

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.

Bruce Ryan, Hearing Officer

v.

Hearing: August 24, 2009

Decided: September 2, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

OSSE
STUDENT HEARING OFFICE
2009 SEP -3 PM 12: 28

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

The due process complaint in this matter was filed July 13, 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 concerns a year old student who currently attends

The complaint alleges that DCPS denied the student a free appropriate public education ("FAPE") by (a) failing to conduct timely triennial re-evaluations; (b) failing to provide the Student an appropriate individualized education program ("IEP"); (c) failing to complete a vocational assessment; and (d) failing to provide compensatory education for missed speech/language services.

DCPS waived resolution as of July 20, 2009, and filed a Response and Notice of Insufficiency ("NOI") on July 24, 2009. DCPS' Response asserted that DCPS did not deny the Student a FAPE under the IDEA and requested that the Hearing Officer deny Petitioner any requested relief. The NOI asserted the absence of a parent or guardian's signature on the complaint, as provided by Section 301.2(C)(e) of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The Hearing Officer determined that the complaint met the requirements of the IDEA, as set forth in 34 C.F.R. §300.508(b).

A Prehearing Conference ("PHC") was held on July 27, 2009, and a Prehearing Order was issued July 28, 2009. Petitioners elected for the hearing to be closed. Five-day disclosures were filed by both parties as directed, on or about August 17, 2009.

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

The Due Process Hearing was held on August 24, 2009. At the hearing, nine documentary exhibits submitted by Petitioners (identified as "P-01" through "P-09") and ten documentary exhibits submitted by DCPS (identified as "DCPS-01" through "DCPS-10") were admitted into evidence.² Testifying at the hearing on behalf of Petitioners was the Parent-Petitioner. Testifying on behalf of DCPS was [REDACTED] DCPS Placement Specialist.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

II. ISSUES AND REQUESTED RELIEF

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

- a. *Whether DCPS denied the Student a FAPE by failing to conduct timely triennial re-evaluations;*
- b. *Whether DCPS denied the Student a FAPE by failing to provide an appropriate IEP;*
- c. *Whether DCPS denied the Student a FAPE by failing to complete an appropriate vocational assessment and/or to provide him with appropriate transition goals and services; and*
- d. *Whether DCPS has failed to provide the Student with compensatory education services for missed speech/language services, as allegedly determined at a 2/26/08 MDT/IEP meeting.*

The relief sought by Petitioners includes (1) funding of remaining independent evaluations; (b) convening an MDT/IEP meeting to discuss and review the evaluations and complete an appropriate transition plan; (c) providing appropriate transition services; and (d) compensatory education in the form of tutoring and/or speech/language services.

DCPS' response stated that copies of completed psychological, educational and clinical evaluations were sent to Petitioners' counsel prior to the filing of the complaint, and that speech/language and audiology evaluations were being completed. At the PHC, DCPS counsel stated that an IEE letter authorizing those latter evaluations was issued the same date as the PHC.

III. FINDINGS OF FACT

1. The Student is a [REDACTED] year old resident of the District of Columbia who is currently attending [REDACTED] pursuant to a DCPS placement. *See P-01; Parent Testimony.*
2. The Student has been determined to be eligible for special education as a child who is Learning Disabled. *See P-02.*

² Petitioner objected to DCPS-10 as late, but the objection was overruled given the absence of any showing of unfair surprise or prejudice, and given its relationship to P-08. All other exhibits were admitted without objection.

3. The Student's current IEP, dated February 20, 2009, provides 25 hours per week of specialized instruction, one hour per week of speech/language therapy, 1.5 hours per week of psychological counseling. *P-02*.

4. The Student's MDT/IEP team met for an annual review of the IEP on 2/20/09. The team included parent-petitioner, DCPS representative, special education teacher, social worker, and speech pathologist. The parent agreed to move forward with the meeting without the advocate present. *See DCPS-6*, p. 1.

5. At the 2/20/09 MDT meeting, the "speech and language pathologist recommended that the two-hour weekly sessions be decreased because the student is highly competent in this area." *DCPS-06*, p. 2. The team agreed to reduce speech and language services to one hour per week, but also agreed to test the Student again to review his level. *Id.*

6. At the 2/20/09 MDT meeting, the "parent informed the team that she is pleased with the academic progress that [the Student] has been making at _____ and would like for him to remain at the school." *DCPS-06*, p. 2. The parent also signed the IEP agreeing with its contents. *DCPS-07*.

