

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

STUDENT,¹ by and through his Parent,

Petitioners,

Case No. 2009-1148
Bruce Ryan, Hearing Officer

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing: October 9, 2009
Decided: October 19, 2009

Respondent.

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STUDENT HEARING OFFICE
2009 OCT 19 AM 9:12

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

The Due Process Complaint in this matter was filed August 6, 2009, pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The complaint alleges that Respondent District of Columbia Public Schools ("DCPS") denied the Student a free appropriate public education ("FAPE") by (a) failing to comply with a 11/28/08 HOD requiring DCPS (*inter alia*) to convene an MDT meeting to discuss and determine an appropriate placement; (b) failing to conduct and review evaluations in all areas of suspected disability; (c) failing to develop an appropriate individualized education program ("IEP"); and (d) failing to determine the Student's eligibility for extended school year ("ESY") services.

On or about August 9, 2009, a resolution meeting was held and resulted in DCPS' authorizing independent developmental ophthalmological and educational evaluations. DCPS also offered 20 hours of independent tutoring to make up for the missed ESY services. DCPS' resolution settlement offer was not accepted by Petitioners, and the 30-day resolution period ended on September 5, 2009.

¹ Personally identifiable information is attached as an Appendix to this decision and must be removed prior to public distribution.

On or about September 8, 2009, DCPS filed a late Response to Petitioners' complaint. The substance of the response stated in its entirety as follows:

"A. HOD Compliance

DCPS is authorizing the Petitioner to obtain independent evaluations. When DCPS receives the reports of those evaluations, the MDT will reconvene to review the evaluations, revise the IEP a[s] appropriate and issue a prior notice of placement.

B. Evaluations

DCPS is authorizing the Petitioner to obtain a developmental ophthalmological and educational evaluation independently.

C. IEP

The speech evaluation will be reviewed when the MDT reconvenes to review the other independent evaluations. The IEP will be revised as necessary and compensatory education will be discussed if warranted.

D. ESY

DCPS is offering the Petitioner 20 hours of independent tutoring to make up for the missed ESY services."

Notwithstanding the requirements of 34 C.F.R. §300.508(e),² DCPS' response contained no explanation of why DCPS had failed or refused to take the actions raised in the complaint prior to this time. Nor did it contain any denials of Petitioners' claims.

Prehearing Conferences ("PHCs") were held on September 8 and 21, 2009, to discuss the pleadings and requested relief, which appeared to raise primarily legal rather than factual issues. Since DCPS failed to include information in its response required by 34 CFR 300.508(e), the Hearing Officer ruled at the 9/21/09 PHC that DCPS would not be allowed to introduce evidence of any such explanation either at hearing or in its five-day disclosures. This order was included in the Prehearing Order issued 9/23/09. The Due Process Hearing was scheduled for October 9, 2009.

² See, e.g., *Massey v. District of Columbia*, 400 F. Supp. 2d 66, 72-73 (D.D.C. 2005) ("the IDEA does not allow DCPS to respond generally to the substance of the complaint in whatever form it deems desirable. On the contrary, Congress' delineation of the four requirements [specified in 20 U.S.C. 1415(c)(2)(B)] makes clear that general responses are not acceptable."); see also *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13 (D.D.C. 2008) (IDEIA adopted "explicit requirements...how an LEA must respond to a complaint...[and] now requires that an LEA file a response to a complaint containing specific information" as set forth in 20 U.S.C. 1415(c)(2)(B)). "Because this is the kind of information that is peculiarly within the knowledge and control of DCPS and because the parent bears the burden of proof, it is no small matter when a response fails to convey the obligatory information." *Jalloh, supra*.

The parties filed five-day disclosures on or about October 2, 2009. On the same date, Petitioners' counsel filed a Motion for Adjudication on the Pleadings. The motion asserted that, based on the pleadings in the record, (a) there is no dispute as to the material facts in this matter, and (b) Petitioners are entitled to summary determination on their claims without the necessity of an evidentiary hearing. On October 7, 2009, DCPS filed a timely response to Petitioners' motion. DCPS agrees that no material facts are in dispute, but asserts that Petitioners are not entitled to judgment as a matter of law. DCPS argues that the complaint should be dismissed as moot because it asserts that all of Petitioners' requested relief has been granted or is improper.

