

<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: August 27, 2009</p> <p>Date of Complaint: July 9, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Fatmata Barrie, Esq. 3800 12th Street, N.E. Washington, DC 20017</p> <p>Counsel for DCPS: Blair Matsumoto, 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>
--	---

OSSE
 STUDENT RECORDS OFFICE
 2009 SEP -8 AM 8: 54

¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened August 27, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on July 9, 2009, alleging the issues outlined below.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-11 and DCPS Exhibits 1-15) which were admitted into the record.

ISSUE(S): ²

1. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate IEP? Petitioner alleges the student requires a full time special education IEP and the IEP does contain the OHI classification for ADHD. Consequently, Petitioner alleges the student's current placement is inappropriate because it is not a full time special education placement.
2. Did DCPS deny the student a free and appropriate public education by failing to make an appropriate ESY decision prior to the end of SY 2008-09?
3. Did DCPS deny the student a free and appropriate public education by failing to provide the student with all of his special education? Specifically, Petitioner alleges the student was not provided his related services.

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn. Petitioner's counsel specifically withdrew issues as to compensatory education and hoped to reserve this issue for possible adjudication later based upon a recent offer by DCPS for compensatory education plan at a MDT meeting in which the parent was present but not represented.

4. Did DCPS deny the student a free and appropriate public education by failing to convene a meeting upon receipt in June 2009 of the psychiatric evaluation to determine his need as an ADHD student?

FINDINGS OF FACT ³:

1. The student is _____ years old, currently attends School A, a DCPS elementary school, and resides in the District of Columbia with his parent(s). During the 2008-09 School Year ("SY") the student was in the kindergarten at School A. (Parent's testimony, Petitioner's Exhibit 4)
2. On September 28, 2009, a Hearing Officer's Determination ("HOD") was issued which determined the student should have been evaluated for special education services. The HOD granted the parent independent evaluations. (Petitioner's Exhibit 9)
3. An independent psychological evaluation was conducted of the student in October 2008. The evaluation determined the student had low cognitive functioning but adequate adaptive functioning for his age. His reading, math and written language skills were determined to be in the very low range with scores placing him in the following percentiles respectively: 3%, .1% and 6%. The evaluation suggested the student be evaluated for Attention Deficit Hyperactivity Disorder ("ADHD"), that an occupation therapy evaluation be conducted, that the student be placed in setting with a low teacher to student ratio and that he receive psychological counseling. (Petitioner's Exhibit 4)
4. As a result of the evaluations the student was determined eligible for special education services and his initial Individualized Educational Program ("IEP") was developed on February 19, 2009, with a specific learning disability ("SLD") classification. (Petitioner's Exhibit 2)
5. The student's IEP prescribes the following weekly services: 15 hours of specialized instruction, 45 minutes of occupational therapy, 30 minutes of psychological counseling and 1 hour of speech and language services. (Petitioner's Exhibit 2)
6. In April 2009, an independent psychiatric evaluation was conducted of the student. The evaluation diagnosed the student with ADHD and recommended the student have an educational placement with a low student to teacher ratio, receive individual and group therapy and medication. The evaluation was provided to DCPS by the parent's counsel on June 9, 2009. The evaluation has yet to reviewed by a multidisciplinary team ("MDT") (Petitioner's Exhibits 3 & 8)
7. The supervising psychologist⁴ for the student's October 2008 evaluation is of the opinion, based on the information in that evaluation, that the student should be in a full

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.

⁴ This witness was qualified as an expert in psychology during the hearing.

time special education program with individualized attention due to the student's repeated disruptive behavior during the evaluation and the reported behavior incidents in the classroom in the evaluation. This psychologist also is of the opinion the student's ADHD might qualify him for an additional disability classification for the ADHD. This psychologist did not evaluate the student personally and did not conduct classroom observations of the student. ([REDACTED] testimony)

