

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS")</p> <p>Respondent.</p> <p>Case</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date of Hearing: September 10, 2009</p> <p>Date of Complaints: July 7, 2009 July 28, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Domiento Hill, Esq. 1220 L Street, NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Daniel Kim, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

Education Improvement Act by failing to complete the student's requested psycho-educational reevaluation?

2. In the alternative, in the event DCPS completed the student's reevaluation, did DCPS deny the student a FAPE by failing to provide the parent and copy of the reevaluation data and reconvene the student's MDT meeting in order to allow the IEP team to review the findings of the reevaluations, and allow the parent and the rest of the IEP team to make appropriate educational decisions on behalf of the student, and make the appropriate modifications and changes to his educational program?
3. Did DCPS deny the student a free and appropriate public education by failing to comply with the Impartial Due Process Hearing Officer's Decision and Order ("HOD") of June 27, 2009?

FINDINGS OF FACT ³:

1. The student is _____ years old and resides with his parent(s) in the District of Columbia. The student has been identified as a child with a disability under IDEIA with a disability classification of Other Health Impaired ("OHI"). The student attends School A, a District of Columbia Public Schools ("DCPS") senior high school. (DCPS Exhibit 1)
2. On April 8, 2008, DCPS the completed a psychological evaluation on the student. The report was completed on May 8, 2008. (DCPS Exhibit 2)
3. An educational evaluation was completed on the student on or about May 15th, 2008. (DCPS Exhibit 4)
4. According the student's Individualized Educational Program ("IEP") developed June 10, 2008, the student is to receive one hour of specialized instruction a week outside the general education setting, 1 hour of behavioral support services and transition services. (DCPS Exhibit 1)
5. On May 21, 2009, the parent, by and through counsel, due to concerns about the student's lack of academic progress, requested pursuant to 34 C.F.R. § 300.303 of the IDEIA that the student be reevaluated with a comprehensive psychological, neuropsychological, and functional behavioral assessment. (Petitioner's Exhibit 17).
6. On July 2, 2009, as a follow-up to her request of May 21, 2009, the parent through counsel requested a copy of the assessments requested by the close of business July 6th, 2009. When no response was received Petitioner filed the first complaint on July 7, 2009. (Petitioner's Exhibits 3 & 11)

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer will cite only one party's Exhibit.

7. On July 8, 2009, DCPS sent Petitioner's counsel a letter authorizing the parent to obtain an independent comprehensive psychological evaluation and a functional behavioral assessment ("FBA"). (Petitioner's Exhibit 12)
8. A due process hearing on a previous due process complaint was held June 17, 2009. As a result of that hearing the hearing officer issued a HOD on June 27, 2009, in which DCPS was ordered to do, among other things, "...within twenty business days of the issuance of this Order, convene [an] MDT/IEP meeting to discuss and determine the student's placement for the 2009-2010 school year..." Thus, the MDT/IEP meeting was to occur on or before July 27, 2009. (Petitioner's Exhibit 8)
9. On July 8, 2009, DCPS sent to Petitioner's counsel, correspondence offering to convene the MDT meeting on July 14th, 15th or 20th. In response, the parent, through counsel, offered to convene on the 23rd or 24th at 2:00 p.m. and further requested a confirmation of the meeting. (Petitioner's Exhibits 13)
10. On July 28, 2009, Petitioner filed a due process complaint alleging DCPS had violated the HOD by not convening the MDT/IEP meeting timely. (Petitioner's Exhibit 4)
11. On August 9, 2009, and August 13, 2009, Petitioner's counsel provided DCPS a copy of the FBA and the independent comprehensive psychological evaluation respectively. (Petitioner's Exhibits 14 & 15)
12. On August 20, 2009, DCPS sent Petitioner a letter of invitation to convene the MDT/IEP meeting. The dates proposed in the letter included August 25, 2009, and September 1, 2009. (DCPS Exhibit 5)
13. Petitioner responded to the letter and offered to convene the meeting on September 1, 2009. Petitioner's counsel received no response to that letter. As a result, more than twenty (20) days elapsed from the time the HOD was issued and the meeting had not been convened as of the date of the due process hearing. However, the parties represented to the Hearing Officer that a meeting date had been agreed to for September 15, 2009. (Petitioner's Exhibit 16)
14. Although the student's placement for the 2009-10 School Year ("SY") was to be determined at the MDT/IEP meeting held pursuant to the June 27, 2009, HOD, the student was allowed after some efforts by Petitioner to continue to attend School A at the start of SY 2009-10 until the MDT/IEP is held on September 15, 2009. (Representation of the Parties)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEIA § 1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁴ In this case the student/parent is seeking relief and has the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