On October 8, 2009, following a further PHC, the Hearing Officer informed the parties in writing as follows:

“As confirmed at today's prehearing conference, in light of Petitioners' motion for adjudication on the pleadings and DCPS' response thereto, the evidentiary Due Process Hearing scheduled for October 9, 2009, at 9:00 AM will NOT be required to resolve this matter and is hereby cancelled. Both parties agree that there are no material facts in dispute. The Hearing Officer will rule on the pending motion and (unless the case is dismissed as moot, as DCPS requests) will issue a written decision and order based on the pleadings and undisputed facts within the required HOD timeline.”³

Neither party objected to this procedure, and the Hearing Officer finds that it is authorized and appropriate under the IDEA and the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* (“SOP”). See, e.g., SOP §§ 401, 700.4.

This written ruling constitutes the Hearing Officer's decision and determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Sections 800.1 (6) and 1003 of the SOP.

II. ISSUE(S) AND REQUESTED RELIEF

A discussion at the PHCs of the issues and requested relief raised by Petitioners, along with the pleadings filed by both parties and the motion for adjudication on the pleadings, has resulted in the following issues being presented for determination:

³ *Email Correspondence from Hearing Officer*, dated 10/8/09 (emphasis added), i-sight Docket 2009-1148.

- a. *Whether DCPS failed to comply with the November 28, 2008 HOD by not discussing and determining an appropriate placement for the 2009-2010 school year;*
- b. *Whether DCPS has denied the Student a FAPE by failing to conduct and/or review evaluations in all areas of suspected disability (i.e., developmental ophthalmological, academic achievement, speech and language); and*
- c. *Whether DCPS has denied the Student a FAPE by failing to provide ESY services during summer 2009.*

As summarized in the Prehearing Order, the relief sought by Petitioners consisted of: (1) findings that DCPS has denied FAPE to the Student in the respects alleged above; (2) ordering DCPS to fund an independent developmental ophthalmological evaluation and an independent academic assessment (which DCPS has now authorized by IEE letter); (3) ordering DCPS to convene an MDT meeting to review all current evaluations, review and revise the IEP as appropriate, and discuss and determine an appropriate placement; (4) ordering DCPS to issue a prior notice of placement; and (5) ordering DCPS to provide appropriate compensatory education for its failure to provide ESY during summer 2009.

However, since the Prehearing Order, Petitioners have withdrawn their request to recover compensatory education as a remedy in this proceeding. Petitioners have also withdrawn their claim that DCPS failed to develop an appropriate IEP (as opposed to the claim under Issue b. above that DCPS failed to conduct and review all required evaluations, including speech and language). These withdrawals are reflected in Petitioners' motion for adjudication on the pleadings, and were specifically confirmed by Petitioners' counsel at the further PHC held October 8, 2009.

III. FINDINGS OF FACT⁴

1. The Student is a [REDACTED] year old resident of the District of Columbia currently attending a DCPS school, who DCPS has determined to be eligible for special education and related services as a qualified child with a learning disability and speech and language impairment. DW2; DW3.

⁴ The undisputed facts set forth in this section of the HOD are based on the pleadings, motion and response, and Petitioners' five-day disclosures.

2. A November 28, 2008 HOD ordered, *inter alia*, as follows: "Within 15 school days of receipt of the independent comprehensive psychological evaluation of the student, DCPS will convene an MDT/IEP/Placement meeting during which evaluations will be reviewed, the IEP reviewed and revised as appropriate, and placement discussed and determined. If a DCPS placement is recommended, a Notice of Placement will be issued within 5 schooldays of the said meeting; if a non-public placement is recommended, a Notice of Placement will be issued within 30 days of the said meeting." *DW1*.

3. On or about March 4, 2009, Petitioners delivered to DCPS the results of an independent comprehensive psychological evaluation and an independent speech and language evaluation of the Student. *DW2; DW5*.

