

DISTRICT OF COLUMBIA
Office of the State Superintendent of Education
Office of Review & Compliance
Student Hearing Office

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2009 APR -9 AM 9:02
SSSE
STUDENT HEARING OFFICE

Confidential

<p>STUDENT¹, by and through guardian, Petitioner, vs. Respondent.</p>	<p><u>HEARING OFFICER'S DETERMINATION</u></p> <p>Counsel for Petitioner/Guardian: Roberta Gambale, Esq.</p> <p>Counsel for Tiffany Winters, Esq.</p> <p><u>Impartial Hearing Officer</u> H. St. Clair, Esq.</p>
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¹ Identifying personal information is attached to this decision as Appendix A and must be detached prior to public distribution.

BACKGROUND

On January 13, 2009, Counsel for the Guardian² filed a complaint with the District of Columbia Office of the State Superintendent of Education (OSSE), Student Hearing Office (SHO), complaining the

its own LEA, denied the student a Free Appropriate Public Education (FAPE). Specifically, Counsel for the Guardian complained failed to complete timely evaluations of the student and, for relief, requested independent evaluations and compensatory education.

On March 27, 2009, a Pre-hearing Conference convened during the course of which permission to amend the complaint was granted to Counsel for the Guardian; the amended complaint ("Complaint") was filed March 4, 2009.

Setting out the below issues, a Pre-hearing Order was issued March 23, 2009.

The Student Hearing Office, OSSE, scheduled a hearing in this matter for March 16, 2009 that on the Joint Motion of the parties was rescheduled for 9:00 A.M., Monday, March 30, 2009 at the Student Hearing Office, OSSE, 1150 Fifth Street, SE - First Floor, Hearing Room 4A, Washington, D.C. 20003. The hearing convened as rescheduled.

JURISDICTION

The hearing convened under Public Law 108-446, The Individuals with Disabilities Education Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300, and Title V of the District of Columbia Municipal Regulations.

ISSUES:

- 1. Did fail to make FAPE available to the student timely?**
- 2. Did inappropriately fail to complete a timely clinical evaluation of the student?**

FINDINGS of FACT

Municipal Regulation 5 DCMR 3030.3 placed the burden of proof upon the parent in this matter and that burden was by the preponderance.

By facsimile dated March 20, 2009, the parent disclosed 5 witnesses and 29 documents.

² Superior Court of the District of Columbia Custody Order, Parent Document No 23

By facsimile dated March 20, 2009, disclosed 8 witnesses and 20 documents.

Counsel for objected to the timeliness of the Guardian's disclosure; that it was received on March 23rd but should have been received on March 20th. The hearing officer determined that the documents were received in compliance with the 5-business day disclosure rule and OVERRULED the objection. Counsel for objected to Guardian Documents 15, 17, 22 & 26, claiming surprise and stating that 15 and 17 were the Educational Advocate's notes of the March 19, 2009 and February 19, 2009 MDT meetings, respectively, and were not a part of MDT meeting notes; that they were statements of opinion and, as such, were inadmissible. The hearing officer noted that the strict rules of evidence were not applicable during *IDEIA 2004* Due Process hearings and OVERRULED the objection. The objection to Guardian Document 22 centered on the fact that the report cards were created by DCPS when the student attended DCPS; that should not be held to account for the student's academics and behavior prior to matriculation to Guardian Document 22 was struck from the disclosure pending establishment by the parent that the report cards were available to for consideration; it was not established. Guardian Document 26 was Counsel for the Guardian's notes of the January 30, 2009 Resolution Session; Counsel for the Guardian withdrew Guardian Document 26.

The remaining documents were placed into the record and are referenced/footnoted herein where relevant.

Counsel for the moved to DISMISS issue 1, stating that the disclosure showed that the student was evaluated for special education services within 120 days of the referral for evaluation. The motion was taken under advisement. Here, the Motion to DISMISS is DENIED; the reasons for the denial are set forth in the below DISCUSSION.

In consideration of the testimony, documents and arguments herein, the hearing officer found the following facts:

1. Via facsimile dated November 5, 2009, Counsel for the Guardian requested evaluation of the student for special education services; accompanying the request was a valid "parental/guardian consent to evaluate" form signed by the Guardian.³
2. had 120 days from November 5, 2008 to make FAPE available to the student.⁴ was required to make FAPE available to the student on or before March 6, 2009 and they did not.
3. convened an MDT/SEP meeting on November 24, 2008, during the course of which the student was referred for psycho-educational

³ Parent Document No 11

⁴ D.C. Code 38-2561.02

and speech/language evaluations along with a social history. During the meeting the MDT discussed the parentally requested clinical psychological evaluation and determined it then unnecessary⁵

4. At the MDT meeting for the student on February 19, 2009, the MDT reviewed the December 23, 2008 Psycho-educational Evaluation,⁶ the January 12, 2009 Speech/Language Evaluation⁷ and the January 22, 2009 Social History⁸ and determined the student eligible for special education services as Learning Disabled ; during the meeting, the student was referred for a clinical psychological evaluation and an occupational therapy assessment . At the conclusion of the February 19, 2008 MDT meeting and on the same day, attempted to convened an IEP meeting to complete an IEP for the student but the Guardian requested time to consider the events to date; the IEP meeting was postponed.⁹

5. On the day of the hearing, neither the clinical psychological evaluation nor the occupational therapy assessment had been completed.