8. During the February 19, 2009, IEP meeting, DCPS decided it would re-convene by the end of the school year to decide on whether the student qualified for Extended School Year ("ESY") services. However, DCPS did not meet to determine the student's need for ESY services and the student did receive ESY services during summer 2009. (Parent's testimony, Petitioner's Exhibit 2).
9. Prior to the student being found eligible for special education the parent received repeated phone calls from the staff of School A regarding the student's behavior. The student repeated was engaged in disruptive behavior in the classroom. Consequently, the parent had to remove the student on several occasions and sometime sit in the classroom with him. The parent is not aware that student has received any of the related services that the student's IEP prescribes since he was found eligible. (Parent's testimony)
10. School A had approximately 28 special education students in the school. The student was provided his special education service principally in a pull out classroom. The student received the related services in his IEP. The school had a social worker, occupational therapist and a speech language therapist who provided the services. The student has made some academic progress during SY 2008-09. The student's writing of alphabets improved after receiving his specialized instruction and related services. (Ms. [REDACTED] testimony)
11. The student has been interviewed by and accepted to the [REDACTED] is a full time special school with only special education students. [REDACTED] can provide the student specialized instruction and related services in his IEP by certified providers. (Mr. [REDACTED] testimony)

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.⁵ 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. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate IEP?

1. Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate IEP? Petitioner alleges the student requires a full time special education IEP and the IEP does contain the OHI classification for ADHD. Consequently, Petitioner alleges the student's current placement is inappropriate because it is not a full time special education placement. Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

34 CFR § 300.116 Placements provides:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that-- (a) The placement decision-- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.114 through 300.118; (b) The child's placement-- (1) Is determined at least annually; (2) Is based on the child's IEP; and (3) Is as close as possible to the child's home; (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled; (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (Authority: 20 U.S.C. 1412(a)(5))

Although the psychologist who testified at the hearing was of the opinion the student needed a full time special education placement due to his disruptive behaviors, the behaviors he reported were those exhibited during the student's October evaluation and the classroom behavior that was reported for that evaluation. The psychologist had not personally evaluated the student and had not observed the student in his classroom and the information he related was behavior prior to the student being determining eligible and receiving special education services. The behavior difficulties the parent reported were primarily behaviors prior to the student being found eligible. There was credible testimony by Ms. Harrower that student has made some academic progress since the student was determined eligible and began to receive special education services. Consequently, there was insufficient evidence the student's least restrictive is a full time special education placement.

Petitioner also alleged the student IEP was inappropriate because it does not contain the OHI classification because of the diagnosis of ADHD. Because the recent psychiatric evaluation which diagnosed the student with ADHD has not yet been reviewed the claim of inappropriate or incomplete disability classification is pre-mature.

⁵ 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.

2. Did DCPS deny the student a free and appropriate public education by failing to make an appropriate ESY decision prior to the end of SY 2008-09? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

DCPS is required to make a determination prior to the end of each school year as to whether each special education student is in need of ESY services. The evidence demonstrates that no such determination was made for this student. The failure to make that determination impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE. There was, however, no evidence presented at the hearing as what remedy would be appropriate for the failure make the ESY determination.

3. Did DCPS deny the student a free and appropriate public education by failing to provide the student with all of his special education? Specifically, Petitioner alleges the student was not provided his related services. Conclusion: Petitioner's counsel did not sustain the burden of proof by a preponderance of the evidence. The parent testified that she was told by the student's teacher that the student was not taken from the classroom to receive related services. However, the parent did not have an independent knowledge of whether the student received the services. The Hearing Officer did not find the parent's testimony any more credible than Ms. Harrower who testified the student received his related services. Therefore, the burden of proof on this issue was not met.

4. Did DCPS deny the student a free and appropriate public education by failing to convene a meeting upon receipt of the psychiatric evaluation to determine his need as an ADHD student? Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

DCPS was provided the student's psychiatric evaluation on June 9, 2009. School ended for the school year within a couple of weeks after the evaluation was received. The Hearing Officer takes administrative notice that DCPS has summer MDT teams and that MDT meetings are convened during the summer months. However, only 30 days had passed between the time the evaluation was received by DCPS and the complaint was filed. The Hearing Officer does not conclude that this month delay was an inordinate time such that the failure to review the evaluation by that time 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.

ORDER:

1. DCPS shall, within fifteen (15) business days of the issuance of this Order, convene a multidisciplinary team (MDT) meeting. When the MDT meets it shall: (1) determine if the student missed services a result of there being no ESY services prior to the end of SY 2008-09, (2) review the student's related services tracking logs for SY 2008-09, (3) review the student's recent psychiatric evaluations, (4) review and revise the student's individualized educational program (IEP) as appropriate and (5) discuss and determine an appropriate placement.
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 7, 2009