4. On or about April 6, 2009, DCPS convened an MDT/IEP Team meeting in order to "comply with the HOD dated 11/28/08." *DW 6-DW 7*. At the April 6, 2009 meeting, the team reviewed the independent psychological evaluation and noted certain concerns and deficiencies in the written report. *See DW-7, p. 2*. In addition, the team determined that:

- a) the Student should be evaluated by a developmental pediatric ophthalmologist to determine his visual acuity and need for vision therapy;
- b) "Form B of the Woodcock-Johnson will be administered to update his current educational functioning"; and
- c) the Student "does meet the criteria for ESY services." *DW-7, p. 4*.

5. With respect to placement, the 4/6/09 MDT decided that placement would continue at Prospect Learning Center pending a final placement determination for the 2009-2010 school year. *See DW-7, p. 4* ("Final placement determination will be made in order to comply with the HOD dated 11/28/08 once the corrected independent comprehensive psychological evaluative report is received and results are interpreted and discussed.").

6. Following the April 6, 2009 meeting, Petitioners' advocate sent a letter to DCPS in which she notified DCPS that (a) the Student's most recent speech and language evaluation had not been reviewed, and (b) Petitioners desired to have the Student receive ESY services. Petitioners also requested that DCPS convene an MDT meeting between May 11 and May 13, or propose alternative dates for a meeting. *DW8*.

7. After receiving the advocate's letter following the April 6, 2009 meeting, DCPS did not (a) respond to the advocate's letter, (b) convene any further MDT meeting, (c) issue a prior notice of placement, (d) complete either developmental ophthalmological or academic achievement assessments, or (e) provide ESY services to the Student.

8. On or about September 9, 2009, over a month after the filing of the complaint, DCPS issued an IEE letter authorizing Petitioners to obtain an independent developmental ophthalmological evaluation and an independent educational evaluation of the Student, at DCPS expense. *DW3*.

9. As of the date of the scheduled due process hearing, DCPS still had not completed the required evaluations of the Student, convened an MDT meeting to review evaluation results, or made a final placement determination for the Student.

10. DCPS has never reviewed the results of the Student's December 17, 2008 speech and language evaluation or reviewed and revised the Student's IEP based on those results.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Summary Adjudication Standards

1. Based on the pleadings, the undisputed facts, and the argument and evidence contained in their motion, Petitioners request that the Hearing Officer grant summary adjudication on their claims and order the relief requested in the complaint.

2. Under ordinary civil procedure rules, summary judgment is appropriate when the motion papers, affidavits, and other submitted evidence demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Whether a fact is "material" is determined in light of the applicable substantive law invoked by the action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In light of the applicable substantive law, a "genuine issue of material fact" is a fact that is determinative of a claim or defense, and therefore, affects the outcome of the case. *See Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248. The moving party bears the initial burden of demonstrating that no genuine issues of material fact are in dispute. Upon such a showing, the burden then shifts to the non-moving party to demonstrate that genuine issues of material fact are in dispute. The court is precluded from

weighing evidence or finding disputed facts and must draw all inferences and resolve all doubts in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

3. Similar standards should apply in IDEA cases, where “the hearing is not governed by formal rules of procedure or evidence.” *SOP, Section 700.4*. The Hearing Officer must “attempt to ensure that all parties have an adequate opportunity to present their cases” and that “the hearing will proceed in an orderly fashion.” *Id.* Pre-hearing motions for summary adjudication are deemed authorized, where appropriate, under the *SOP*. Moreover, Section 401(C) (5) requires that “[r]esponses contesting facts shall so state and supply supporting affidavits, declarations or documents as appropriate.” *SOP, Section 401 (C) (5)*. *See also* 71 Fed. Reg. 46,706-07 (Aug. 14, 2006).

4. The Hearing Officer concludes that Petitioners have met the standards for summary adjudication in that the motion, undisputed facts, and other submitted evidence demonstrate that no genuine issue of material fact exists and that Petitioners are entitled to judgment as a matter of law.

B. Mootness

5. As noted above, DCPS argues that “the complaint should be dismissed as a matter of law as moot” because it asserts that all of Petitioners’ requested relief has been granted or is improper. *DCPS Response to Petitioner’s Motion for Adjudication on the Pleadings*, filed Oct. 7, 2009, at 1. DCPS further suggests that hearing officers may not grant “declaratory relief,” including in the form of “findings of FAPE denials.” *Id.*, at 2. The Hearing Officer concludes that DCPS’ argument is without merit, for several reasons.