6. On March 18, 2009, reconvened the MDT and completed an IEP that disability coded the student Learning Disabled with 18 hours of special education services in a 40% Out of General education Setting. As the evaluation had not been completed, the IEP was inappropriate.¹⁰

7. The Guardian who was also the student's great grandmother was concerned about the student's social/emotional being and thought it was effecting the student's academic performance and in-school behavior. During the February 19, 2009 IEP meeting, the Guardian requested time to consider matters before completion of an IEP for the student; she attended the March 18, 2009 MDT/IEP meeting and signed approval of the March 18, 2009 IEP.¹¹

8. Although the DCPS psychological evaluation did not recommend special education services for the student, the December 23, 2008 Psycho-educational Evaluation did recommend the services.¹²

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⁵ Doc. No 7; -testimony of Student Support Coordinator

⁶ Par. Doc. No 13; Doc. No 2

⁷ Par. Doc. No 12; No 4

⁸ Doc. No 5

⁹ -testimony of the Educational Advocate

¹⁰ Doc. No 16

¹¹ -testimony of the Guardian

¹² -testimony of the psychologist; the psychologist was the evaluator for 12-23-09 psychological evaluation, *ibid*, 6, above.

CONCLUSIONS of LAW

ONE & TWO

is required to make FAPE available to all children with disabilities that attend its academy in the District of Columbia.

IDEIA 2004 requires DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 21, determine eligibility for special education services and, if eligible, provide same through an appropriate IEP and Placement. Moreover, this requirement must be met within 120 days of referral and is applicable to public charter schools in the District of Columbia that have elected to be their own LEAs or local educational agencies.

Under *IDEIA 2004*, an LEA has 60 days¹³ to complete the evaluation to determine the educational needs of a student and 30 days more¹⁴ to complete an IEP for a total of 90 days. In the District of Columbia, DCPS, and by extension each LEA in the District of Columbia that is its own LEA, has 120 days to make FAPE available to a student who may be eligible for special education services. An LEA in the District of Columbia must find and assess fully all the suspected disabilities a student may have, complete an IEP and offer an educational placement, all within 120 days of the referral for evaluation or, in this case, November 5, 2008; that did not occur in this matter. See D.C. Code 38-2561.02.

By the time of the hearing, had not completed the February 19, 2009 MDT recommended clinical psychological evaluation and occupational therapy assessment and advanced the position that they had 120 days to complete both; that from February 19, 2009, the date APAPCS suspected an emotional disability and an occupational therapy problem, had 120 days to complete the evaluation/assessment and then another 30 days to complete an IEP. Accepting the proposition meant that making FAPE available could possibly take a year or more, depending on the number of suspected disabilities and when the MDT suspected the disability.

was required to make FAPE – evaluate fully for all possibly suspected disabilities, complete an IEP and offer an educational placement - available to the student within 120 days of November 5, 2008, the day Counsel for the Guardian requested evaluation of the student for special education services with the Guardian's signed consent to evaluate. had until March 6, 2009 to make FAPE available to the student and did not.

As to the clinical psychological evaluation, when and however referred, it had to be completed between November 5, 2008 and March 6, 2009 and in enough time to permit the completion of an appropriate IEP and placement designation. FAPE had to be made available within 120 days of the referral for evaluation for special education services.

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¹³ 34 CFR 300.301(c)

¹⁴ 34 CFR 300.323(c)

The March 18, 2009 IEP was inappropriate because at the time the student had not been fully assessed in all areas related to suspected disabilities, the emotional and occupational therapy areas.

SUMMARY of the DECISION

The burden of proof in this matter was by the preponderance and rested with the Guardian. That burden was met. The Guardian was the prevailing party in his matter.

In consideration of the foregoing, the hearing officer made the following

ORDER

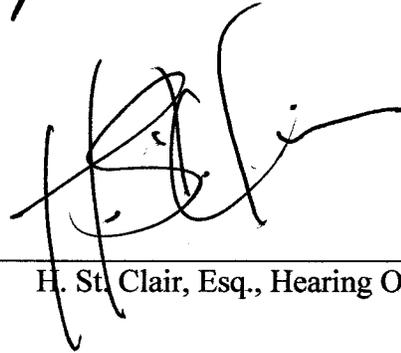
1. Provided _____ does not deliver to Counsel for the Guardian a completed clinical psychological evaluation and a completed occupational therapy assessment within 10 days hereof, the Guardian is authorized to arrange the said evaluation/assessment independently for which will pay according to DCPS Superintendent's Directive 530.6. Within 15 school/business days of completion/receipt of the last evaluation/assessment report, _____ 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 an _____ placement is recommended, a Notice of Placement will be issued within 5 schooldays of the said meeting; if a non-public or DCPS placement is recommended, a Notice of Placement will be issued within 30 days of the said meeting.

2. For the said MDT/IEP/Placement meeting, scheduling is to be through and notices are to be sent to Counsel for the Guardian except that, for everyday of unavailability of Guardian/educational advocate/Counsel for the Guardian, the deadline herein will be extended one day. In the event of independent evaluation(s) sent to _____, Counsel for the Guardian will verify by telephone the receipt of the evaluation report copy(ies) by the _____ person addressee. For disputes under this paragraph,

documentation of the parties will be relied upon to determine the good faith of each party.

3. As the clinical psychological evaluation and occupational therapy assessment had not been completed nor reviewed by the MDT by time of the hearing, issues as to compensatory education are reserved.

Dated this 9th day of April, 2009



H. St. Clair, Esq., Hearing Officer

This is THE FINAL ADMINISTRATIVE DECISION. Appeal can be made to a court of competent jurisdiction within ninety (90) days of the issue date of this decision.