7. The 2/20/09 MDT developed a Student Evaluation Plan ("SEP"), which called for psychological, educational, speech/language, and audiological assessments to be completed. *See P-03*.³ The parent signed a consent to the proposed evaluations the same date. *Id.*

8. A comprehensive psycho-educational and clinical psychological evaluation was conducted in April 2009, and the report was completed on May 18, 2009. *P-5; DCPS-09*.⁴

9. DCPS has not completed either the speech/language or audiological evaluations ordered by the MDT on 2/20/09. On July 27, 2009, approximately two weeks after the complaint was filed in this case, DCPS issued a letter to Petitioners' counsel authorizing independent audiological and speech/language evaluations at the expense of DCPS ("IEE letter"). *DCPS-04*. The week before the due process hearing, the parent took the Student for independent evaluations pursuant to the IEE letter. *See Parent Testimony*.

10. DCPS has not conducted a full and complete vocational evaluation or other age-appropriate transition assessment of the Student in connection with developing his Transition Services Plan ("TSP").

11. The Student's TSP is not appropriately based on the Student's specific, individual needs and does not appropriately take into account his particular strengths, preferences, and interests.

³ The SEP indicated that the speech/language evaluation was "more than 3 years old." *P-03*. However, the evidence shows that the previous speech/language evaluation was completed in May 17, 2006 (*P-07*), and thus the three-year anniversary date of that evaluation did not occur until 5/17/09. The SEP also stated that the "audiological is being requested to assess for issues regarding past operations and the impact it may have on [the Student's] academic progress. *P-03*."

⁴ Petitioners alleged in the complaint that the last psycho-educational evaluation was completed on 8/19/05. *P-01*. However, the evidence in the record indicates that a psychological evaluation was completed on 5/16/06 (*see P-05*, p.2; *DCPS-07*, at p. 9 Clinical Update dated 2/17/09)), and thus the three-year anniversary date of that evaluation did not occur until 5/16/09.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. *See Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to provide an appropriate IEP and/or placement.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See DCMR 5-3030.3*. The standard generally applied is preponderance of the evidence. *E.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); *see also* 20 U.S.C. §1415(i)(2)(C)(iii).

B. Issues/Alleged Denials of FAPE

3. For the reasons discussed below, the Hearing Officer concludes that Petitioners have met their burden of proof in part on **Issue(a)**, but only to the limited extent set forth below; Petitioners have failed to carry their burden of proof on **Issues (b) and (d)**; and Petitioners have met their burden of proof on **Issue (c)**.

Issue (a): Whether DCPS denied the Student a FAPE by failing to conduct timely triennial re-evaluations

4. IDEA provides that an LEA “shall ensure that a reevaluation of each child is conducted ...at least once every 3 years, unless the parent and [LEA] agree that a reevaluation is unnecessary.” 34 C.F.R. §300.303 (b)(2); *see, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions). The reevaluation must be conducted “in accordance with §§ 300.304 through 300.311.” 34 C.F.R. §300.303(a). This includes the requirement that the evaluation be “sufficiently comprehensive to identify all of the child’s special education and related services needs...” *Id.* §300.304(c) (6); *see also Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation “must be a complete evaluation of the child in all areas of the child’s suspected disability....”).

5. In this case, Petitioners allege that DCPS failed to complete timely triennial evaluations “because the Student’s last psycho-educational was completed on 08/19/05 and the speech and language evaluation was last completed on 05/17/06.” *P-01*, p. 3. Petitioners claim that DCPS has therefore violated 34 CFR 300.303 and denied the Student a FAPE, as well as failed to adhere to the 2/20/09 MDT determination. *Id.* “DCPS argues that delay in the evaluation is a procedural, not substantive, error and no harm came to the child as a result.” *DCPS-02*, p. 2.

6. The complaint in this case was filed July 13, 2009. By that time, it appears that DCPS had already completed an updated psycho-educational evaluation, on or about the three-year anniversary date of the previous psychological evaluation completed on 5/16/06. However, DCPS had not taken any steps to complete the audiological or speech/language evaluations in the

nearly five months since they had been ordered by the MDT on 2/20/09. Nor had DCPS convened any meeting for the express purpose of conducting a “3-year re-evaluation,” as opposed to an annual IEP review.