6. First, the constitutional objections DCPS raises regarding so-called “advisory opinions” – which are grounded in Article III’s case or controversy requirement, *see, e.g., Green v. District of Columbia*, 45 IDELR 240 (D.D.C. 2006) – are inapplicable to these administrative complaint proceedings. Impartial hearing officers under IDEA are not Article III courts, but rather are administrative officers authorized to conduct due process hearings under procedures established by the SEA that is directly responsible for the statutory hearing process.

7. Second, IDEA specifically authorizes hearing officers to make findings and determinations as to whether a child received FAPE from an LEA, 34 C.F.R. 300.513(a), as well as “to make rulings on matters in addition to those concerning the provision of FAPE, such as the other matters mentioned in 300.507(a)(1).” 71 Fed. Reg. 46,707 (Aug. 14, 2006). These “other matters” include any matters “relating to the identification, *evaluation* or educational placement of a child with a disability....” 34 C.F.R. 300.507 (emphasis added); *see also id.* §300.503(a). Moreover, as DCPS acknowledges (*Response* at 1), the statutory authority of hearing officers expressly includes “ordering an LEA to comply with procedural requirements” under IDEA. 20 U.S.C. 1415(f)(3)(E)(iii); 34 C.F.R. 300.513(a)(3).

8. Third, contrary to DCPS’ contention, the case at hand is not at all similar to the situation addressed in *Green*. There, the challenged conduct had ceased, “with the requested placement having been granted and an IEP having been agreed upon” as a result of an HOD finding that a violation of IDEA had occurred and ordering a subsequent MDT/IEP meeting. Thus, the court found that “a ruling by the Court would have no practical effect...because it is ‘impossible for the Court to grant any effectual relief whatever to the prevailing party.’” *Green, supra*, slip op. at 12-13, quoting *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000). In contrast, in this case, DCPS still has not complied with the IDEA by completing and reviewing required evaluations within a reasonable time; DCPS is seeking to avoid a finding that an IDEA violation and denial of FAPE has occurred; and a ruling on those points may well have practical effect and consequences for DCPS and the Student (*e.g.*, the MDT could decide to incorporate additional services into the IEP to compensate for the adjudicated violations concerning delayed evaluations and/or HOD implementation).

C. Issues/Alleged Denials of FAPE

9. The burden of proof in an IDEA special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). For the reasons discussed below, the Hearing Officer concludes that Petitioners have met their burden of proof.

(1) Violation of November 28, 2008 HOD

10. The pleadings and undisputed facts establish that DCPS has failed to comply fully with the November 28, 2008 HOD in that, although DCPS did convene an MDT/IEP Team meeting to review evaluations and discuss placement, DCPS has failed to (a) make a final placement determination for the Student, and (b) issue a prior notice of placement for the 2009-2010 school year.

11. Petitioners assert that this HOD violation should give rise to a presumption of harm that has not been rebutted by DCPS. However, since Petitioners have withdrawn their request for compensatory education relief under this complaint, the Hearing Officer concludes that he need not rule on this issue at this time.

(2) Failure to Conduct and Review Evaluations

12. The IDEA and its implementing regulations require DCPS to evaluate children in all areas related to suspected disabilities and in a manner that is sufficiently comprehensive to identify all of a child's special education and related services needs. *See* 34 C.F.R. §300.304 (c) (4), (6). *See also* DCMR 5-3002.1 (d), (f). DCPS must conduct and review all warranted evaluations in a timely manner. *See generally* 20 USC 1414(a)(2), (c)(1); 34 CFR 300.305(a). However, other than for initial evaluations, neither IDEA nor D.C. law establishes a timeline for completing evaluations, leaving the standard as a reasonable period of time under the circumstances of the particular case. *See, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254 (D.D.C. 2008).

