (D.D.C. 2008); 34 C.F.R. §300.8. In addition, in order to be eligible, a student must not be found to have poor academic performance as a result of a lack of appropriate instruction. 34 C.F.R. §§300.306; 300.8.

3. The determination by the student's MDT team on November 26, 2008 that the student was not eligible for special education and related services was correct and does not constitute a violation of the special education laws. *NG v. District of Columbia* 556 F.Supp.2d 11, 50 IDELR 7 (D.D.C. 2008); 34 C.F.R. §§34 C.F.R. §300.8.

4. A school district such as Respondent must consider evaluations submitted by parents by convening a team to

review such evaluations. IDEA §614(c)(1)(A)(1); 34 C.F.R. §300.305(a)(1)(i).

5. Respondent committed a procedural violation of IDEA by failing to review the independent evaluations submitted by the Petitioner in the instant case.

6. Procedural violations of IDEA only result in a denial of FAPE where they cause educational harm to the student or seriously impair the parent's right to participate in the IEP process. *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. May 19, 2006); IDEA § 615(f)(3)(E)(ii). In the instant case, the procedural violation by respondent did not result in educational harm to the student or in a serious impairment of the parent's right to participate.

7. Even though a procedural violation may not be viable denial of FAPE unless it accompanied by evidence that the procedural violation impeded the child's right to a free and appropriate public education, or significantly impeded the parent's opportunity to participate, or caused deprivation of

educations benefits, IDEA is clear that the provision restricting relief for such procedural violations does not preclude a hearing officer from ordering a school district to comply with the procedural requirements of IDEA. IDEA § 615(f)(3)(E)(iii). Because it is abundantly clear that fairness and the interests of justice require that the independent evaluations of the student now available should be properly considered by Respondent, the Order portion of this decision includes such an order.

## DISCUSSION

### Merits

Issue No. 1: Did Respondent fail to comply with the November 16, 2008 Hearing Officer Determination?

A school district such as Respondent must comply with the orders issued pursuant to a hearing officer decision unless the order is altered by a reviewing court. IDEA §615(f)(3)(E); 615(i)(A). The November 16, 2008 Hearing Officer Determination requires Respondent to convene an eligibility committee meeting within ten days of the date of the decision

pursuant to the relevant provisions of IDEA and the federal regulations. In addition, the HOD required Respondent to fund three specific independent evaluations and reconvene the student's MDT/IEP team within ten calendar days of the receipt of the final independent evaluation report. The Hearing Officer Determination goes on to note that any allegation of failure to comply with the Hearing Officer Determination should require Petitioner's counsel to contact the special education coordinator at the student's school and Respondent's Office of Mediation and Compliance to obtain compliance prior to filing any additional complaints. Moreover, the Hearing Officer Determination specifies that any delay in meeting the deadlines in the order caused by Petitioner's absence or failure to respond promptly to scheduling requests will extend the deadlines contained therein by the number of days attributable to Petitioner's delay.

It is abundantly clear from the record evidence in this case that Respondent has complied with the November 16, 2008 Hearing Officer Determination. Respondent convened an eligibility team meeting for the student on November 26, 2008, within ten days of the date of the Hearing Officer Determination. The eligibility team found the student

not to be eligible for special education and related services pursuant to IDEA.

Petitioner's argument appears to be that because the Hearing Officer Determination had specific requirements concerning the development of an IEP and determination of placement for the student that the Hearing Officer Determination had impliedly found the student already to be eligible. This is not a fair reading of the Hearing Officer Determination. Indeed, the fact that the hearing officer required a meeting of the eligibility team pursuant to the provisions of IDEA and the federal regulations compels a conclusion that the hearing officer had not yet determined eligibility and left that to the committee. Respondent clearly convened the eligibility committee and made a finding that the student was not eligible. Given the lack of eligibility, Respondent could not develop and IEP or provide a placement for the student.

Concerning the evaluations, it is clear that Respondent sent authorizations to Petitioner for the three independent evaluations specified by the Hearing Officer Determination, a functional behavioral

analysis, a psychiatric evaluation, and a comprehensive diagnostic evaluation by Lindamood-Bell Learning Processes.