7. The Hearing Officer concludes that, while perhaps not labeled as such, the process engaged in by the MDT at and after the 2/20/09 meeting essentially amounts to a comprehensive reevaluation of the Student in all areas of suspected disability, with the consent of the parent as a member of the team. Moreover, the key psycho-educational piece was in fact updated within the statutory three-year period, although it has not yet been reviewed by the team. Under these circumstances, DCPS’ failure to complete the audiological and speech/language evaluations within a reasonable period of time after the 2/20/09 MDT meeting and schedule another MDT meeting within the three-year re-evaluation period amounts to at most a procedural violation, rather than a substantive denial of FAPE. Petitioners have not shown that the delay in completing these latter evaluations caused educational harm to the Student, especially given the MDT’s determination that his speech/language therapy sessions could be decreased as a result of his progress in that area. Nor have Petitioners shown that any procedural violation has “significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE” or otherwise “impeded the child’s right to a FAPE.” 34 CFR 300.513 (a)(2). Appropriate relief on this issue is included in the Order.

Issue (b): Whether DCPS denied the Student a FAPE by failing to provide an appropriate IEP

8. Under IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982).⁵ The issue of whether an IEP is appropriate is a question of fact. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

9. In this case, Petitioners alleges that DCPS failed to provide the Student with an appropriate IEP “because his 02/20/09 IEP is based on evaluations that ha[ve] expired. Therefore, the goals and objectives in the IEP do not reflect his current level of functioning and as such are not appropriate.” *P-01*, p. 3. DCPS argues that the IEP is appropriate and is reasonably calculated to provide educational benefit to the Student. *DCPS-02*, p. 2.

10. As discussed above under Issue (a), it appears that none of the Student’s evaluations had actually “expired” (in the sense of being at least 3 years old) at the time of the 2/20/09 MDT/IEP team meeting. Accordingly, as this was the only allegation in the complaint regarding the appropriateness of the IEP (excepting the transition plan, under Issue (c)), Petitioners have *not* met their burden of proof as to Issue (b).

⁵ See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 (“while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit.”).

Issue (c): Whether DCPS denied the Student a FAPE by failing to complete an appropriate vocational assessment and/or to provide him with appropriate transition goals and services

11. Petitioners next claim that DCPS “failed to complete the Student’s vocational assessment and as such failed to provide him with transition goals or services...” *P-01*, p. 3. Petitioners allege that “although he is now years old, DCPS has yet to complete the vocational and provide him with a transition plan and as such has yet to implement the plan.” *Id.* DCPS denies that it failed to develop an appropriate transition plan for the Student. *DCPS-02*, p. 3.

12. Since the Student turned years old in March 2009, the 2/20/09 IEP was required to include “transition services” appropriate for reaching “measureable post-secondary goals. 20 U.S.C. § 1414 (d)(1)(A)(i)(VII); 34 C.F.R. §300.320(b). Thereafter, the IEP “must include – (1) appropriate measureable postsecondary goals **based upon age appropriate transition assessments** related to training, education, employment, and, where appropriate, independent living skills; and (2) the transition services (including courses of study) needed to assist the child in reaching those goals.” 34 CFR 300.320(b) (emphasis added). “**Transition services,**” in turn, are defined under IDEA as a “coordinated set of activities for a child with a disability that –

(A) is designed to be within a results-oriented process that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities...;

(B) is **based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests;** and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, **when appropriate, acquisition of living skills and functional vocational evaluation.”**

20 U.S.C. §1401(34) (emphasis added); *see also* 34 C.F.R. §300.43; *Virginia S. v. Department of Education*, 47 IDELR 42 (D. Haw. Jan. 8, 2007). The primary intent underlying these IDEA provisions was to afford individual students the opportunity to reach measureable post-secondary goals of self-sufficiency as adults.