13. In this case, it is undisputed that the Student's MDT determined on or about April 6, 2009, that (a) the Student should be evaluated by a developmental pediatric ophthalmologist to assess whether vision problems were inhibiting the Student's academic progress, and (b) the Student should receive an updated academic achievement assessment. Despite this determination by the MDT, neither evaluation was conducted in the approximately 120 days before the complaint was filed on or about August 6, 2009. Moreover, DCPS did not authorize Petitioners to obtain independent evaluations at DCPS expense until a month after the filing of the complaint.

14. The Hearing Officer concludes that DCPS' delay in completing the developmental ophthalmological evaluation and updated academic assessment found warranted by the MDT on 4/6/09 was unreasonable under the circumstances. Over six months have now passed since the MDT determined that these evaluations were warranted. Accordingly, the Hearing Officer concludes that DCPS has violated its obligations under IDEA and its rules, Section 300.304(c), as well as DCMR 5-3002.1.

15. A similar conclusion follows with respect to DCPS' failure to review the results of the speech and language evaluation. There is no dispute that DCPS has never reviewed the December 17, 2008 speech and language evaluation for the purpose of determining whether any IEP revisions may be appropriate. Over seven months have now passed since Petitioners delivered the results of that evaluation. The Hearing Officer concludes that DCPS' delay in reviewing the speech and language evaluation was unreasonable under the circumstances, and that DCPS has therefore violated its obligations under IDEA and its rules, 34 C.F.R. §§300.304(b)(1), 300.305(a), 300.324(b), as well as DCMR 5-3005.4.

16. DCPS' failure to complete timely evaluations, in these circumstances, constitutes a substantive deprivation of FAPE. *See, e.g., Harris v. DC*, 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008) (failure to act on request for independent evaluation is not a "mere procedural inadequacy"; "such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA"). As in *Harris*, the Hearing Officer concludes that "[t]he intransigence of DCPS as exhibited in its failure to respond quickly to [the MDT's determination] has certainly compromised the effectiveness of the IDEA as applied to [the Student], and it thereby constitutes a deprivation of FAPE." 561 F. Supp. 2d at 69.⁵

17. Finally, even assuming *arguendo* that DCPS' failure to complete the eligibility process in a timely manner could be characterized as a mere "procedural violation," the Hearing Officer concludes that such procedural inadequacy has affected the Student's substantive rights

⁵ *See also IDEA Public Charter School, supra* (failure to perform child-find duty and comply with DC's 120-day timeline constitutes denial of FAPE); *Hawkins v. District of Columbia*, 539 F. Supp. 2d 108 (D.D.C. 2008)(same); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80 (D.D.C. 2007) (noting that DCPS is obligated to "offer FAPE by evaluating the student, convening an eligibility meeting, determining eligibility, developing an IEP if the student is eligible, and determining and offering an appropriate placement").

in this case by (i) impeding the child's right to a FAPE, and (ii) significantly impeding the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child. See 34 C.F.R. §300.513(a)(2); see also 71 Fed. Reg. 46,707 (Aug. 14, 2006) ("hearing officers also may find that a child did not receive FAPE based on the specific procedural inadequacies set out in §300.513(a)(2)"). The violation will continue to have these effects until the necessary evaluations are completed.

(3) Failure to Provide ESY Services – Summer 2009

18. The undisputed facts show that: (a) the MDT/IEP Team determined that the Student met the criteria for ESY services; (b) Petitioners requested on or about 4/6/09 that DCPS provide ESY to the Student during summer 2009; and (c) DCPS failed to provide ESY services to the Student during summer 2009.

19. DCPS' failure to provide ESY services to the Student during summer 2009 constitutes a denial of FAPE to the Student.

D. Appropriate Relief

20. The IDEA authorizes district courts and hearing officers to order "appropriate" relief, e.g., 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005).

21. In this case, the Hearing Officer has exercised his discretion to order appropriate equitable relief, based on the record developed in this proceeding and the particular violation(s) and denial(s) of FAPE adjudicated herein. The appropriate relief is set forth in the Order below.⁶

⁶ The Hearing Officer notes that he has *not* determined whether Petitioners are entitled to the remedy of compensatory education for any denials of FAPE found in this proceeding because Petitioners withdrew their request for such relief and did not present evidentiary support for that remedy.