Although all three evaluations were eventually conducted, there was an extraordinary delay in the completion of the evaluations. It was the testimony of the student's mother at the due process hearing herein that she could not obtain the cooperation of the student in order to finalize the evaluation process. The Lindamood-Bell testing was completed on approximately November 16, 2009. The report of the psychiatric evaluation was completed on December 23, 2009. These two evaluations were not completed until more than a year after the previous Hearing Officer Determination. The functional behavioral assessment was not completed until October 4, 2010. The report of the functional behavioral assessment was not completed until nearly two years after the previous Hearing Officer Determination. The evidence in the record indicates that Petitioner's counsel did not share the functional behavior assessment with the school district until October 8, 2010. Because of the delay of nearly two years in providing the information required by the previous Hearing Officer Determination to Respondent, it is abundantly clear that the delays in completing the

evaluations are the result of inaction and non-cooperation by the student and his mother. Respondent has complied with the provisions of the Hearing Officer Determination.

It is significant to note that the previous hearing officer anticipated that Petitioner's absences or lack of cooperation might occur and that such occurrences would extend the timelines contained in the decision. The one and two year delays caused by Petitioner in responding to the evaluations which were funded by Respondent years earlier, according to the provisions of the Hearing Officer Determination, should be tacked on to the end of the period within which deadlines are assessed. Petitioner's inexcusable delay caused by permitting the student fail to cooperate in obtaining the evaluations and getting the reports to the Respondent was so excessive as to be unreasonable. It is concluded that the noncooperation by the Petitioner and the student in this case caused an excessive delay. Despite the delays, however, the Respondent has complied with the provisions of the November 16, 2008 Hearing Officer Determination.

Petitioner has failed to meet her burden with regard to this issue. Respondent has prevailed with regard to this issue.

Issue No. 2: Did Respondent violate IDEA by failing to find the student eligible for special education and related services?

Under IDEA, a child with a disability is defined as "a child:

> (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbances (referred to in this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
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> (ii) who by reason thereof needs special education and related services."

IDEA § 603(3).

In order to be eligible for special education and related services pursuant to IDEA, a student must be shown to have one of the enumerated disabilities and that by reason thereof he needs special education and related services. The student's disability must also have an adverse effect upon his educational performance such that he needs

special education and related services in order for him to be eligible for special education and related services. See, *NG v. District of Columbia* 556 F.Supp.2d 11, 50 IDELR 7 (D.D.C. 2008); 34 C.F.R. §300.8. In addition, in order to be eligible, a student must not be found to have poor academic performance as a result of a lack of appropriate instruction. 34 C.F.R. §§300.306; 300.8.

In the instance case, the student had been diagnosed with ADHD by a psychiatrist and, therefore, he has one of the enumerated disabilities- "other health impairment". It was not apparent, however, to the eligibility committee, which met on November 26, 2008, that the student's academic problems were the result of his ADHD or that he was in need of special education and related services because of his ADHD. Indeed, the report of the MDT meeting convened on November 26, 2008 indicates that the student was not eligible for special education and related services because of his excessive absenteeism. A student has a duty to attend classes in his school. Because of his extreme failure to attend classes, it was not possible to determine whether this student's academic difficulties were the result of his absenteeism or his attention deficit hyperactivity disorder. There is no evidence in the

record that the student's attendance problem is caused by his disability, and counsel for Petitioner has made no such argument in this case.

Given the extreme absenteeism by the student and his failure to attend the classes he did not want to attend, the committee's determination was in fact correct. The student did not avail himself of the education provided to him by Respondent. Perhaps he would have succeeded if he had attended class, but he refused to attend class. Given his horrendous attendance record, it is not possible to conclude that his disability adversely affected his academic performance.

It is clear that the student's absenteeism prevented him from being eligible for special education and related services. Petitioner has not proven that the student's disability adversely affected his educational performance or that by reason of his disability, he needed special education. The conclusion by Respondent's MDT team on November 26, 2008 that the student was not eligible for special education and related services clearly was a correct determination.

The student's mother testified at the hearing that the student's attendance had improved this school year and that he was now doing better. This testimony is not credible or persuasive. Indeed, the

student's attendance records for the current school year reveal that his attendance has in fact gotten worse. From August 16, 2010 to December 2, 2010, the student has a total 216 absences, of which 207 were unexcused. In addition, the student was tardy to school during that timeframe on 14 occasions.

Moreover, the independent psychiatric evaluation which diagnosed the student with ADHD had not been submitted to Respondent until January 13, 2010 when the Petitioner's attorney faxed a copy to the principal of the student's high school. Thus, as of the date of the report of the MDT committee, the psychiatric report had not yet even been completed. The eligibility committee could only consider evaluations that were in front of them when they met.