1. Did DCPS deny the student a free and appropriate public education by failing to Comply with 34 C.F.R. §§ 300.303 (a)(2) of the Individuals with Disabilities Education Improvement Act and complete the student's requested psycho-educational reevaluation? Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

According to 34 C.F.R. Sec. 300.303 (a)(2) of the Individuals with Disabilities Education Act (IDEIA) "a public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304-300.311 if the public agency determines that the educational or related services needs, including improved academic achievements and functional performance, of the child warrant a reevaluation, or child's parent or teacher requests a reevaluation, but at least once every three years.

In this case the parent, on May 21, 2009, due to concerns about her child's academic progress requested that student be reevaluated with, among other things, a comprehensive psychological assessment, a neuropsychological, and a functional behavioral assessment. On July 2nd, 2009, as a follow-up to her request of May 21, 2009, the parent requested a copy of the student's reevaluations on or before July 6, 2009. Petitioner filed the complaint on July 7, 2009, and DCPS granted authorization for independent evaluations on July 8, 2009.

Although DCPS responded to the request a day after the complaint was filed DCPS granted independent evaluations. There was insufficient evidence presented that there was an unreasonable delay in DCPS's response or that the student was in any way harmed because the authorization for independent evaluations came approximately forty-five days following the initial request. Thus, the Hearing Officer concludes there was insufficient proof that the delay significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the student a deprivation of educational benefits.

Petitioner asserts, in the alternative, DCPS denied the student a FAPE by failing to reconvene the student's MDT meeting in order to allow the IEP team to review the

⁴ Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

findings of the reevaluations. DCPS did not conduct the reevaluations but instead granted authorization for reevaluations. DCPS received the evaluation reports by August 13, 2009. On August 20, 2009, DCPS sent a letter of invitation to convene MDT meeting. The Hearing Officer concludes that this response by DCPS with a letter of invitation represented a good faith effort soon after it received the independent evaluations to convene a MDT meeting to review the evaluations. Thus, the Hearing Officer does not conclude that there was a delay in attempting to review the evaluations such that the parent's opportunity to participate in the decision making process regarding provision of FAPE was significantly impeded, or caused the student was caused a deprivation of educational benefits.

2. Did DCPS deny the student a free and appropriate public education by failing to comply with the Impartial Due Process Hearing Officer's Decision and Order of June 27, 2009? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

DCPS pursuant to the June 27, 2009, HOD was to convene the student's MDT/IEP meeting within twenty (20) business days, to discuss and determine placement. Although DCPS attempted to convene the meeting within the timeframe prescribed by the HOD Petitioner provided alternative dates and finally agreed on a date DCPS offered: September 1, 2009. There was apparently no response by DCPS in order for the meeting to be held September 1, 2009.

Consequently, as of September 15, 2009, the date of the due process hearing, the meeting had not been held. There was no reason provided by DCPS that justified the non response to the agreed upon date of September 1, 2009. Although the parties represented that they had agreed to a new date of September 15, 2009, DCPS's non response to the previously offered date resulted in significant delay beyond the time frame prescribed the HOD in convening a meeting that was to determine the student's placement for SY 2008-09.

Pursuant to the *Blackman/Jones* Consent Decree a rebuttable presumption of harm is created whenever DCPS fails to do, inter alia, comply with hearing officer determinations. See also *Hawkins v. District of Columbia*, Civil Action No. 07-0278 (JDB)(March 7, 2008)⁵. There was no evidence presented to rebut the presumption of harm. Therefore, the Hearing Officer concludes that DCPS failed to timely comply with the HOD and thus denied the student a FAPE.

ORDER:

1. If it has not already done so by the date of the issuance of this Order DCPS shall, within ten (10) business days of the issuance of this Order, convene a MDT meeting to review the student's existing evaluations, review and revise the student's IEP as appropriate and discuss and determine an appropriate placement for the student for SY 2009-10.

⁵ (In *Hawkins* the Court found that the hearing officer's determination was in error when he failed to find that DCPS had violated the findings of a previous hearing officer's determination. As a result thereof the court found DCPS had denied the student a FAPE).

2. The MDT meeting shall be scheduled through counsel for the student and parent.
3. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).



Coles B. Ruff, Esq.

Hearing Officer

Date: September 17, 2009