13. The Hearing Officer concludes that the Student’s transition plan is not sufficiently based on the individual child’s needs, and does not take into account his particular strengths, preferences and interests. The transition plan appears to be no more than a “generic and somewhat vague formula of post-high school goals and services, equally applicable to almost any high school student.” *Virginia S. v. Department of Education*, 47 IDELR 42 (D. Haw. Jan. 8, 2007). In fact, the section of the current IEP/Transition Services Plan used by DCPS to record the Student’s post-secondary goals and interests is largely left blank.⁶ In addition, DCPS has failed to conduct a functional vocational evaluation or other age-appropriate transition

⁶ This section states only that the Student “needs to do community service,” nothing more. Employment, Post-Secondary Education and Training, and Independent Living Goals are all blank. *DCPS-09*, p. 17 (DCPS Transition Services Plan). In the 2/26/08 transition plan, the Student’s employment goals are stated to be “construction worker if NFL/NBA don’t work out.” *P-04*, p. 7.

assessment to help formulate specific transition goals and plans for the Student.⁷ These failures amount to a denial of FAPE to the Student.

14. DCPS' witness basically took the position that a transition services plan is a "skeleton" that can "evolve" into more specific transition goals for the Student, via a coordinator's future implementation. *DCPS Testimony*. However, the mandatory specifics of a transition plan (just like any other aspect of the IEP) cannot simply be worked out in practice. IDEA requires that a *written* plan be included in the IEP, containing "appropriate measurable postsecondary goals" that are geared *specifically* to the "individual child's needs." That plan then serves as the guide for a coordinated set of transition activities.

Issue (d) Whether DCPS has failed to provide the Student with compensatory education services for missed speech/language services, as allegedly determined at a 2/26/08 MDT/IEP meeting

15. Finally, Petitioners allege that DCPS has failed to provide the Student with compensatory education services for two years of missed speech services as allegedly determined at the 2/20/09 MDT meeting. *P-01*, p. 3. DCPS contends that, while the Student "may have missed some speech and language time," compensatory education is not appropriate unless Petitioners can demonstrate detriment and/or educational harm to the Student. *DCPS-02*, p. 3.

16. The Hearing Officer concludes that Petitioners have *not* met their burden of proof on this issue. The 2/26/08 MDT meeting notes do not reflect a determination that DCPS had failed to provide specific speech/language services previously required or that compensatory education services should be provided to address any resulting harm. Nor have Petitioners made any fact-specific evidentiary showing at hearing sufficient to demonstrate entitlement to a compensatory education remedy under *Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005).

C. Appropriate Relief

17. The IDEA authorizes district courts and hearing officers to fashion "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*, 401 F.3d at 521-23.

18. In this case, the Hearing Officer has exercised his discretion to fashion 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.

⁷ For example, the parent testified that the Student is interested and has shown ability in computers, but this is not reflected anywhere in the Transition Services Plan. The parent also testified that she received no contact or communication with DCPS regarding any vocational assessments and did not recall any discussion at the 2/20/09 MDT regarding the Student's future plans or goals. *See Parent Testimony*. While DCPS' witness testified that there was a "thorough discussion," she could not explain why such discussion would not be reflected in the meeting notes. *See DCPS Testimony* (cross examination). Also, while DCPS' witness "assumed" that a customary "interest inventory" had been completed, she conceded that there is no record of one in this case. *Id.*

V. **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ordered:

1. Within **30 calendar days** of this Order (*i.e.*, by **October 2, 2009**), DCPS shall convene a meeting of the Student's MDT/IEP team (including the parent) for the following purposes:
 - a) to review the **May 18, 2009 comprehensive psycho-educational and clinical psychological evaluation**, and to review and revise the IEP as appropriate;
 - b) to review the **independent speech/language and audiological evaluations**, if the written reports have been completed and submitted to DCPS by then, and to review and revise the IEP as appropriate;
 - c) to conduct and review a **functional vocational evaluation** of the Student, including but not limited to an interests and career inventory, and other age-appropriate transition assessments;
 - d) to review and revise the **Transition Services Plan** for the Student to ensure that it contains sufficiently detailed, measureable post-secondary goals and instruction related to training, education, employment and independent living skills, which are based on the Student's individual needs and appropriately take into account the Student's strengths, preferences and interests; and
 - e) otherwise to complete a **comprehensive triennial re-evaluation** of the Student in all areas of suspected disability, in compliance with 34 CFR 300.303.
2. Petitioner's other requests for relief are hereby **DENIED**.
3. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Fatmata Barrie, Esq., via facsimile (202-626-0048), or via email (fbarrie@verizon.net).
4. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.
5. This case shall be, and hereby is, **CLOSED**.

Dated: September 2, 2009



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).