Respondent's MDT correctly found the student to be not eligible for special education and related services on November 26, 2010. Petitioner has failed to carry her burden with respect to this issue. Respondent has prevailed with regard to this issue.

Issue No. 3: Did Respondent violate IDEA by failing to convene a meeting to review the three independent evaluations after receiving them from Petitioner?

A school district such as Respondent must consider evaluations and information submitted by parents by convening a team to review such evaluations. IDEA §614(c)(1)(A)(1); 34 C.F.R. §300.305(a)(1)(i).

The evidence submitted by Petitioner herein indicates that Petitioner shared with Respondent the functional behavior assessment completed for the student on October 8, 2010. Although it took two years to complete, this was the last of the three independent evaluations that Respondent was required to fund pursuant to the November 16, 2008 Hearing Officer Determination. Petitioner has alleged that Respondent has not conducted any type of MDT team or other team meeting to analyze and review the three evaluations which the hearing officer ordered in the November 16, 2008 Hearing Officer Determination. Although Respondent put on no testimony in this case, it did provide a number of exhibits. None of the exhibits provided by Respondent address any subsequent meeting to review the evaluations, with the exception of the minutes of the resolution meeting conducted

on November 9, 2010. The resolution meeting notes do show that Respondent offered to have a meeting to consider eligibility based upon the recently submitted evaluations. In closing argument, Respondent contended that Petitioner attempted to place additional conditions upon the meeting and therefore the meeting was not agreed to.

Although it appears that the last of the three independent evaluation reports was only provided to Respondent two months ago, and only a few weeks prior to the institution of the current due process complaint, Respondent failed to provide any testimony or other evidence to the effect that it has or it would comply with its duty to consider the three independent evaluations provided by the Petitioner. Accordingly, Respondent is not in compliance with the law by its failure to consider the evaluations provided to it by the Petitioner.

It is clear that Respondent's failure to consider these evaluations is a procedural violation. Procedural violations of IDEA only result in a denial of FAPE where they cause educational harm to the student or seriously impair the parent's right to participate in the IEP process. *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. May 19, 2006); IDEA § 615(f)(3)(E)(ii). Given the relatively

short time that Respondent has had to consider the most recent evaluation, it is concluded that the student did not receive any harm from Respondent's violation and that the Petitioner's to meaningful participate in the process was not seriously impaired. There is no evidence of educational harm or severe restriction of the parent's right to meaningfully participate in the record evidence. Accordingly, the Respondent's violation of the Act is not a violation of its duty to provide FAPE to the student and no individual relief can be awarded to the student as a result of Respondent's inaction with regard to this matter. However, IDEA permits hearing officers to correct procedural violations without finding a denial of FAPE or awarding related relief. IDEA §615(f)(3)(E)(iii). Accordingly, this decision shall include an order compelling Respondent to consider the evaluations and to follow the procedural requirements of IDEA. To prevent later confusion, this order does not require Respondent to find the student to be eligible; rather it only requires respondent to consider all evaluation reports submitted by Petitioner and then make any appropriate decisions.

The Petitioner has met her burden with regard to this issue. The Petitioner has prevailed with regard to this issue.

## RELIEF

Because Petitioner has not prevailed on any of the three issues contained in the complaint, with the exception of the procedural violation proven with regard to Issue No. 3 which did not result in a denial of FAPE, none of the relief requested by the Petitioner herein is granted.

However, because IDEA specifically provides that a hearing officer may order a school district to comply with the procedural requirements of the Act, IDEA §615(f)(3)(E)(iii), the Order portion of this decision shall contain such a directive.

## ORDER

Based upon the foregoing, IT IS HEREBY ORDERED:

1. Respondent is ordered to consider the reports of the three independent evaluations that were eventually completed as the result of the November 16, 2008 Hearing Officer Determination. Respondent is ordered to consider said evaluations by convening an MDT and/or eligibility meeting for the student within 30 calendar days of this Hearing Officer Determination. The team shall determine whether the

reports of said evaluations require any changes to the student's eligibility for special education and related services.

2. All other relief requested in the foregoing due process complaint is hereby denied.

## NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: December 22, 2010

/s/ James Gerl
James Gerl,
Hearing Officer